process, the majority on the Court adopted what is called the selective incorporation approach. This approach recognizes that all rights that the Court deems to be fundamental are included in the concept of due process.

Fundamental rights include those that have historically been part of our legal tradition, such as the First Amendment freedoms. Other fundamental rights include intimate decisions relating to marriage, procreation, contraception, family relations, child rearing, and education. The determination of whether a right is fundamental is made by the U.S. Supreme Court on a case-by-case basis.

The following case of *Washington v. Glucksberg* illustrates conflicting approaches to the meaning of substantive due process. In this case, Dr. Harold Glucksberg and four other doctors brought suit for declaratory and injunctive relief against the state of Washington. They sought to enjoin the enforcement of a Washington statute that made it a crime for the doctors to help three of their mentally competent but terminally ill patients to commit suicide. The late Chief Justice Rehnquist first explains his views on the proper scope of substantive due process under the Fourteenth Amendment. Recently retired Associate Justice David Souter then explains that although he agrees with Rehnquist as to the correct decision in the case, he profoundly disagrees with the chief justice about the proper scope of substantive due process.

Washington et al., Petitioners v. Harold Glucksberg et al.
521 U.S. 702
U.S. Supreme Court
June 26, 1997

Chief Justice Rehnquist delivered the opinion of the Court.

The question presented in this case is whether Washington's prohibition against "causing" or "aiding" a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not.

It has always been a crime to assist a suicide in the State of Washington. In 1854, Washington's first Territorial Legislature outlawed "assisting another in the commission of self murder." Today, Washington law provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide."…"Promoting a suicide attempt" is a felony, punishable by up to five years' imprisonment and up to a $10,000 fine…. At the same time, Washington's Natural Death Act, enacted in 1979, states that the "withholding or withdrawal of life sustaining treatment" at a patient's direction "shall not, for any purpose, constitute a suicide"…

Petitioners in this case are the State of Washington and its Attorney General. Respondents Harold Glucksberg, M.D., Abigail Halperin, M.D., Thomas A. Preston, M.D., and Peter Shalit, M.D., are physicians who practice in Washington. These doctors occasionally treat terminally ill, suffering patients, and declare that they would assist these patients in ending their lives if not for Washington's assisted suicide ban. In January 1994, respondents, along with three gravely ill, pseudonymous plaintiffs who have since died and Compassion in Dying, a nonprofit organization that counsels people considering physician assisted suicide, sued in the United States District Court, seeking a declaration that Wash Rev. Code 9A.36.060(1) (1994) is, on its face, unconstitutional.

The plaintiffs asserted "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician assisted suicide." …Relying primarily on *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), the District Court agreed… and concluded that Washington's assisted suicide ban is unconstitutional because it "places an undue burden on the exercise of [that] constitutionally protected liberty interest."…The District Court also decided that the Washington statute violated the Equal Protection Clause's requirement that "all persons similarly situated…be treated alike"…

A panel of the Court of Appeals for the Ninth Circuit reversed, emphasizing that "in the two hundred

and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction."…The Ninth Circuit reheard the case en banc, reversed the panel's decision, and affirmed the District Court…. Like the District Court, the en banc Court of Appeals emphasized our *Casey* and *Cruzan* decisions…. The court also discussed what it described as "historical" and "current societal attitudes" toward suicide and assisted suicide… and concluded that "the Constitution encompasses a due process liberty interest in controlling the time and manner of one's death—that there is, in short, a constitutionally recognized 'right to die.'"…After "weighing and then balancing" this interest against Washington's various interests, the court held that the State's assisted suicide ban was unconstitutional "as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians."…The court did not reach the District Court's equal protection holding…. We granted certiorari…and now reverse.

I.

We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices…. In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States' assisted suicide bans are not innovations. Rather, they are long-standing expressions of the States' commitment to the protection and preservation of all human life…. Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages….

More specifically, for over 700 years, the Anglo American common law tradition has punished or otherwise disapproved of both suicide and assisting suicide…. In the thirteenth century, Henry de Bracton, one of the first legal treatise writers, observed that "just as a man may commit felony by slaying another so may he do so by slaying himself." …The real and personal property of one who killed himself to avoid conviction and punishment for a crime were forfeit to the king; however, thought Bracton, "if a man slays himself in weariness of life or because he is unwilling to endure further bodily pain…[only] his movable goods [were] confiscated." …Thus, "the principle that suicide of a sane person, for whatever reason, was a punishable felony was…introduced into English common law." Centuries later, Sir William Blackstone, whose *Commentaries on the Laws of England* not only provided a definitive summary of the common law but was also a primary legal authority for 18th and 19th century American lawyers, referred to suicide as "self murder" and "the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure…." Blackstone emphasized that "the law has… ranked [suicide] among the highest crimes," although, anticipating later developments, he conceded that the harsh and shameful punishments imposed for suicide "borde[r] a little upon severity." …

For the most part, the early American colonies adopted the common law approach….

Over time, however, the American colonies abolished these harsh common law penalties. William Penn abandoned the criminal forfeiture sanction in Pennsylvania in 1701, and the other colonies (and later, the other States) eventually followed this example….

Nonetheless, although States moved away from Blackstone's treatment of suicide, courts continued to condemn it as a grave public wrong….

That suicide remained a grievous, though nonfelonious, wrong is confirmed by the fact that colonial and early state legislatures and courts did not retreat from prohibiting assisting suicide…. And the prohibitions against suicide never contained exceptions for those who were near death….

The earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828 … and many of the new States and Territories followed New York's example…. In this century, the Model Penal Code also prohibited "aiding" suicide, prompting many States to enact or revise their assisted suicide bans. The Code's drafters observed that "the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim." …

Though deeply rooted, the States' assisted suicide bans have in recent years been re-examined and, generally, reaffirmed. Because of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses…. Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect. Many States, for example, now permit "living wills," surrogate health care decision making, and the withdrawal or refusal of life sustaining medical treatment…. At the same time, however, voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide.

The Washington statute at issue in this case…was enacted in 1975 as part of a revision of that State's criminal code. Four years later, Washington passed its Natural Death Act, which specifically stated that the "withholding or withdrawal of life sustaining treatment …shall not, for any purpose, constitute a suicide" and that "nothing in this chapter shall be construed to condone, authorize, or approve mercy killing…." In 1991, Washington voters rejected a ballot initiative which, had it passed, would have permitted a form of physician assisted suicide. Washington then added a provision to the Natural Death Act expressly excluding physician assisted suicide.…Wash. Rev. Code § 70.122.100 (1994).

Attitudes toward suicide itself have changed since *Bracton*, but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end of life decision making, we have not retreated from this prohibition. Against this backdrop of history, tradition, and practice, we now turn to respondents' constitutional claim.

II

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint…. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests…. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specifically protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, …*Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion…. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted life-saving medical treatment. *Cruzan*, 497 U.S., at 278–279.

But we "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open ended." …By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," …lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court….

Our established method of substantive due process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," …"so rooted in the traditions and conscience of our people as to be ranked as fundamental," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." …Second, we have required in substantive due process cases a "careful description" of the asserted fundamental liberty interest…. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decision making" …that direct and restrain our exposition of the Due Process Clause. As we stated recently…the Fourteenth Amendment "forbids the government to infringe…'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."…Justice Souter, relying on Justice Harlan's dissenting opinion in *Poe v. Ullman*, would largely abandon this restrained methodology, and instead ask "whether [Washington's] statute sets up one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the Due Process Clause of the Fourteenth Amendment," …(quoting *Poe* …[1961] [Harlan, J., dissenting]). In our view, however, the development of this Court's substantive due process jurisprudence, described briefly above…has been a process whereby the outlines of the "liberty" specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due process judicial review. In addition, by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.

Turning to the claim at issue here, the Court of Appeals stated that "properly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death"…or, in other words, "is there a right to die?"…Similarly,

respondents assert a "liberty to choose how to die" and a right to "control of one's final days"…and describe the asserted liberty as "the right to choose a humane, dignified death" …and "the liberty to shape death." …As noted above, we have a tradition of carefully formulating the interest at stake in substantive due process cases. For example, although *Cruzan* is often described as a "right to die" case …we were, in fact, more precise: we assumed that the Constitution granted competent persons a "constitutionally protected right to refuse life-saving hydration and nutrition." …The Washington statute at issue in this case prohibits "aid[ing] another person to attempt suicide"…and, thus, the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.

We now inquire whether this asserted right has any place in our Nation's traditions. Here, as discussed above…we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State….

Respondents contend, however, that the liberty interest they assert is consistent with this Court's substantive due process line of cases, if not with this Nation's history and practice. Pointing to *Casey* and *Cruzan*, respondents read our jurisprudence in this area as reflecting a general tradition of "self sovereignty" …and as teaching that the "liberty" protected by the Due Process Clause includes "basic and intimate exercises of personal autonomy." …According to respondents, our liberty jurisprudence, and the broad, individualistic principles it reflects, protects the "liberty of competent, terminally ill adults to make end of life decisions free of undue government interference." … The question presented in this case, however, is whether the protections of the Due Process Clause include a right to commit suicide with another's assistance. With this "careful description" of respondents' claim in mind, we turn to *Casey* and *Cruzan*.

Respondents contend that in *Cruzan* we "acknowledged that competent, dying persons have the right to direct the removal of life sustaining medical treatment and thus hasten death," …and that "the constitutional principle behind recognizing the patient's liberty to direct the withdrawal of artificial life support applies at least as strongly to the choice to hasten impending death by consuming lethal medication." …Similarly, the Court of Appeals concluded that "*Cruzan*, by recognizing a liberty interest that includes the refusal of artificial provision of life sustaining food and water, necessarily recognize[d] a liberty interest in hastening one's one death." …

The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct…. In *Cruzan* itself, we recognize that most States outlawed assisted suicide—and even more do today—and we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide….

Respondents also rely on *Casey*. There, the Court's opinion concluded that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." …We held, first, that a woman has a right, before her fetus is viable, to an abortion "without undue interference from the State"; second, that States may restrict post-viability abortions, so long as exceptions are made to protect a woman's life and health; and third, that the State has legitimate interests throughout a pregnancy in protecting the health of the woman and the life of the unborn child…. In reaching this conclusion, the opinion discussed in some detail this Court's substantive due process tradition of interpreting the Due Process Clause to protect certain fundamental rights and "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and noted that many of those rights and liberties "involv[e] the most intimate and personal choices a person may make in a lifetime." …

The Court of Appeals, like the District Court, found *Casey* '"highly instructive'" and '"almost prescriptive'" for determining '"what liberty interest may inhere in a terminally ill person's choice to commit suicide.'"

'"Like the decision of whether or not to have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.'"

By choosing this language, the Court's opinion in *Casey* described, in a general way and in light of our

prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment…. That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected …and *Casey* did not suggest otherwise.

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted suicide ban be rationally related to legitimate government interests…. This requirement is unquestionably met here. As the court below recognized…Washington's assisted suicide ban implicates a number of state interests….

First, Washington has an "unqualified interest in the preservation of human life." …The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest….

Respondents admit that "the State has a real interest in preserving the lives of those who can still contribute to society and enjoy life." …The Court of Appeals also recognized Washington's interest in protecting life, but held that the "weight" of this interest depends on the "medical condition and the wishes of the person whose life is at stake." …Washington, however, has rejected this sliding scale approach and, through its assisted suicide ban, insists that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law…. As we have previously affirmed, the States "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy." …This remains true, as *Cruzan* makes clear, even for those who are near death.

Relatedly, all admit that suicide is a serious public health problem, especially among persons in otherwise vulnerable groups…. The State has an interest in preventing suicide, and in studying, identifying, and treating its causes….

The State also has an interest in protecting the integrity and ethics of the medical profession. In contrast to the Court of Appeals' conclusion that "the integrity of the medical profession would [not] be threatened in any way by [physician assisted suicide]," …the American Medical Association, like many other medical and physicians' groups, has concluded that "physician assisted suicide is fundamentally incompatible with the physician's role as healer." American Medical Association, Code of Ethics §2.211 (1994)… And physician assisted suicide could, it is argued, undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming….

Next, the State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes. The Court of Appeals dismissed the State's concern that disadvantaged persons might be pressured into physician assisted suicide as "ludicrous on its face." … We have recognized, however, the real risk of subtle coercion and undue influence in end of life situations…. Similarly, the New York Task Force warned that "legalizing physician assisted suicide would pose profound risks to many individuals who are ill and vulnerable…. The risk of harm is greatest for the many individuals in our society whose autonomy and well being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group." …If physician assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end of life health care costs.

The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and "societal indifference." …The State's assisted suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's….

Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. The Court of Appeals struck down Washington's assisted suicide ban only "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." …Washington insists, however, that the impact of the court's decision will not and cannot be so limited…. If suicide is protected as a matter of constitutional right, it is argued, "every man and woman in the United States must enjoy it." … See *Kevorkian*…527 N. W. 2d, at 727–728, n. 41. The Court of Appeals' decision, and its expansion reasoning, provide ample support for the State's concerns. The court noted, for example, that the "decision of a duly appointed surrogate decision maker is for all legal

purposes the decision of the patient himself," …that "in some instances, the patient may be unable to self administer the drugs and …administration by the physician …may be the only way the patient may be able to receive them," …and that not only physicians, but also family members and loved ones, will inevitably participate in assisting suicide…. Thus, it turns out that what is couched as a limited right to "physician-assisted suicide" is likely, in effect, a much broader license, which could prove extremely difficult to police and contain…. Washington's ban on assisting suicide prevents such erosion.

We need not weigh exactingly the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection. We therefore hold that Wash. Rev. Code § 9A.36.060(1) (1994) does not violate the Fourteenth Amendment, either on its face or "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors."

Justice Souter, concurring in the judgment

When the physicians claim that the Washington law deprives them of a right falling within the scope of liberty that the Fourteenth Amendment guarantees against denial without due process of law, they are…[claiming] that the State has no substantively adequate justification for barring the assistance sought by the patient and sought to be offered by the physician. Thus, we are dealing with a claim to one of those rights sometimes described as rights of substantive due process and sometimes as unenumerated rights, in view of the breadth and indeterminacy of the "due process" serving as the claim's textual basis. The doctors accordingly arouse the skepticism of those who find the Due Process Clause an unduly vague or oxymoronic warrant for judicial review of substantive state law, just as they also invoke two centuries of American constitutional practice in recognizing unenumerated, substantive limits on governmental action…. The persistence of substantive due process in our cases points to the legitimacy of the modern justification for such judicial review…while the acknowledged failures of some of these cases point with caution to the difficulty raised by the present claim….

Respondents claim that a patient facing imminent death, who anticipates physical suffering and indignity, and is capable of responsible and voluntary choice, should have a right to a physician's assistance in providing counsel and drugs to be administered by the patient to end life promptly….

This liberty interest in bodily integrity was phrased in a general way by then Judge Cardozo when he said, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body" in relation to his medical needs…. The familiar examples of this right derive from the common law of battery and include the right to be free from medical invasions into the body, …as well as a right generally to resist enforced medication…. Thus "it is settled now …that the Constitution places limits on a State's right to interfere with a person's most basic decisions about …bodily integrity." …Constitutional recognition of the right to bodily integrity underlies the assumed right, good against the State, to require physicians to terminate artificial life support, … and the affirmative right to obtain medical intervention to cause abortion. See…*Roe v. Wade*….

It is, indeed, in the abortion cases that the most telling recognitions of the importance of bodily integrity and the concomitant tradition of medical assistance have occurred. In *Roe v. Wade*, the plaintiff contended that the Texas statute making it criminal for any person to "procure an abortion," …for a pregnant woman was unconstitutional insofar as it prevented her from "terminat[ing] her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions,'" …and in striking down the statute we stressed the importance of the relationship between patient and physician….

The analogies between the abortion cases and this one are several. Even though the State has a legitimate interest in discouraging abortion, the Court recognized a woman's right to a physician's counsel and care… Like the decision to commit suicide, the decision to abort potential life can be made irresponsibly and under the influence of others, and yet the Court has held in the abortion cases that physicians are fit assistants. Without physician assistance in abortion, the woman's right would have too often amounted to nothing more than a right to self-mutilation, and without a physician to assist in the suicide of the dying, the patient's right will often be confined to crude methods of causing death, most shocking and painful to the decedent's survivors.

There is, finally, one more reason for claiming that a physician's assistance here would fall within the accepted tradition of medical care in our society, and the abortion cases are only the most obvious illustration of the further point. While the Court has held that the performance of abortion procedures can be restricted to physicians, the Court's opinion in *Roe* recognized the doctors' role in yet another way. For, in the course of holding that the decision to perform an abortion called for a physician's assistance, the Court

recognized that the good physician is not just a mechanic of the human body whose services have no bearing on a person's moral choices, but one who does more than treat symptoms, one who ministers to the patient…. This idea of the physician as serving the whole person is a source of the high value traditionally placed on the medical relationship. Its value is surely as apparent here as in the abortion cases, for just as the decision about abortion is not directed to correcting some pathology, so the decision in which a dying patient seeks help is not so limited. The patients here sought not only an end to pain (which they might have had, although perhaps at the price of stupor) [but also] an end to their short remaining lives with a dignity that they believed would be denied them by powerful pain medication, as well as by their consciousness of dependency and helplessness as they approached death. In that period when the end is imminent, they said, the decision to end life is closest to decisions that are generally accepted as proper instances of exercising autonomy over one's own body, instances recognized under the Constitution and the State's own law, instances in which the help of physicians is accepted as falling within the traditional norm….

I take it that the basic concept of judicial review with its possible displacement of legislative judgment bars any finding that a legislature has acted arbitrarily when the following conditions are met: there is a serious factual controversy over the feasibility of recognizing the claimed right without at the same time making it impossible for the State to engage in an undoubtedly legitimate exercise of power; facts necessary to resolve the controversy are not readily ascertainable through the judicial process; but they are more readily subject to discovery through legislative fact finding and experimentation. It is assumed in this case, and must be, that a State's interest in protecting those unable to make responsible decisions and those who make no decisions at all entitles the State to bar aid to any but a knowing and responsible person intending suicide, and to prohibit euthanasia. How, and how far, a State should act in that interest are judgments for the State, but the legitimacy of its action to deny a physician the option to aid any but the knowing and responsible is beyond question….

The principal enquiry at the moment is into the Dutch experience, and I question whether an independent front line investigation into the facts of a foreign country's legal administration can be soundly undertaken through American courtroom litigation. While an extensive literature on any subject can raise the hopes for judicial understanding, the literature on this subject is only nascent. Since there is little experience directly bearing on the issue, the most that can be said is that whichever way the Court might rule today, events could overtake its assumptions, as experimentation in some jurisdictions confirmed or discredited the concerns about progression from assisted suicide to euthanasia.

Legislatures, on the other hand, have superior opportunities to obtain the facts necessary for a judgment about the present controversy. Not only do they have more flexible mechanisms for fact finding than the Judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions. There is, indeed, good reason to suppose that in the absence of a judgment for respondents here, just such experimentation will be attempted in some of the States….

I do not decide here what the significance might be of legislative foot dragging in ascertaining the facts going to the State's argument that the right in question could not be confined as claimed. Sometimes a court may be bound to act regardless of the institutional preferability of the political branches as forums for addressing constitutional claims…. Now, it is enough to say that our examination of legislative reasonableness should consider the fact that the Legislature of the State of Washington is no more obviously at fault than this Court is in being uncertain about what would happen if respondents prevailed today. We therefore have a clear question about which institution, a legislature or a court, is relatively more competent to deal with an emerging issue as to which facts currently unknown could be dispositive. The answer has to be, for the reasons already stated, that the legislative process is to be preferred. There is a closely related further reason as well.

One must bear in mind that the nature of the right claimed, if recognized as one constitutionally required, would differ in no essential way from other constitutional rights guaranteed by enumeration or derived from some more definite textual source than "due process." An unenumerated right should not therefore be recognized, with the effect of displacing the legislative ordering of things, without the assurance that its recognition would prove as durable as the recognition of those other rights differently derived. To recognize a right of lesser promise would simply create a constitutional regime too uncertain to bring with it the expectation of finality that is one of this Court's central obligations in making constitutional decisions….

Legislatures, however, are not so constrained. The experimentation that should be out of the question in constitutional adjudication displacing legislative judgments is entirely proper, as well as highly desirable,

when the legislative power addresses an emerging issue like assisted suicide. The Court should accordingly stay its hand to allow reasonable legislative consideration. While I do not decide for all time that respondents' claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time.

Case Questions

1. What was Dr. Glucksberg's argument in the U.S. Supreme Court?
2. On what grounds did Chief Justice Rehnquist justify his conclusion that Washington's statute did not violate the Due Process Clause?

Glucksberg Postscript

Eleven years after the U.S. Supreme Court ruled in favor of the State of Washington in the *Glucksberg* case, Washington voters redefined the state's public policy regarding assisted suicide. On November 4, 2008, 54 percent of voters supported Initiative 1000 and Washington joined with Oregon to become the only states to have enacted physician-assisted suicide laws. Oregon's 1994 "Death with Dignity" law was the first such law to be adopted in the United States.

More recently, the Montana Supreme Court decided in the 2009 case of *Baxter v. Montana* that physician-assisted suicide was permitted in that state. The court ruled in a 5–4 decision that there was no relevant statutory or case law prohibiting the practice. The Montana legislature, as of this writing, has not indicated whether it will maintain the status quo or enact legislation declaring physician-assisted suicide to be contrary to public policy. A legislative decision to prohibit physician-assisted suicides would likely result in this question returning to the Montana Supreme Court.

INTERNET TIP

An edited version of the Montana Supreme Court's opinion in *Baker v. Montana* and excerpts from the concurring and dissenting opinions can be found with the Chapter I materials in the textbook's website. Future developments in Montana law regarding physician-assisted suicides will be posted on the textbook's website with the Chapter I materials.

VAGUENESS AND OVERBREADTH

One of our fundamental legal principles is that laws must be written with sufficient precision or they will fail substantive due process requirements. Courts will declare unconstitutional statutes and ordinances that are overly broad and/or too vague. **Vagueness** exists where legislation fails to control the police exercise of discretion and fails to provide citizens with fair notice of what the law prohibits. **Overbreadth** exists where a statute is insufficiently focused. Thus, a disorderly conduct statute would be overly broad if it includes within its scope conduct that is clearly criminal as well as conduct that is protected by the First Amendment.

INTERNET TIP

An interesting Supreme Court vagueness case, *Chicago v. Morales* (1999), can be found on the textbook's website. This case involves a constitutional challenge to a Chicago ordinance intended to help combat loitering by members of Chicago street gangs.

Procedural Due Process

American law is very much concerned with procedure. The underlying premise is that justice is more likely to result when correct procedures have been followed. All states and the federal government have extensive rules that govern criminal and civil

litigation; these are subject to modification by federal and state legislative and judicial bodies. Although some rules are essentially arbitrary—for instance, one that requires a defendant to file an answer within twenty days of being served with a summons and complaint—other procedures are thought to be essential to due process and have been given constitutional protection. This latter category of rules promotes accurate fact-finding and fairness and is used in all jurisdictions in every case.

Procedural due process rules play a major role in criminal cases, placing limits on police investigative techniques and prosecutorial behavior, and outlining how criminal trials should be conducted.

Even when the Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to require a procedural right, however, it sometimes permits states to deviate from practices followed in federal courts. Procedural due process, for example, guarantees criminal defendants who are subject to more than six months' incarceration upon conviction the right to a jury trial. A defendant who stands trial in a state court, however, may not receive the same type of jury trial as in a federal court. Due process has been interpreted to permit states to accept nonunanimous jury verdicts in criminal cases where a unanimous verdict would be required in a federal court. Similarly, states are not constitutionally mandated to provide twelve-member juries even though twelve jurors are required in federal court.

In civil cases, due process rules are less extensive. They ensure that the court has jurisdiction over the parties, that proper notice has been given to defendants, and that the parties have an equal opportunity to present evidence and argument to the decision maker. In both types of litigation, procedural due process rules help ensure that decisions are made in a fair and reasonable manner.

As mentioned earlier, however, accuracy and fairness are not the only considerations. Elaborate procedural requirements are costly in terms of time, money, and utility. When the Supreme Court decides that a procedural right is fundamental to due process, there are often financial costs imposed on government, society, and individual litigants. Due process requirements can also lengthen the time it takes to conclude litigation, adding to the existing backlogs in many jurisdictions. Courts therefore generally try to balance accuracy against its cost on a case-by-case basis. In criminal cases, the need for accurate decision making is paramount, and the requirements of due process are quite extensive.

It is important to emphasize that the Fifth and Fourteenth Amendment Due Process Clauses operate only as restraints on government. One of the consequences of this limitation is that private schools have considerably more procedural latitude than public schools. Private elementary and secondary schools can regulate what students wear, substantially restrict student expression and behavior, enforce a common moral code, and enforce rules that are so vague that they would not be constitutionally acceptable in a public school. If private schools contract with their students to provide due process, or if they violate public policy, commit torts, or act inequitably, courts have been increasingly willing to intervene. Over the years, there has been an expansion of the concept of "state action" and a closer relationship between private schools and government in the form of grants, scholarships, and research funds to institutions of higher education. Courts are beginning to require procedural due process in actions of those private colleges and universities that have such governmental involvement.

In recent years, state legislatures throughout the country have enacted controversial statutes intended to protect the public from future attacks by convicted sexual offenders. These statutes require convicted sexual offenders to register with one or more governmental agencies (often the police or state attorney general) and supply detailed personal information. Often these statutes are challenged on procedural due process grounds.

The following case from Idaho was brought by a convicted sex offender who successfully argued that he was denied procedural due process in a proceeding in which resulted in his designation as a violent sexual predator.

Jason C. Smith v. State of Idaho

203 P.3d 1221
February 10, 2009

Horton, Justice.

Jason Smith was incarcerated for the 1998 rape of a fifteen-year-old girl. Prior to his release, he was referred to the Sexual Offender Classification Board (the Board or SOCB) to determine whether he should be classified as a violent sexual predator (VSP). The Board classified Smith as a VSP. Smith sought judicial review of that decision. After conducting an evidentiary hearing, the district court upheld the Board's decision. We conclude Smith's designation was not constitutionally sound and, therefore, reverse and remand with instructions to vacate Smith's designation as a VSP....

Analysis

We begin by acknowledging the obvious: Smith's history of violent deviant sexual behavior is such that the Board's designation as a VSP may well be warranted. The important question presented by this appeal, however, is not whether he deserves that label. Rather, the question that is the focal point of this Court's inquiry is whether the State of Idaho has labeled Smith as a VSP in a fashion that comports with his constitutional right to due process....

A. The statutory framework for VSP designation in Idaho presents significant constitutional shortcomings.

1. The Statutory Framework

Designation as a VSP is based on the provisions of Idaho's Sexual Offender Registration Notification and Community Right to Know Act (the Act or SOR Act)..... Only offenders convicted of certain specified crimes are eligible for designation as VSPs.... The Board is charged with the duty of considering for VSP designation those inmates scheduled for release who have been referred by the department of correction or the parole commission.... Smith was such an inmate.... A VSP designation is based upon the Board's determination that the offender continues to "pose a high risk of committing an offense or engaging in predatory sexual conduct."... The Board's rules provide that "[a] sexual offender shall be designated as a VSP if his risk of re-offending sexually or threat of violence is of sufficient concern to warrant the designation for the safety of the community."... In reaching this decision, the Board is required to "assess how biological, psychological, and situational factors may cause or contribute to the offender's sexual behavior.... Once the Board determines whether to designate the offender as a VSP, it must make written findings that include a risk assessment of the offender, the reasons upon which the risk assessment is based, the Board's determination whether the offender should be designated, and the reasons upon which the determination is based....

Apart from submitting to a mandatory... psychosexual evaluation...the offender has no opportunity to provide input to the Board. "The Board and the evaluator conducting the psychosexual evaluation may have access to and may review all obtainable records on the sexual offender to conduct the VSP designation assessment." ...The offender is not given notice of the information being considered by the Board, much less an opportunity to be heard as to the reliability of that information. If the Board determines that the offender is to be designated as a VSP, the offender is notified of the Board's decision by way of a copy of the Board's written findings....

If the Board makes a VSP designation, the offender has 14 days from receipt of the notice to seek judicial review... An offender designated a VSP is only entitled to challenge the designation on two grounds:

(a) The offender may introduce evidence that the calculation that led to the designation as a violent sexual predator was incorrectly performed either because of a factual error, because the offender disputes a prior offense, because the variable factors were improperly determined, or for similar reasons; ... and (b) The offender may introduce evidence at the hearing that the designation as a violent sexual predator does not properly encapsulate the specific case, i.e., the offender may maintain that the case falls outside the typical case of this kind and, therefore, that the offender should not be designated as a violent sexual predator....

The scope of judicial review is limited to "a summary, in camera review proceeding, in which the court decides only whether to affirm or reverse the board's designation of the offender as a violent sexual predator."... Thus, the Act contemplates that judicial review will ordinarily occur without the offender having the opportunity to address the basis of the Board's decision. The Act does provide that "[w]here the proof, whether in the form of reliable hearsay, affidavits, or offers of live testimony, creates a genuine issue of material fact as to whether the offender is a violent

sexual predator, the court should convene a fact-finding hearing and permit live testimony."… At the hearing, the State bears the burden of presenting a prima facie case justifying the Board's designation…. Despite this threshold burden of production, the offender ultimately bears the burden of proof… [The statute] provides that "[t]he court shall affirm the board's determination unless persuaded by a preponderance of the evidence that it does not conform to the law or the guidelines."

2. The Constitutional Shortcomings

The oddity lies herein: while both parties may introduce evidence, neither party is provided with the record utilized by the Board to make its determination, except for a written summary of information relied upon by the Board and documents that are available to the parties by other means…. All records that contain witness or victim names or statements, reports prepared in making parole determinations, or other "confidential" records are withheld from disclosure to the offender, his attorney, and even the prosecutor, and are available only to the district court for the purpose of reviewing the Board's determination…. The rules of evidence do not apply….

In our view, there are significant constitutional shortcomings in the statutory procedure as a result of the lack of procedural due process afforded an offender. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). "[C]ertainly where the State attaches `a badge of infamy' to the citizen, due process comes into play. We take it as a given that the label of "violent sexual predator" is a "badge of infamy" that necessitates due process protections. The high court of New York has recognized that an individual's private interest, his liberty interest in not being stigmatized as a sexually violent predator, is substantial. The ramifications of being classified and having that information disseminated fall squarely within those cases that recognize a liberty interest where there is some stigma to one's good name, reputation or integrity, coupled with some more "tangible" interest that is affected or a legal right that is altered. More than "name calling by public officials," the sexually violent predator label "is a determination of status" that can have a considerable adverse impact on an individual's ability to live in a community and obtain or maintain employment….

Idaho provides a computerized sex offender registry that is accessible to the public via the internet complete with photos of all sex offenders, along with their personal information including name, address, date of birth, and offense history…. Furthermore, there is a special link for those sex offenders designated as VSPs. This Court has recognized "the fact that registration brings notoriety to a person convicted of a sexual offense …prolong[s] the stigma attached to such convictions….

Designation as a VSP results in consequences beyond simply requiring the designee to register as a sex offender. Sex offenders need only update their information and photographs in the registry annually, while VSPs must do so every ninety days…. Non-VSP offenders may petition a court for relief from the duty to register after a period of ten years…. On the other hand, a VSP has no right to such relief. Thus, for an offender designated as a VSP, the scarlet letters are indelible.

While the duty to register as a sex offender is triggered simply by reason of conviction for a specified crime, classification as a VSP is based upon a factual determination of probable future conduct, i.e., that the offender poses a high risk of committing an offense or engaging in predatory sexual conduct. … This distinguishes Idaho's VSP system from a sex offender registry based solely on the fact of conviction of a predicate offense. As to the latter, the United States Supreme Court has concluded that sex offender registration laws do not violate the offender's procedural due process rights, noting the offender "has already had a procedurally safeguarded opportunity to contest" the charge. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003). … In reaching this conclusion, the Supreme Court emphasized that Connecticut's registry requirement is "based on the fact of previous conviction, not the fact of current dangerousness…[i]ndeed, the public registry explicitly states that officials have not determined that any registrant is currently dangerous."…

Under *Constantineau* and its progeny, procedural due process is a constitutional prerequisite to the state's ability to designate an individual a VSP. "Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented."… This Court has stated:

> Procedural due process basically requires that a person, whose protected rights are being adjudicated, is afforded an opportunity to be heard in a timely manner. There must be notice and the opportunity to be heard must occur at a meaningful time and in a meaningful manner….

In spite of the existence of well-established standards of procedural due process, Idaho's statutory scheme for VSP designation minimizes, at every turn, the possibility that an offender has the constitutionally required notice and opportunity to be heard. The offender is not provided notice or opportunity to be heard before the Board. At the district court level, the offender is provided only a summary of the information considered by the Board, presenting little meaningful opportunity to respond to specific information considered by the Board. The offender is given his first opportunity to be heard only if he can persuade the district court that there is a genuine issue of material fact whether he is a VSP. In the event that the offender clears this threshold hurdle, he then bears the burden of disproving the propriety of the designation, all the while being denied access to many of the documents upon which the designation may have been based....

We do not question the legitimate state interest in identifying those offenders who pose a high risk of reoffending or engaging in predatory sexual conduct. However, the United States Constitution prohibits the state from doing so without affording the offender due process. In our view, Idaho's statutory scheme violates an offender's right to procedural due process by failing to provide notice and an opportunity to be heard at a meaningful time and in a meaningful manner and by placing the burden of proof on the offender... at the only hearing in which he is permitted to appear....

Conclusion

When information upon which the VSP designation is based is withheld from an offender it cannot be said that there is either notice or a meaningful opportunity to be heard. The procedures afforded by the statute must comport with constitutional standards of procedural due process.

[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.... [S]ecrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it....

The statutory scheme for VSP designation is constitutionally infirm. The district court did not succeed in fashioning an *ad hoc* remedy to the invalid statute. Until Smith has the benefit of his constitutional right to notice and an opportunity to be heard, the State may not designate him as a VSP. Accordingly, we reverse the decision of the district court and remand this matter to the district court with direction to vacate Smith's designation as a VSP...

Case Questions

1. According to the Idaho Supreme Court, what fundamental constitutional rights were denied to Smith?
2. To what extent should judges consider the real-life consequences of their actions when deciding a case such as this one?
3. Were you surprised that legislation this flawed could be enacted into law?
4. How should citizens feel about the court's decision in favor of Smith?

CRIMINAL AND CIVIL LAW

The distinction between criminal and civil law is a very important concept in our legal system (see Figure 1.1). This text deals primarily with civil law. A civil suit involves a dispute between private individuals involving either a breach of an agreement or a breach of a duty imposed by law. A criminal action is brought by the government against an individual who has allegedly committed a crime. Crimes are classified as treason, felonies, and misdemeanors, depending on the punishment attached to the crime. **Treason** is a crime defined only by the Constitution, Article III, Section 3, clause 1. To commit treason—levying war against the United States, or adhering to or giving aid or comfort to its enemies—there must be an overt act and the intent to commit treason. A **felony** is a crime that is classified by statute in the place in which it is committed. That is, the severity of the punishment for a felony varies from place to place. A felony is generally regarded as being any criminal

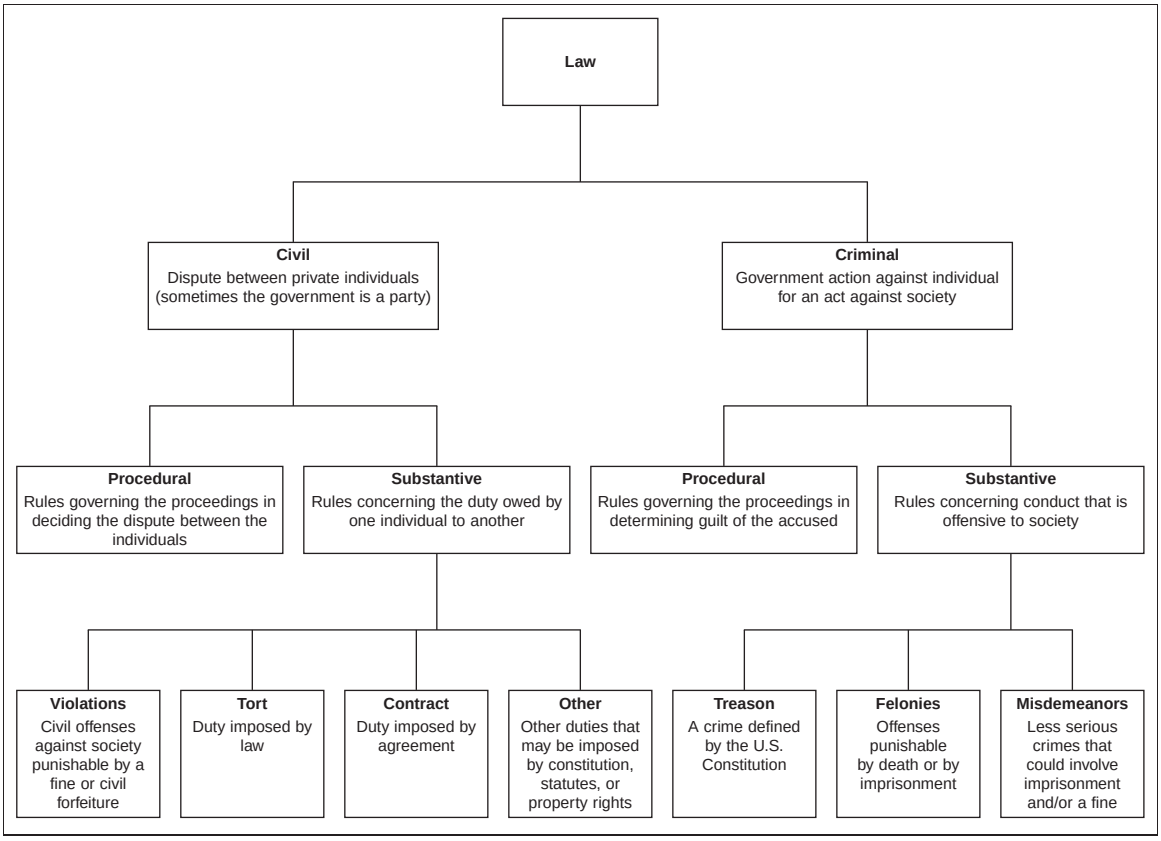

FIGURE 1.1 Criminal and Civil Law

offense for which a defendant may be imprisoned for more than one year, or executed. One determines whether a crime is a felony according to the sentence that might lawfully be imposed, not according to the sentence actually ordered. Felonies do not include **misdemeanors,** offenses that are generally punishable by a maximum term of imprisonment of less than one year.

In a civil suit, the court attempts to remedy the dispute between individuals by determining their legal rights, awarding money damages to the injured party, or directing one party to perform or refrain from performing a specific act. Since a crime is an act against society, the criminal court punishes a guilty defendant by imposing a fine or imprisonment or both.

In a criminal prosecution, the rules of court procedure differ. In order to meet the burden of proof to find a person guilty of a crime, guilt must be proved beyond a reasonable doubt, a stricter standard than the preponderance of evidence usually required in a civil case.

As we will see in the next case, when the same act gives rise to both a criminal proceeding and a civil suit, the actions are completely independent of each other. *Katko v. Briney* involves a civil suit for damages brought against the victim of a criminal larceny, by the person convicted of committing the crime.

Katko v. Briney
183 N.W.2d 657
Supreme Court of Iowa
February 9, 1971

Moore, Chief Justice

The primary issue presented here is whether an owner may protect personal property in an unoccupied boarded-up farmhouse against trespassers and thieves by a spring gun capable of inflicting death or serious injury.

We are not here concerned with a man's right to protect his home and members of his family. Defendants' home was several miles from the scene of the incident to which we refer *infra*.

Plaintiff's action is for damages resulting from serious injury caused by a shot from a 20-gauge spring shotgun set by defendants in a bedroom of an old farmhouse, which had been uninhabited for several years. Plaintiff and his companion, Marvin McDonough, had broken and entered the house to find and steal old bottles and dated fruit jars, which they considered antiques. At defendants' request, plaintiff's action was tried to a jury consisting of residents of the community where defendants' property was located. The jury returned a verdict for plaintiff and against defendants for $20,000 actual and $10,000 punitive damages.

After careful consideration of defendants' motions for judgment notwithstanding the verdict and for a new trial, the experienced and capable trial judge overruled them and entered judgment on the verdict. Thus we have this appeal by defendants….

Most of the facts are not disputed. In 1957 defendant Bertha L. Briney inherited her parents' farmland in Mahaska and Monroe Counties. For about ten years, 1957 to 1967, there occurred a series of trespassing and housebreaking events with loss of some household items, the breaking of windows, and "messing up of the property in general." The latest occurred June 8, 1967, prior to the event on July 16, 1967, herein involved.

Defendants through the years boarded up the windows and doors in an attempt to stop the intrusions. They had posted "no trespass" signs on the land several years before 1967. The nearest one was 35 feet from the house. On June 11, 1967, defendants set a "shotgun trap" in the north bedroom. After Mr. Briney cleaned and oiled his 20-gauge shotgun, the power of which he was well aware, defendants took it to the old house where they secured it to an iron bed with the barrel pointed at the bedroom door. It was rigged with wire from the doorknob to the gun's trigger so that it would fire when the door was opened. Briney first pointed the gun so an intruder would be hit in the stomach but at Mrs. Briney's suggestion it was lowered to hit the legs. He admitted he did so "because I was mad and tired of being tormented" but "he did not intend to injure anyone." He gave no explanation of why he used a loaded shell and set it to hit a person already in the house. Tin was nailed over the bedroom window. The spring gun could not be seen from the outside. No warning of its presence was posted.

Plaintiff lived with his wife and worked regularly as a gasoline station attendant in Eddyville, seven miles from the old house. He had observed it for several years while hunting in the area and considered it as being abandoned. He knew it had long been uninhabited. In 1967 the area around the house was covered with high weeds. Prior to July 16, 1967 plaintiff and McDonough had been to the premises and found several old bottles and fruit jars, which they took and added to their collection of antiques. On the latter date about 9:30 P.M. they made a second trip to the Briney property. They entered the old house by removing a board from a porch window, which was without glass. While McDonough was looking around the kitchen area, plaintiff went to another part of the house. As he started to open the north bedroom door the shotgun went off, striking him in the right leg above the ankle bone. Much of his leg, including part of the tibia, was blown away. Only by McDonough's assistance was plaintiff able to get out of the house and after crawling some distance, he was put in his vehicle and rushed to a doctor and then to a hospital. He remained in the hospital 40 days.

Plaintiff's doctor testified he seriously considered amputation but eventually the healing process was successful. Some weeks after his release from the hospital plaintiff returned to work on crutches. He was required to keep the injured leg in a cast for approximately a year and wear a special brace for another year. He continued to suffer pain during this period.

There was undenied medical testimony that plaintiff had a permanent deformity, a loss of tissue, and a shortening of the leg.

The record discloses plaintiff to trial time had incurred $710 for medical expenses, $2056.85 for hospital service, $61.80 for orthopedic service and $750 as loss of earnings. In addition thereto the trial court

submitted to the jury the question of damages for pain and suffering and for future disability.

Plaintiff testified he knew he had no right to break and enter the house with intent to steal bottles and fruit jars therefrom. He further testified he had entered a plea of guilty to larceny in the nighttime of property of less than $20 value from a private building. He stated he had been fined $50 and costs and paroled during good behavior from a 60-day jail sentence. Other than minor traffic charges, this was plaintiff's first brush with the law. On this civil case appeal, it is not our prerogative to review the disposition made of the criminal charge against him.

The main thrust of defendants' defense in the trial court and on this appeal is that "the law permits use of a spring gun in a dwelling or warehouse for the purpose of preventing the unlawful entry of a burglar or thief."…[T]he court referred to the early case history of the use of spring guns and stated under the law their use was prohibited except to prevent the commission of felonies of violence and where human life is in danger. The instruction included a statement that breaking and entering is not a felony of violence.

Instruction 5 stated: "You are hereby instructed that one may use reasonable force in the protection of his property, but such right is subject to the qualification that one may not use such means of force as will take human life or inflict great bodily injury. Such is the rule even though the injured party is a trespasser and is in violation of the law himself."

Instruction 6 stated: "An owner of premises is prohibited from willfully or intentionally injuring a trespasser by means of force that either takes life or inflicts great bodily injury; and therefore a person owning a premise is prohibited from setting out 'spring guns' and like dangerous devices which will likely take life or inflict great bodily injury, for the purpose of harming trespassers. The fact that the trespasser may be acting in violation of the law does not change the rule. The only time when such conduct of setting a 'spring gun' or a like dangerous device is justified would be when the trespasser was committing a felony of violence or a felony punishable by death, or where the trespasser was endangering human life by his act."

Instruction 7, to which defendants made no objection or exception, stated:

> "To entitle the plaintiff to recover for compensatory damages, the burden of proof is upon him to establish by a preponderance of the evidence each and all of the following propositions:
>
> "1. That defendants erected a shotgun trap in a vacant house on land owned by defendant, Bertha L. Briney, on or about June 11, 1967, which fact was known only by them, to protect household goods from trespassers and thieves.
> "2. That the force used by defendants was in excess of that force reasonably necessary and which persons are entitled to use in the protection of their property.
> "3. That plaintiff was injured and damaged and the amount thereof.
> "4. That plaintiff's injuries and damages resulted directly from the discharge of the shotgun trap which was set and used by defendants."
>
> The overwhelming weight of authority, both textbook and case law, supports the trial court's statement of the applicable principles of law."

Prosser on Torts, third edition, pages 116–118, states that:

> "[T]he law has always placed a higher value upon human safety than upon mere rights in property. [I]t is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels, unless there is also such a threat to the defendant's personal safety as to justify a self-defense… spring guns and other man-killing devices are not justifiable against a mere trespasser, or even a petty thief. They are privileged only against those upon whom the landowner, if he were present in person, would be free to inflict injury of the same kind."

Restatement of Torts, §85, page 180, states that:

> "the value of human life and limbs, not only to the individual concerned but also to society, so outweighs the interest of a possessor of land in excluding from it those whom he is not willing to admit thereto that a possessor of land has, as is stated in §79, no privilege to use force intended or likely to cause death or serious harm against another whom the possessor sees about to enter his premises or meddle with his chattel, unless the intrusion threatens death or serious bodily harm to the occupiers or users of the premises…. A possessor of land cannot do indirectly and by a mechanical device that which, were he present, he could not do immediately and in person. Therefore, he cannot gain a privilege to install, for the purpose of protecting his land from intrusions harmless to the lives and limbs of the occupiers or users of it, a mechanical device whose only

purpose is to inflict death or serious harm upon such as may intrude, by giving notice of his intention to inflict, by mechanical means and indirectly, harm which he could not, even after request, inflict directly were he present."…

In *Hooker v. Miller*, 37 Iowa 613, we held defendant vineyard owner liable for damages resulting from a spring gun shot although plaintiff was a trespasser and there to steal grapes. At pages 614, 615, this statement is made: "This court has held that a mere trespass against property other than a dwelling is not a sufficient justification to authorize the use of a deadly weapon by the owner in its defense; and that if death results in such a case it will be murder, though the killing be actually necessary to prevent the trespass."… At page 617 this court said: "Trespassers and other inconsiderable violators of the law are not to be visited by barbarous punishments or prevented by inhuman inflictions of bodily injuries."

The facts in *Allison v. Fiscus*, 156 Ohio 120, decided in 1951, are very similar to the case at bar. There plaintiff's right to damages was recognized for injuries received when he feloniously broke a door latch and started to enter defendant's warehouse with intent to steal. As he entered, a trap of two sticks of dynamite buried under the doorway by defendant owner was set off and plaintiff seriously injured. The court held the question whether a particular trap was justified as a use of reasonable and necessary force against a trespasser engaged in the commission of a felony should have been submitted to the jury. The Ohio Supreme Court recognized the plaintiff's right to recover punitive or exemplary damages in addition to compensatory damages….

In *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268, 275, the Court states: "The liability for spring guns and mantraps arises from the fact that the defendant has…expected the trespasser and prepared an injury that is no more justified than if he had held the gun and fired it."

In addition to civil liability many jurisdictions hold a landowner criminally liable for serious injuries or homicide caused by spring guns or other set devices….

In Wisconsin, Oregon and England the use of spring guns and similar devices is specifically made unlawful by statute….

The legal principles stated by the trial court in instructions 2, 5 and 6 are well established and supported by the authorities cited and quoted *supra*. There is no merit in defendants' objections and exceptions thereto. Defendants' various motions based on the same reasons stated in exceptions to instructions were properly overruled.

Plaintiff's claim and the jury's allowance of punitive damages, under the trial court's instructions relating thereto, were not at any time or in any manner challenged by defendants in the trial court as not allowable. We therefore are not presented with the problem of whether the $10,000 award should be allowed to stand.

We express no opinion as to whether punitive damages are allowable in this type of case. If defendants' attorneys wanted that issue decided, it was their duty to raise it in the trial court.

The rule is well established that we will not consider a contention not raised in the trial court. In other words, we are a court of review and will not consider a contention raised for the first time in this court….

Under our law punitive damages are not allowed as a matter of right. When malice is shown or when a defendant acted with wanton and reckless disregard of the rights of others, punitive damages may be allowed as punishment to the defendant and as a deterrent to others. Although not meant to compensate a plaintiff, the result is to increase his recovery. He is the fortuitous beneficiary of such an award simply because there is no one else to receive it.

The jury's findings of fact including a finding that defendants acted with malice and with wanton and reckless disregard, as required for an allowance of punitive or exemplary damages, are supported by substantial evidence. We are bound thereby.

This opinion is not to be taken or construed as authority that the allowance of punitive damages is or is not proper under circumstances such as exist here. We hold only that a question of law not having been properly raised cannot in this case be resolved.

Study and careful consideration of defendants' contentions on appeal reveal no reversible error.

Affirmed.

Larson, Justice, dissenting

I respectfully dissent, first because the majority wrongfully assumes that by installing a spring gun in the bedroom of their unoccupied house the defendants intended to shoot any intruder who attempted to enter the room. Under the record presented here, that was a fact question. Unless it is held that these property owners are liable for any injury to an intruder from such a device regardless of the intent with which it is installed, liability under these pleadings must rest on two definite issues of fact, i.e., did the defendants intend to shoot the invader, and if so, did they employ unnecessary and unreasonable force against him?

It is my feeling that the majority oversimplifies the impact of this case on the law, not only in this but

other jurisdictions, and that it has not thought through all the ramifications of this holding.

There being no statutory provisions governing the right of an owner to defend his property by the use of a spring gun or other like device, or of a criminal invader to recover punitive damages when injured by such an instrumentality while breaking into the building of another, our interest and attention are directed to what should be the court determination of public policy in these matters. On both issues we are faced with a case of first impression. We should accept the task and clearly establish the law in this jurisdiction hereafter. I would hold there is no absolute liability for injury to a criminal intruder by setting up such a device on his property, and unless done with an intent to kill or seriously injure the intruder, I would absolve the owner from liability other than for negligence. I would also hold the court had no jurisdiction to allow punitive damages when the intruder was engaged in a serious criminal offense such as breaking and entering with intent to steal....

Case Questions

1. Suppose that, instead of a spring gun, the Brineys had unleashed on the premises a vicious watchdog that severely injured Katko's leg? Would the result have been different? What if the watchdog had been properly chained?
2. When may one set a spring gun and not be subject to liability? What can one legally do to protect property or life?
3. What do you think the consequences would have been if the dissenting judge's suggestions had become law?
4. A case involving breaking and entering and shooting a gun might appear to be a criminal matter. What factors make this a civil lawsuit?

EQUAL PROTECTION OF THE LAW

The Equal Protection Clause of the Fourteenth Amendment has been used to strike down legislation that was enacted for the purpose of discriminating against certain groupings of people (called "classifications" in legalese). The Jim Crow laws, used to discriminate against African Americans, are one notorious example of an invidious (legally impermissible) classification scheme.

Earlier in this chapter, we learned about the U.S. Supreme Court's decision in the 1967 case of *Loving v. Virginia*. Virginia's miscegenation statute was found to violate substantive due process. We return to that case at this time because the Lovings had an additional ground for challenging the statute. They maintained that it also violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court agreed. It ruled that the statute had deprived the Lovings of equal protection because "Virginia prohibit[ed] only interracial marriages involving white persons" and because there "is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."

The Equal Protection Clause has been invoked to invalidate discriminatory classification schemes that are based on national origin, alienage, religion, and gender (in some situations).

TORT AND CONTRACT LAW

A person has a right to bring a civil action against another for a wrongful act or omission that causes injury to him or her. The basis of the suit is a violation of some duty owed to the injured person. This duty arises either from an agreement of the persons or by operation of the law.

Torts

Tort law establishes standards of conduct that all citizens must meet. A plaintiff sues in tort to recover money damages for injuries to his or her person, reputation, property, or business caused by a breach of a legal duty.

A tort is any wrongful act, not involving a breach of an agreement, for which a civil action may be maintained. The wrongful act can be intentional or unintentional. Intentional torts are based on the defendant's willful misconduct or intentional wrongdoing. This does not necessarily mean the defendant had a hostile intent, but only that he or she had a belief that a particular harmful result was substantially likely to follow. *Katko v. Briney* was such a case. When Briney rigged the spring gun, he did so believing that serious bodily injury was very likely to occur to any intruder who opened the door. Briney was civilly found to have violated the standard of care owed by a property owner to a trespasser such as Katko under the circumstances of that case. A person who commits an intentional tort may also be committing a criminal act, for which the government may bring criminal charges. As we saw in *Katko v. Briney*, the tort and criminal actions would be independent of each other.

An unintentional tort occurs when a person acts negligently. That is, he or she unintentionally fails to live up to the community's ideal of reasonable care. Every person has a legal duty to act toward other people as a reasonable and prudent person would have acted under the circumstances. Torts are discussed more fully in Chapter XI.

Contracts

A contract is a promissory agreement between two or more people that creates, modifies, or destroys a legally enforceable obligation. People voluntarily enter into a contract in order to create private duties for mutual advantage. Thus, under ordinary conditions, contractual terms are not imposed by law. There are exceptions to this rule; however, the essence of contract law is the enforcement of a promise voluntarily made.

Although contract law is more thoroughly discussed in Chapter X, it will be helpful to introduce it here. In the legal sense, the term **contract does not mean the tangible document that contains evidence of an agreement.** Rather, a contract is the legally enforceable agreement itself. There are three parts to every contract: **offer, acceptance,** and **consideration.** An offer is a communication of a promise, with a statement of what is expected in return. An offer is made with the intention of creating an enforceable legal obligation. Acceptance is the evidence of assent to the terms of the offer. Consideration is the inducement each party has to enter into an agreement. Only legally enforceable obligations are called contracts.

A person who fails to perform a contractual obligation has breached the contract. The plaintiff brings a suit in contract to obtain legal relief from the breaching party. The normal remedy for a breach of contract is monetary damages, although in appropriate circumstances, the breaching party may be ordered to perform his or her agreement.

Contracts may be oral, written, express (explicit terms), implied in fact (inferred from the person's actions), or implied in law. In *Suggs v. Norris*, which follows, the trial court permitted the jury to find an implied-in-law agreement from the facts of the case, even though there was no proof of an oral agreement or written document evidencing a contract.

Suggs v. Norris
364 S.E.2d 159
Court of Appeals of North Carolina
February 2, 1988

Wells, Judge

The overriding question presented by this appeal is whether public policy forbids the recovery by a plaintiff partner to an unmarried but cohabiting or meretricious relationship, from the other partner's estate, for services rendered to or benefits conferred upon the other partner through the plaintiff's work in the operation of a joint business when the business proceeds were utilized to enrich the estate of the deceased partner.

Defendant argues under her first three assignments of error that any agreement between plaintiff and the decedent providing compensation to plaintiff for her efforts in the raising and harvesting of produce was void as against public policy because it arose out of the couple's illegal cohabitation. While it is well settled that no recovery can be had under either a contractual or restitutionary (*quantum meruit*) theory arising out of a contract or circumstances which violate public policy…defendant's application of the rule to the present case is misplaced.

This Court has made it clear that we do not approve of or endorse adulterous meretricious affairs, *Collins v. Davis*, 68 N.C. App. 588…. We made it clear in *Collins*, however, that cohabiting but unmarried individuals are capable of "entering into enforceable express or implied contracts for the purchase and improvement of houses, or for the loan and repayment of money."…Judge Phillips, writing for the majority, in *Collins* was careful to point out that if illicit sexual intercourse had provided the consideration for the contract or implied agreement, all claims arising therefrom, having been founded on illegal consideration, would then be unenforceable.

While our research has disclosed no other North Carolina cases which address this specific issue, we do find considerable guidance in the decisional law of other states. Most notable is Justice Tobriner's landmark decision in *Marvin v. Marvin*, 18 Cal.3d 660… (1976) which held that express contracts between unmarried cohabiting individuals are enforceable unless the same are based solely on sexual services….

The *Marvin* Court also held that an unmarried couple may, by words and conduct, create an implied-in-fact agreement regarding the disposition of their mutual properties and money as well as an implied agreement of partnership or joint venture…. Finally, the court endorsed the use of constructive trusts wherever appropriate and recovery in *quantum meruit* where the plaintiff can show that the services were rendered with an expectation of monetary compensation….

Other jurisdictions have fashioned and adhered to similar rules. In *Kinkenon v. Hue* [207 Neb. 698 (1981)], the Nebraska Supreme Court confirmed an earlier rule that while bargains made in whole or in part for consideration of sexual intercourse are illegal, any agreements not resting on such consideration, regardless of the marital status of the two individuals, are enforceable….

Likewise, the New Jersey Supreme Court held as enforceable an oral agreement between two adult unmarried partners where the agreement was not based "explicitly or inseparably" on sexual services. Kozlowski *v. Kozlowski* [80 N.J. 378 (1979)]. In *Fernandez v. Garza*, 88 Ariz. 214 (1960), the Arizona Supreme Court held that plaintiff's meretricious or unmarried cohabitation with decedent did not bar the enforcement of a partnership agreement wherein the parties agreed to share their property and profits equally and where such was not based upon sexual services as consideration….

We now make clear and adopt the rule that agreements regarding the finances and property of an unmarried but cohabiting couple, whether express or implied, are enforceable as long as sexual services or promises thereof do not provide the consideration for such agreements….

In the present case, the question is before this Court on an appeal of the trial court's denial of defendant's Motion for Judgment Notwithstanding the Verdict; therefore, our standard of review is whether the evidence, viewed in the light most favorable to plaintiff, is sufficient to support the jury verdict. *Wallace v. Evans*, [60 N.C. App. 145 (1982)]. Applying the foregoing standard, we find that plaintiff's evidence that she began work for the decedent in his produce business several years before she began cohabiting with him and that at the time she began work she believed the two of them were "partners" in the business, was sufficient evidence for the jury to have inferred that plaintiff's work comprised a business relationship with decedent which was separate and independent from and of their cohabiting relationship. Therefore, the jury may have inferred that sexual services did not provide the consideration for plaintiff's claim. We therefore hold that plaintiff's claim for a *quantum meruit* recovery was not barred as being against public policy. Defendant's first three assignments of error are overruled.

Defendant next argues under assignments of error 4 and 5 that the trial court erred in submitting a *quantum meruit* recovery issue to the jury because any services rendered by plaintiff were either gratuitous or incidental to an illegal relationship. As we have already addressed the issue of illegality, we are concerned here only with the question of whether there existed sufficient evidence to submit the issue of recovery in *quantum meruit* to the jury.

The trial court placed the following issue regarding a quasi-contract or *quantum meruit* recovery before the jury:

Issue Four:

> Did DARLENE SUGGS render services to JUNIOR EARL NORRIS involving the raising, harvesting and

sale of produce under such circumstances that the Estate of JUNIOR EARL NORRIS should be required to pay for them?
ANSWER: Yes

Recovery on *quantum meruit* requires the establishment of an implied contract…. The contract may be one implied-in-fact where the conduct of the parties clearly indicates their intention to create a contract or it may be implied-in-law based on the restitutionary theory of quasi-contract, which operates to prevent unjust enrichment…. An implied-in-law theory required the plaintiff to establish that services were rendered and accepted between the two parties with the mutual understanding that plaintiff was to be compensated for her efforts…. Moreover, plaintiff's efforts must not have been gratuitous as is generally presumed where services are rendered between family or spousal members….

In the present case, the evidence clearly showed that the plaintiff had from 1973 until the death of the decedent in 1983 operated a produce route for and with the decedent. According to several witnesses' testimony, plaintiff had worked decedent's farm, disked and cultivated the soil, and harvested and marketed the produce. Plaintiff, working primarily without the decedent's aid, drove the produce to various markets over a 60-mile route. She handled all finances and deposited them in the couple's joint banking account. Finally, the evidence showed that the decedent, an alcoholic, depended almost entirely on plaintiff's work in the produce business and as well her care of him while he was ill. Because of plaintiff's efforts the couple had amassed seven vehicles valued at $20,000; some farm equipment valued at $4,000; $8,000 in cash in the account, and all debts which had attached to the farm when plaintiff began working with decedent in 1973 were paid—all due to plaintiff's efforts. Additionally, plaintiff testified that when she began work with the decedent in 1973 she believed they were partners and that she was entitled to share in one-half the profits.

The foregoing evidence clearly establishes a set of facts sufficient to have submitted a quasi-contractual issue to the jury and from which the jury could have inferred a mutual understanding between plaintiff and the decedent that she would be remunerated for her services. Plaintiff's efforts conferred many years of benefits on the decedent and the decedent, by all accounts, willingly accepted those benefits.

Because the evidence viewed in the light most favorable to plaintiff was clearly sufficient to permit the jury to find a mutual understanding between plaintiff and decedent that plaintiff's work in the produce business was not free of charge and because plaintiff's work in the produce business was not of the character usually found to be performed gratuitously…defendant's Motions for Directed Verdict and Judgment Notwithstanding the Verdict were properly denied.

No Error.

Case Questions

1. Darlene Suggs's suit against the estate of Junior E. Norris was based on what legal theories?
2. Under what circumstances does the court indicate that the contracts between unmarried but cohabiting persons would not be enforceable?
3. Why should a court be able to create a contract after a dispute arises for parties who never signed a binding contract?
4. Do you see any moral principles reflected in the court's opinion in this case?

CHAPTER SUMMARY

Chapter I began by raising a fundamental jurisprudential question, "What is law?" Many students who have not previously thought much about law are surprised to learn that there is no single universally accepted answer to the question and that the likely best answer is "it depends." After reading brief synopses of several differing philosophical schools, it becomes apparent why developing a consensus definition has proven to be so difficult. What followed next were a discussion of legal objectives that are common to both private and public law in this country and a review of Anglo-American historical

and cultural heritage with a focus on how these have contributed to law as we know it today. Because students using this textbook need immediately to begin developing the ability to read excerpts from judicial opinions, the chapter included a highly simplified overview of civil procedure. This overview was necessary preparation for students about to read their first case. Civil procedure is a topic that is covered in considerably more detail in Chapter V. The chapter continued with some additional comments on reading cases immediately prior to the first judicial opinion, *Video Software Dealers Association v. Schwarzenegger*. An analysis of that case followed, along with a sample brief, both of which were intended to further help students learn how to read and understand judicial opinions in general, and the first case in particular. The chapter then turned to an overview of constitutional due process and equal protection, and a discussion of the differences between civil and criminal law. The chapter concluded with an explanation of the differences between tort and contract law.

CHAPTER QUESTIONS

1. Inmates in a state reformatory brought suit against the state department of corrections because corrections officials refused to permit certain persons to visit inmates. The inmates brought suit because receiving visitors is essential to inmates' morale and to maintaining contacts with their families. They argued that the state had established regulations to guide prison officials in making visitation decisions, thus the court should recognize that inmates have a constitutionally protected liberty right to a hearing whenever prison officials deny a visitation. Convening such a hearing would make it possible for inmates to determine whether prison officials had complied with the guidelines or had acted arbitrarily in denying a visitation. Should the inmates have a due process right to a hearing?

   Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989)

2. Terry Foucha, a criminal defendant, was charged with aggravated burglary and a firearms offense. On October 12, 1984, Foucha was found not guilty by reason of insanity and was ordered committed to a mental institution until medically discharged or released pursuant to a court order. In March 1988, doctors evaluated Foucha and determined that he was "presently in remission from mental illness, [but] [w]e cannot certify that he would not constitute a menace to himself or to others if released." There was testimony from one doctor that Foucha had "an antisocial personality, a condition that is not a mental disease, and that is untreatable." Based on these opinions, the court ordered that Foucha remain in the mental institution because he posed a danger to himself as well as others. Under state law, a person who has been acquitted of criminal charges because of insanity but who is no longer insane can only be released from commitment if he can prove that he is not a danger to himself or to society. Does the statutory scheme violate Foucha's liberty rights under the Due Process Clause?

   Foucha v. Louisiana, 504 U.S. 71 (1992)

3. Rhode Island's legislature enacted laws that prevented liquor retailers from advertising the retail prices of their merchandise at sites other than their retail stores. It feared that allowing package stores to advertise their prices freely and honestly would lower the cost to consumers and increase the use of alcoholic beverages. 44 Liquormart, a liquor retailer, brought suit seeking a declaratory judgment on the grounds that Rhode Island's laws violated the store's First Amendment right to freedom of speech. The U.S. District Court made a

finding of fact that Rhode Island's law had "no significant impact on levels of alcohol consumption" and concluded that the law was unconstitutional. The district judge's rationale was that the statute in question did not further the goal of reducing alcohol consumption, and further, that its restrictions on commercial freedom of speech were unnecessary and excessive. The U.S. Court of Appeals for the First Circuit reversed, however, and the U.S. Supreme Court granted certiorari. Do you believe that Rhode Island's statute violates the package store's First Amendment and due process right to engage in commercial speech?

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)

4. Margaret Gilleo is a homeowner in a St. Louis suburb. In December 1990, she placed a 24- by 36-inch sign on her lawn expressing opposition to Operation Desert Storm. She contacted police after her sign was stolen on one occasion and knocked down on another occasion. Police officials told Margaret that her signs were prohibited by city ordinance. Margaret unsuccessfully petitioned the city council for a variance, and then filed suit. In her civil rights action, she maintained that the city ordinance violated her First Amendment right of freedom of speech, which was applicable to the state through the Fourteenth Amendment Due Process Clause. The U.S. District Court agreed and enjoined the enforcement of the ordinance. Margaret then placed an 8½- by 11-inch sign in an upstairs window indicating her desire for "Peace in the Gulf." The city, in the meantime, repealed its original ordinance and replaced it with an ordinance that prohibited all signs that did not fit within ten authorized exemptions. The ordinance's preamble indicated that its purpose was to improve aesthetics and protect property values within the city. Margaret's peace sign did not fit within any of the authorized exemptions. She amended her complaint and challenged the new ordinance because it prohibited her from expressing her opposition to the war. The city defended by arguing that its ordinance was content neutral and its purposes justified the limited number of exemptions. It noted that alternative methods of communication, such as hand-held signs, pamphlets, flyers, etc., were permissible under the ordinance. How would you decide this case?

City of Ladue v. Gilleo, 512 U.S. 43 (1994)

5. Keen Umbehr was in the trash collection business. He had an exclusive contract with Wabaunsee County and six of the county's seven cities to collect the trash from 1985 to 1991. Throughout his term as the primary trash collector, he publicly criticized the county board and many of its policies, successfully sued the board for violating the state open meetings law, and tried, unsuccessfully, to be elected to the board. The board's members retaliated against Umbehr by voting to terminate his contract with the county. Umbehr, however, successfully negotiated new agreements with five of the six cities whose trash he had previously collected. In 1992, Umbehr sued the two county board members who had voted to terminate his contract. He alleged that his discharge/nonrenewal was in retaliation for having exercised his right to freedom of speech. The U.S. District Court ruled that only public employees were protected by the First Amendment from retaliatory discharge. The U.S. Court of Appeals disagreed and reversed. Should independent contractors who have government contracts be protected by the Fourteenth Amendment's Due Process Clause from retaliatory contract discharges resulting from a contractor's exercise of speech? Should the well-known system of patronage, a practice followed by politicians of all stripes by which they reward their supporters with contracts and discharge those who are their political adversaries or who criticize their policies, take precedence over First Amendment considerations?

Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668 (1996)

6. A Cincinnati, Ohio, ordinance makes it a criminal offense for "three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings." Coates, a student who became involved in a demonstration, was arrested and convicted for the violation of this ordinance. His argument on appeal was that the ordinance on its face violated the Fourteenth Amendment. Is this a valid contention?
   Coates v. City of Cincinnati, 402 U.S. 611 (1971)

7. Fuentes purchased a stove and stereo from Firestone Tire and Rubber Company. Payment was to be made in monthly installments over a period of time. After two-thirds of the payments were made, Fuentes defaulted. Firestone filed an action for repossession, and at the same time instructed the sheriff to seize the property pursuant to state law. The sheriff seized the property before Fuentes even knew of Firestone's suit for repossession. Fuentes claims that she was deprived of due process because her property was taken without notice or a hearing. What should the result be?
   Fuentes v. Shevin, 407 U.S. 67 (1972)

8. Plaintiff brought a class action on behalf of all female welfare recipients residing in Connecticut and wishing divorces. She alleged that members of the class were prevented from bringing divorce suits by Connecticut statutes that required payment of court fees and costs of service of process as a condition precedent to access to the courts. Plaintiff contended that such statutes violate basic due process considerations. Is her argument valid?
   Boddie v. Connecticut, 401 U.S. 371 (1970)

9. Like many other states, Connecticut requires nonresidents of the state who are enrolled in the state university system to pay tuition and other fees at higher rates than residents of the state who are so enrolled. A Connecticut statute defined as a nonresident any unmarried student if his or her "legal address for any part of the one-year period immediately prior to [his or her] application for admission…was outside of Connecticut," or any married student if his or her "legal address at the time of his application for admission…was outside of Connecticut." The statute also provided that the "status of a student, as established at the time of [his or her] application for admission… shall be [his or her] status for the entire period of his attendance." Two University of Connecticut students who claimed to be residents of Connecticut were by the statute classified as nonresidents for tuition purposes. They claimed that the Due Process Clause does not permit Connecticut to deny an individual the opportunity to present evidence that he or she is a bona fide resident entitled to state rates and that they were being deprived of property without due process. Is this a valid argument?
   Vlandis v. Kline, 412 U.S. 441 (1973)

NOTES

1. Special recognition goes to Bruce D. Fisher and Edgar Bodenheimer. Students seeking more extensive treatment of this material should see Fisher, *Introduction to the Legal System* (St. Paul, MN: West Publishing Co., 1977); and Bodenheimer, *Jurisprudence* (Cambridge, MA: Harvard University Press, 1967).
2. J. G. Murphy and J. Coleman, *An Introduction to Jurisprudence* (Totowa, NJ: Rowman and Allenheld Publishers, 1984), p. 13.
3. Bodenheimer, p. 71; and Fisher, p. 7.
4. Bodenheimer, p. 72.
5. Examples are adverse possession, delivery of a deed, the concept of escheat, estate, and the

covenant of seisin, and the rule against restraints on alienation.

6. Property law addresses the notion that property equals rights, the rights of a finder vis-à-vis everyone but the true owner, the importance of delivery in the making of a gift, or the right of survivorship in joint tenancies.
7. The concepts of consideration, silence as acceptance, and the Statute of Frauds are addressed by contract law.
8. The Massachusetts legislature has again enacted a mandatory seat belt law. An attempt to repeal this statute was unsuccessful.
9. G. Sabine, *A History of Political Theory*, 3d ed. (New York: Holt, Rinehart and Winston, 1961), pp. 681–684; and Bodenheimer, p. 85.
10. Bodenheimer, p. 84; and B. H. Levy, *Anglo-American Philosophy of Law* (New Brunswick, NJ: Transaction Publishers, 1991), pp. 19–23.
11. Bodenheimer, pp. 94, 99; and Levy, pp. 29–36.
12. Bodenheimer, p. 96; and Fisher, p. 11.
13. *Lochner v. New York*, 198 U.S. 45 (1905).
14. Adair v. United States, 208 U.S. 161 (1908).
15. B. Cardozo, *The Nature of Judicial Process* (New Haven, CT: Yale University Press, 1921), p. 65–66.
16. R. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 *Harvard Law Review* 591 (1911).
17. Ibid., pp. 510–514.
18. Bodenheimer, p. 116.
19. K. Llewellyn, "A Realistic Jurisprudence—The Next Step," 30 *Columbia Law Review*, 431 (1930) 12.
20. K. Llewellyn, *The Bramble Bush* (1930), p. 12.
21. D. Black, *Sociological Justice* (New York: Oxford University Press, 1989), p. 5.
22. Ibid., p. 21.
23. Ibid., pp. 24–25 and Chapter II "Sociological Litigation."
24. Ibid., pp. 9–13, 21–22.
25. Ibid., p. 24–25, 95–96.
26. F. Marcham, *A History of England* (New York: Macmillan, 1937), p. 62.
27. G. Keeton, *The Norman Conquest and the Common Law* (London: Ernest Benn Limited, 1966), p. 14.
28. Ibid., p. 128; and Marcham, pp. 60–61.
29. T. F. F. Plucknett, *A Concise History of the Common Law* (Little, Brown and Co., 1956), p. 102.
30. F. Marcham, *A History of England* (New York: Macmillan, 1937), p. 62; and T. F. F. Plucknett, *A Concise History of the Common Law* (Boston: Little, Brown, 1956), p. 144.
31. Keeton, p. 23.
32. F. Barlow, *The Feudal Kingdom of England*, 4th ed. (Longman, 1988), p. 51; P. Loyn, *The Making of the English Nation* (Thames & Hudson, 1991), p. 78; C. Brooke, *From Alfred to Henry III* (Norton, 1961), p. 78.
33. Plucknett, p. 139.
34. A. K. R. Kiralfy, *Potter's Historical Introduction to English Law*, 4th ed. (London: Sweet and Maxwell Ltd., 1962), p. 11.
35. Plucknett, p. 141; and Keeton, p. 13.
36. Marcham, p. 80.
37. Plucknett, p. 11; and Barlow, p. 81.
38. Marcham, p. 83.
39. Ibid., p. 86.
40. Ibid., p. 90; and Plucknett, p. 12.
41. Marcham, pp. 110–111.
42. Keeton, p. 160.
43. A. C. Baugh and T. Cable, *A History of the English Language*, 3d ed. (Englewood Cliffs, NJ: Prentice Hall, 1978), pp. 145, 148–149.
44. Brooke, pp. 160, 192.
45. Ibid., p. 156; and Plucknett, p. 14.
46. Marcham, p. 118; and Plucknett, p. 22.
47. Plucknett, p. 15.
48. Brooke, pp. 182–185; and Loyn, p. 128.

49. Marcham, pp. 156–157.
50. Plucknett, p. 103.
51. Keeton, p. 125.
52. Ibid., p. 201.
53. Loyn, p. 139.
54. Marcham, p. 131; and Plucknett, p. 355.
55. Marcham, p. 295.
56. Plucknett, p. 408.
57. Plucknett, p. 357.
58. R. Walsh, *A History of Anglo-American Law* (Indianapolis: Bobbs-Merrill Co., 1932), p. 65.
59. P. H. Winfield, *Chief Sources of English Legal History* (Cambridge, MA: Harvard University Press, 1925).
60. Plucknett, p. 259.
61. Ibid., pp. 280–281.
62. M. Grossberg, *Governing the Hearth* (Chapel Hill: University of North Carolina Press, 1985), p. 15.
63. Marcham, p. 295.
64. Plucknett, p. 178.
65. Ibid., p. 180.
66. Ibid., p. 280; and Marcham, p. 295.
67. Cardinal Wolsey was educated at Oxford, and Becket was educated at the universities of Paris and Bologna (Brooke, p. 64).
68. Brooke, p. 64.
69. D. Roebuck, *The Background of the Common Law*, 2d ed. (Oxford University Press, 1990), p. 64; and Marcham, p. 295.
70. Plucknett, p. 688.
71. Ibid., p. 689; and Potter, pp. 581–584.
72. Potter, p. 280; and Plucknett, pp. 693–694.
73. Roebuck, p. 68.
74. E. Ward, "Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?" 81 *St. John's Law Review* 77 (2007), 83.
75. Ibid, p. 87.
76. M. Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," 1 *J. Empirical Legal Studies* 459 (2004), p. 463.
77. Loyn, p. 141; and Brooke, pp. 220–223.
78. Marcham, p. 143; and Brooke, p. 221.
79. Brooke, p. 223.
80. C. A. Miller, "The Forest of Due Process of Law: The American Constitutional Tradition," in J. R. Pennock and J. W. Chapman, *Due Process* (New York: New York University Press, 1977), p. 6.
81. Ibid.
82. Ibid., p. 9.

II

Ethics

CHAPTER OBJECTIVES

1. *Increase awareness of the connection between ethics and law.*
2. *Encourage students to understand why there are different ways of thinking about moral questions.*
3. *Build on themes addressed in the philosophy of law discussion in Chapter I (especially natural law, utilitarianism, and analytical positivism).*
4. *Encourage students to think about current highly controversial moral issues (such as same-sex marriage, abortion, physician-assisted suicide, medical marijuana, and capital punishment), from differing ethical perspectives.*

This chapter builds on themes introduced in the philosophy section of Chapter I. It shows readers why people need to be sensitive to ethical issues and illustrates some of the problems that arise when members of our complex and diverse society disagree as to the proper boundaries of ethics and law. Because of the limitations of space, it is only possible to give the reader a taste of the ways law and ethics intertwine. However, this discussion can expand interest and understanding and stimulate thinking about this rich and intricate subject.

All human beings face ethical challenges in their personal, professional, and public lives. Ethical questions permeate our society. In charting public policy, for example, legislators choose from among alternative courses of action as part of the lawmaking process. Similarly, when appellate judges construe constitutions and statutes and review the decisions of lower courts in contract and tort cases, they also make choices about public policy. Is it morally right for the Supreme

Judicial Court of Maine to rule in a medical malpractice unintended pregnancy case that "a parent cannot be said to have been damaged by the birth and rearing of a healthy, normal child?"[1] Is the Massachusetts legislature morally justified in enacting an extremely short statute of limitations for the commencement of skiers' personal injury actions against ski area operators, to the detriment of injured skiers?[2]

South Dakota's legislature enacted the following statute, which permits pharmacists in certain circumstances to refuse to fill a customer's prescription if doing so would violate the pharmacist's moral beliefs.

> South Dakota Codified Laws 36-11-70. Refusal to dispense medication.
>
> No pharmacist may be required to dispense medication if there is reason to believe that the medication would be used to:
>
> 1. Cause an abortion; or
> 2. Destroy an unborn child as defined in subdivision 22-1-2(50A); or
> 3. Cause the death of any person by means of an assisted suicide, euthanasia, or mercy killing.
>
> No such refusal to dispense medication pursuant to this section may be the basis for any claim for damages against the pharmacist or the pharmacy of the pharmacist or the basis for any disciplinary, recriminatory, or discriminatory action against the pharmacist.

Should health care professionals be legally permitted to refuse to fulfill their patients'/customers' lawful requests because of the provider's deeply held moral beliefs? If so, do providers exercising this legal right have any moral obligation to inform their potential customers of this fact?

Reasonable people can differ about whether the ethical judgments embodied in these legislative and judicial decisions should be legally sanctioned as the public policy of the state. It is no wonder that there is great public concern about the morality of governmental policies regarding such topics as capital punishment, abortion, assisted suicide, same-sex marriages, homosexuality, interracial adoptions, the rights of landowners versus environmental protection, the meaning of cruel and unusual punishment, and the right of indigents to appellate counsel in capital cases.

The following case is an example of an ethical debate over public policy. The petitioner was a convicted robber and murderer who was sentenced to death pursuant to a Georgia statute. He failed to convince the courts in Georgia to overturn his sentence, but he did successfully petition the U.S. Supreme Court for certiorari.

In the case of *Gregg v. Georgia*, the Supreme Court justices debated the ethics and the legality of capital punishment. The case of *Gregg v. Georgia* was decided in 1976. In that case, seven justices ruled that Georgia's statute authorizing capital punishment was not inherently cruel and unusual under the Eighth and Fourteenth Amendments to the U.S. Constitution. The following excerpts from *Gregg* have been edited to focus on the argument about the morality of capital punishment. In the opinions below, you will find several references to an earlier case, *Furman v. Georgia*. *Furman* was a 1972 case in which the Supreme Court prohibited states from imposing the death penalty in an arbitrary manner. The justices wrote extensively on the ethical issue of capital punishment in Furman, and only summarized their views in *Gregg*. Because of limitations of space, *Gregg* has been excerpted below. However, you are encouraged to read the *Furman* case on the Internet.[3] You will better understand the following discussion of *Gregg* if you do so.

Gregg v. Georgia

428 U.S. 153
United States Supreme Court
July 2, 1976

Opinion of Justices Stewart, Powell, and Stevens

C

… We now consider specifically whether the sentence of death for the crime of murder is a per se violation of the Eighth and Fourteenth Amendments to the Constitution. We note first that history and precedent strongly support a negative answer to this question.

The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. The common-law rule imposed a mandatory death sentence on all convicted murderers…, And the penalty continued to be used into the 20th century by most American States, although the breadth of the common-law rule was diminished, initially by narrowing the class of murders to be punished by death and subsequently by widespread adoption of laws expressly granting juries the discretion to recommend mercy….

It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes…. The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury …; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; … nor be deprived of life, liberty, or property, without due process of law…."

And the Fourteenth Amendment, adopted over three quarters of a century later, similarly contemplates the existence of the capital sanction in providing that no State shall deprive any person of "life, liberty, or property" without due process of law.

For nearly two centuries, this Court, repeatedly and often expressly, has recognized that capital punishment is not invalid per se….

… In *Trop v. Dulles* … Mr. Chief Justice Warren, for himself and three other Justices, wrote:

> "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment … the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Four years ago, the petitioners in *Furman* … predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated. The petitioners in those cases said, in effect, that the evolutionary process had come to an end, and that standards of decency required that the Eighth Amendment be construed finally as prohibiting capital punishment for any crime regardless of its depravity and impact on society. This view was accepted by two Justices. Three other Justices were unwilling to go so far; focusing on the procedures by which convicted defendants were selected for the death penalty rather than on the actual punishment inflicted, they joined in the conclusion that the statutes before the Court were constitutionally invalid.

The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.

The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. These recently adopted statutes have attempted to address the concerns expressed by the Court in *Furman* primarily (i) by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, or (ii) by making the death

penalty mandatory for specified crimes. But all of the post *Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people….

As we have seen, however, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment…. Although we cannot "invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology," … the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering….

The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." Furman v. Georgia … (STEWART, J., concurring).
>
> "Retribution is no longer the dominant objective of the criminal law," *Williams v. New York* … but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men…. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive….

… In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe….

We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.

Mr. Justice Brennan, dissenting

… In *Furman v. Georgia*,… I said:

> "From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, 'the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries.' It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime."

That continues to be my view. For the Clause forbidding cruel and unusual punishments under our constitutional system of government embodies in unique degree moral principles restraining the punishments that our civilized society may impose on those persons who transgress its laws. Thus, I too say: "For myself, I do not hesitate to assert the proposition that the only way the law has progressed from the days of the rack, the screw, and the wheel is the development

of moral concepts, or, as stated by the Supreme Court … the application of 'evolving standards of decency.'"…

This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society. My opinion in Furman v. Georgia concluded that our civilization and the law had progressed to this point and that therefore the punishment of death, for whatever crime and under all circumstances, is "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution. I shall not again canvass the reasons that led to that conclusion. I emphasize only the foremost among the "moral concepts" recognized in our cases and inherent in the Clause is the primary moral principle that the State even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings—a punishment must not be so severe as to be degrading to human dignity. A judicial determination whether the punishment of death comports with human dignity is therefore not only permitted but compelled by the Clause….

I do not understand that the Court disagrees that "in comparison to all other punishments today … the deliberate extinguishment of human life by the State is uniquely degrading to human dignity." … For three of my Brethren hold today that mandatory infliction of the death penalty constitutes the penalty cruel and unusual punishment. I perceive no principled basis for this limitation. Death for whatever crime and under all circumstances "is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity…. An executed person has indeed 'lost the right to have rights.'" Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment….

The fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity." … As such it is a penalty that "subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause]." I therefore would hold, on that ground alone, that death is today a cruel and unusual punishment prohibited by the Clause. "Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first."

I dissent from the judgments in … *Gregg v. Georgia* … *Proffitt v. Florida*, and … *Jurek v. Texas*, insofar as each upholds the death sentences challenged in those cases. I would set aside the death sentences imposed in those cases as violative of the Eighth and Fourteenth Amendments.

Mr. Justice Marshall, dissenting

In *Furman v. Georgia*, 408 U.S. 238, 314 (1972) (concurring opinion), I set forth at some length my views on the basic issue presented to the Court in these cases. The death penalty, I concluded, is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. That continues to be my view….

In *Furman* I concluded that the death penalty is constitutionally invalid for two reasons. First, the death penalty is excessive…. And second, the American people, fully informed as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable….

… Assuming … that the post-*Furman* enactment of statutes authorizing the death penalty renders the prediction of the views of an informed citizenry an uncertain basis for a constitutional decision, the enactment of those statutes has no bearing whatsoever on the conclusion that the death penalty is unconstitutional because it is excessive. An excessive penalty is invalid under the Cruel and Unusual Punishments Clause "even though popular sentiment may favor" it…. The inquiry here, then, is simply whether the death penalty is necessary to accomplish the legitimate legislative purposes in punishment, or whether a less severe penalty—life imprisonment—would do as well….

The two purposes that sustain the death penalty as nonexcessive in the Court's view are general deterrence and retribution. In *Furman*, I canvassed the relevant data on the deterrent effect of capital punishment….

The available evidence, I concluded … was convincing that "capital punishment is not necessary as a deterrent to crime in our society." … The evidence I reviewed in *Furman* remains convincing, in my view,

that "capital punishment is not necessary as a deterrent to crime in our society." … The justification for the death penalty must be found elsewhere….

The other principal purpose said to be served by the death penalty is retribution. The notion that retribution … can serve as a moral justification for the sanction of death finds credence in the opinion of my Brothers Stewart, Powell, and Stevens, and that of my Brother White…. It is this notion that I find to be the most disturbing aspect of today's unfortunate decisions.

The concept of retribution is a multifaceted one, and any discussion of its role in the criminal law must be undertaken with caution. On one level, it can be said that the notion of retribution or reprobation is the basis of our insistence that only those who have broken the law be punished, and in this sense the notion is quite obviously central to a just system of criminal sanctions. But our recognition that retribution plays a crucial role in determining who may be punished by no means requires approval of retribution as a general justification for punishment. It is the question whether retribution can provide a moral justification for punishment—in particular, capital punishment—that we must consider.

My Brothers Stewart, Powell, and Stevens offer the following explanation of the retributive justification for capital punishment:

> "'The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed … by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.'" …

This statement is wholly inadequate to justify the death penalty. As my Brother Brennan stated in *Furman*, "There is no evidence whatever that utilization of imprisonment rather than death encourages private blood feuds and other disorders." … It simply defies belief to suggest that the death penalty is necessary to prevent the American people from taking the law into their own hands.

In a related vein, it may be suggested that the expression of moral outrage through the imposition of the death penalty serves to reinforce basic moral values—that it marks some crimes as particularly offensive and therefore to be avoided. The argument is akin to a deterrence argument, but differs in that it contemplates the individual's shrinking from antisocial conduct, not because he fears punishment, but because he has been told in the strongest possible way that the conduct is wrong. This contention, like the previous one, provides no support for the death penalty. It is inconceivable that any individual concerned about conforming his conduct to what society says is "right" would fail to realize that murder is "wrong" if the penalty were simply life imprisonment.

The foregoing contentions—that society's expression of moral outrage through the imposition of the death penalty preempts the citizenry from taking the law into its own hands and reinforces moral values—are not retributive in the purest sense. They are essentially utilitarian in that they portray the death penalty as valuable because of its beneficial results. These justifications for the death penalty are inadequate because the penalty is, quite clearly I think, not necessary to the accomplishment of those results.

There remains for consideration, however, what might be termed the purely retributive justification for the death penalty—that the death penalty is appropriate, not because of its beneficial effect on society, but because the taking of the murderer's life is itself morally good. Some of the language of the opinion of my Brothers Stewart, Powell, and Stevens … appears positively to embrace this notion of retribution for its own sake as a justification for capital punishment. They state:

> "The decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."…

They then quote with approval from Lord Justice Denning's remarks before the British Royal Commission on Capital Punishment:

> "'The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.'" …

Of course, it may be that these statements are intended as no more than observations as to the popular demands that it is thought must be responded to in order to prevent anarchy. But the implication of the statements appears to me to be quite different, that society's judgment that the murderer "deserves" death must be respected not simply because the preservation of order requires it, but because it is appropriate that society make the judgment and carry it out. It is this latter notion, in particular, that I consider to be fundamentally at odds with the Eighth Amendment….

The mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty, for as Justices Stewart, Powell, and Stevens remind us, "the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society." ... To be sustained under the Eighth Amendment, the death penalty must "compor[t] with the basic concept of human dignity at the core of the Amendment," ... the objective in imposing it must be "[consistent] with our respect for the dignity of [other] men." ... Under these standards, the taking of life "because the wrongdoer deserves it" surely must fall, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth.

The death penalty, unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution, is an excessive penalty forbidden by the Eighth and Fourteenth Amendments. I respectfully dissent from the Court's judgment upholding the sentences of death imposed upon the petitioners in these cases....

Case Questions

1. How does Justice Stewart justify his conclusion that capital punishment is a permissible form of punishment?
2. What is the moral principle that is the fundamental basis of Justice Brennan's dissent?
3. Does Justice Marshall believe that retribution provides a moral justification for capital punishment? Why or why not?
4. In your opinion, is the fact that capital punishment is popular with a majority of society a sufficient fact to conclude the debate about whether the death penalty is cruel and unusual under the Eighth Amendment?

People are also affected by ethical considerations in their professional interactions with others. Although we may not realize it at the time, our actions and inactions at work and school are often interpreted by others as evidence of our personal values and character—who we are and what we stand for. A person whose behavior is consistent with moral principles is said to have integrity. It is common for people to try to create at least the illusion that they have integrity. Integrity is prized by employers, who try to avoid hiring persons known to lie, cheat, and steal. Many companies also try to avoid doing business with firms that are reputed to engage in fraudulent practices, who try to take unfair advantage of those with whom they contract, who negotiate in bad faith, or are otherwise unscrupulous to their business partners. Students applying to professional schools quickly learn that integrity is important to members of admissions committees. Such committees generally require recommenders to include an evaluation of an applicant's character in their letters. People are also concerned about ethical behavior in their personal lives. They worry about whether a person with whom they have shared a confidence is trustworthy.

But it is often difficult to know the parameters of ethical behavior in particular situations. Is it ever permissible to break a promise not to tell? Are there any rules about lying? Who determines the rules? How are they enforced? Are there any circumstances when it is morally permissible to lie to a total stranger? A family member? A best friend? A business partner? When is it acceptable for other people to lie to you? What are the social and legal consequences of lying?[4]

In your role as a student you may have encountered situations in which you and/or some classmates have cheated on a test or paper. Have you ever seriously thought about the ethics of cheating? Is it always morally wrong for a student to cheat? Can circumstances make a difference? Does it make a difference if the teacher makes no effort to prevent dishonesty and virtually every other student in the class is cheating on a test or written assignment? Would it make a difference if you believed the teacher had been unfair to you on a previous assignment and cheating would enable you to get the final grade that you "really deserved"? If you observe classmates cheat, do you have any duty to tell the instructor? What

would you think about some other student who did tell? What is the basis for your positions?

Who makes the rules for you? Is it up to you to decide, your peer group, your parents, or other significant people in your life? Perhaps you look to religious leaders for guidance. Religious groups have historically assumed a major role in setting moral standards, and religious leaders frequently take firm positions on contemporary ethical issues. How can anyone tell who is "right"? Thomas Jefferson in the Declaration of Independence said, "We hold these truths to be self evident…" Is that sufficient proof of the proposition that all people are created equal?

Philosophers have argued for centuries about the answers to questions such as those raised above. The following mini-introduction will help to provide some background and structure for the discussion of the cases that follow.

ETHICS

Ethics, which is the study of morality, is one of the five traditional branches of study within philosophy, as can be seen in Table 2.1. Ethicists are concerned with what makes conduct morally right or wrong and the essential nature of moral responsibility. They also investigate the application of ethical principles to the practice of professions such as law, medicine, and business.

We see in Table 2.2 that ethical theories are often classified as being either metaethical or normative in their approach.[5]

TABLE 2.1 Branches of Philosophy

Ethics	The study of morality
Metaphysics	The study of the nature of reality or being
Aesthetics	The study of beauty
Logic	The study of correct reasoning
Epistemology	The study of knowledge

TABLE 2.2 Ethics

Metaethics	Theoretical foundations of ethics
Normative ethics	Applied ethics

Metaethical scholars have centered on defining ethical terms and developing theories. They have tended to focus on abstract topics, such as identifying the fundamental characteristics of moral behavior. These discussions have tended to be extremely theoretical and have been often criticized for not having many practical applications.[6] The following example is intended to raise philosophical questions about the essential nature of integrity under circumstances when it is acknowledged that all of the actors have engaged in "correct" actions.

Karen, Keisha, and Kelly

Assume that Karen is a "goody-goody" and always tries to do the "right" thing in order to comply with what she perceives to be her moral duty. Assume that Keisha also does the "right" thing, but does so at least in part for selfish reasons (being seen doing the right thing will make the newspapers and will be good for business). What if Kelly selectively does the "right" thing only when she feels a personal connection with some other person in need, under circumstances when she feels she can help without putting herself at risk? Does Karen have more integrity than Keisha and Kelly?

Normative ethicians have been more concerned with answering practical questions such as "Is killing in self-defense wrong?" or "What should a physician do when a patient dying of a terminal disease asks for assistance in committing suicide?" Modern ethicians primarily focus on normative moral issues rather than metaethical ones, although this tendency is of recent origin and primarily began in the 1970s.[7]

Philosophers disagree about whether ethical judgments about right and wrong can be conclusively proven.[8] Some have argued that ethical

judgments can be scientifically proven. Others have rejected science and insisted that such judgments be based on natural law, sounding intuitive notions of right and wrong,[9] or based on the logical soundness of the reasons underlying the ethical judgment.[10]

Another area of disagreement involves where those making ethical judgments should focus their attention. Some philosophers believe that whether an action is "good" or "bad" can only be determined after an act has occurred by examining the outcomes. Only by looking backward can the relative costs and benefits of an action be weighed and its worth assessed.[11] *Utilitarianism*, which was discussed in Chapter I, is such a theory. Thus, from a utilitarian perspective, publicly and brutally caning one prisoner for a given criminal offense would be moral if it could be proven later that it has deterred thousands of others from engaging in that same offense.

Deontologists would reject a focus on aftermaths in favor of studying the role of moral duty. Immanuel Kant, for example, argued that, to be ethical, an actor's *deeds* should be evaluated based on the reasoning that led to the act.[12] Kant believed that intent mattered and that an ethical actor should be motivated only by a desire to comply with a universally accepted *moral duty*. He did not view actions motivated by feelings of love, sympathy, or the potential for personal gain, as being ethically principled.[13] Caning a convicted person could not be a moral act if it amounted to torture. **Egoists** had yet a different approach. They believed that individuals were ethically "right" to act in their own self-interest, without regard for the consequences to other people.[14]

Many theorists have argued that conduct is moral only if it coincides with religious mandates such as the Ten Commandments or the Golden Rule. Society, however, has been unable to agree on any single, universally acceptable ethical theory. Serious disagreements exist about what constitutes ethical conduct in specific contexts. "Right" answers are not always obvious, and rules, interpretive opinions, and guidelines are needed to direct individuals toward "good" conduct.

Law and Morality

One of the unresolved debates revolves around what role law should play in making ethical rules. Should law supply the enforcement mechanism for enforcing moral norms? What should an ethical person do when confronted with "bad" laws? Should decisions about morality in some contexts be reserved to the individual?

Although law can contribute rules that embody moral norms, law in our democracy is not expected to play the primary role in promoting ethical behavior in society. Parents, churches, schools, youth organizations, athletic teams, and business, professional, and fraternal groups of all types are expected to fill the void. They often establish ethical codes, rules (such as those prohibiting "unsportsmanlike conduct" or "conduct unbecoming an officer"), and discipline and even expel members who violate their terms. A precise calculus of law's relationship to morality, however, remains illusive.

You may recall from reading Chapter I that there is a fundamental and unresolved disagreement between philosophers who are *natural law adherents* and those who are *analytical positivists* regarding the true nature of law. From the positivist point of view, laws are merely the rules that political superiors develop pursuant to duly established procedures that are imposed on the rest of the polity. Laws are viewed as being intrinsically neither good nor bad. They do establish norms of legal behavior, but such efforts sometimes amount to little more than arbitrary line drawing. Positivists would point out that law establishes a floor but not a ceiling. Individuals who satisfy their legal obligations always retain the right to self-impose additional restrictions on their conduct in order to satisfy a deeply felt moral duty. But law does not depend for its authority on an ad hoc assessment of whether the government ought to follow a different policy. It is clear, however, that defying the law can result in state-imposed sanctions. Assume, for example, that a taxpayer takes an unauthorized "deduction" off her income tax obligation and makes an equivalent dollar donation to a charity rather than to the Internal Revenue

Service. The fact that her conscience tells her that it is self-evident that the U.S. government is morally wrong to spend our dollars on some disfavored program is unlikely to save her from criminal and civil sanctions.

In the following passage, Martin Luther King Jr. distinguishes between just and unjust laws and argues that immoral laws should be civilly disobeyed.

Letter from a Birmingham Jail★

> You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing segregation in the public schools, it is rather strange and paradoxical to find us consciously breaking laws. One may well ask, "How can you advocate breaking some laws and obeying others?" The answer is found in the fact that there are two types of laws: there are just and there are unjust laws….
>
> … A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority, and the segregated a false sense of inferiority….
>
> So segregation is not only politically, economically and sociologically unsound, but it is morally wrong and sinful….
>
> … I submit that an individual who breaks a law that conscience tells him is unjust and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law….
>
> We can never forget that everything Hitler did in Germany was "legal" and everything that Hungarian freedom fighters did in Hungary was "illegal." It was "illegal" to aid and comfort a Jew, in Hitler's Germany. But I am sure that if I had lived in Germany during that time I would have aided and comforted my Jewish brothers even though it was illegal….

Positive Law Rules

In our republic, the people are sovereign, but there is no law higher than the U.S. Constitution.[15] We have adopted the analytical positivist view that bills that have been enacted in conformity with constitutional requirements are the law. Individuals, for reasons of conscience, may defy these duly enacted laws, but they are lawfully subject to prosecution.

It is important to note, however, that political majorities in federal and state legislatures often enact statutes that reflect widely held moral beliefs in the electorate. Examples include the Civil Rights Act of 1964, the Americans with Disabilities Act, the Clean Air Act, the Clean Water Act, and the Sherman Act, to name just a few. Legislative bodies have also taken the ethical views of political minorities into consideration when drafting legislation. Congress, for example, exempted conscientious objectors from having to register with the Selective Service System. Similarly, Congress's 1998 omnibus spending bill contained a provision that permitted doctors opposed to birth control to refuse on moral grounds to write prescriptions for contraceptives

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requested by federal employees.[16] But one need only look at Article I, Section 9, of the U.S. Constitution to see an example of political expediency taking precedence over moral considerations. In that article, antislavery founders compromised their moral principles in order to win ratification of the Constitution in southern states.

Federal and state judicial bodies also impart moral views when they construe constitutions and statutes. Examples include the U.S. Supreme Court's interpretations of the Fourteenth Amendment in *Lawrence v. Texas* (the right of two same-sex, consenting adults, while at home, to determine the nature of their sexual intimacy), *Loving v. Virginia* (an individual's right to marry a person of a different race), and *Moore v. City of East Cleveland* (in which the court broadened the meaning of the term "family"), three famous cases involving interpretations of the Due Process Clause, which are included elsewhere in this textbook.

It is obvious that there are many instances in which moral rules and legal rules overlap. Our criminal laws severely punish persons convicted of murder, rape, and robbery, and they ought to do so. Such acts simultaneously violate legal and moral principles. Tort law provides another example. Damages in negligence cases should be borne by the parties based on the extent to which each was responsible for the damages. Because this decision is, with some exceptions, based on the relative fault of the parties, it can also be argued both on teleological and deontological grounds to be an ethical rule. We see another example of legal and ethical harmony in the *Iacomini* case (Chapter VII). In that case the court ruled that the law would permit a mechanic to claim an equitable lien against a motor vehicle that he had repaired, under circumstances when no other relief was possible. The court said that such a remedy was legally appropriate in proper circumstances to prevent unjust enrichment. The following materials raise interesting legal and moral questions about legal and moral duties as they relate to members of one's family.

Aiding and Abetting, Misprision, Informing, and the Family

Imagine how difficult it must be for a person who, after acquiring bits and pieces of information from various sources, ultimately concludes that a member of his or her family is probably involved in criminal activity. Suppose further that the crimes involved are a series of premeditated murders, and that the offender will probably be sentenced to the death penalty upon conviction of the charges. Assume further that you have to admit that, unless you inform authorities, other innocent persons may well become additional victims. Suppose there is a million-dollar cash award that will be paid to the person who provides the information that ultimately leads to the conviction of the offender. What would you do? Would you tell authorities and run the risk of being viewed as being disloyal to your family? Would you stay silent and hope that nobody else is harmed?[17]

If you were writing a statute to prevent people from harboring fugitive felons, would you carve out an exception for people protecting members of their own families? Examine the following New Mexico statute from ethical and legal perspectives.

> *New Mexico Statutes Annotated 30–22–4. Harboring or Aiding a Felon.*
>
> Harboring or aiding a felon consists of any person, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, who knowingly conceals any offender or gives such offender any other aid, knowing that he has committed a felony, with the intent that he escape or avoid arrest, trial conviction or punishment. Whoever commits harboring or aiding a felon is guilty of a fourth degree felony. In a prosecution under this section it shall not be necessary to aver, or on the trial to prove, that the principal felon has been either arrested, prosecuted or tried.

Do you agree with the way the legislature defined the scope of the legal duty? Should the scope of the moral duty be the same as the scope of the legal duty?

The above statute has its roots in the common law crime of accessory after the fact. With the exceptions indicated above, it creates a legal duty on everyone else to refrain from helping a known felon escape apprehension by authorities. You can see how this statute was applied in the following case. Read the case and think about whether you agree with the opinion of the court majority or the dissenting judges. What is the basis for your choice?

State v. Mobbley
650 P.2d 841
Court of Appeals of New Mexico
August 3, 1982

Wood, Judge

The criminal information charged that defendant did "knowingly aid Andrew Needham knowing that he had committed a felony with the intent that he escape arrest, trial, conviction and punishment…. The issue is whether the agreed upon facts are such that defendant may not be prosecuted for the offense of aiding a felon.

Defendant is married to Ricky Mobbley. Police officers went to a house and contacted defendant; they advised defendant that felony warrants had been issued for Ricky Mobbley and Andrew Needham. The officers asked defendant if "both were there." Defendant denied that the men were there, although she knew that both men were in the house. Hearing noises, the officers entered the house and discovered both men. Defendant could not have revealed Needham without also revealing her husband. The criminal charge was based on the failure to reveal Needham….

The power to define crimes is a legislative function….

Section 30–22–4, *supra*, applies to "any person, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister by consanguinity or affinity…." There is no claim that any of the exempted relationships applies as between defendant and Needham. As enacted by the Legislature, § 30–22–4, *supra*, applies to the agreed facts.

Defendant contends that such a result is contrary to legislative intent because statutes must be interpreted in accord with common sense and reason, and must be interpreted so as not to render the statute's application absurd or unreasonable…. We give two answers to this contention.

First, where the meaning of the statutory language is plain, and where the words used by the Legislature are free from ambiguity, there is no basis for interpreting the statute…. Section 30–22–4, *supra*, applies to "any person" not within the relationship exempted by the statute. Defendant is such a person.

Second, if we assume that the statute should be interpreted, our holding that § 30–22–4, *supra*, applies to the agreed facts accords with legislative intent. Statutes proscribing harboring or aiding a felon grew out of the common law of accessories after the fact. LaFave & Scott, Criminal Law § 66 (1972). However:

> At common law, only one class was excused from liability for being accessories after the fact. Wives did not become accessories by aiding their husbands. No other relationship, including that of husband to wife, would suffice. Today, close to half of the states have broadened the exemption to cover other close *relatives*…. This broadening of the excemption [*sic*] may be justified on the ground that it is unrealistic to expect persons to be deterred from giving aid to their close *relations*. (Our emphasis.)

LaFave & Scott, *supra*, at 523–24.

New Mexico legislative history accords with the discussion in LaFave & Scott, *supra*. In 1875 New Mexico adopted the common law…. The present statute … was a part of the Criminal Code enacted in 1963….

Limiting the exemptions in § 30–22–4, *supra*, to *relatives* named in that statute accords with the legislative intent as shown by legislative history. In light of the limited exemption at common law, and legislation limited to relatives, it is not absurd and not unreasonable to hold that if defendant aided Needham, § 30–22–4, *supra*, applies to that aid.

Except for one fact, there would have been no dispute as to the applicability of § 30–22–4, *supra*. That

one fact is that defendant could not have revealed Needham without also revealing her husband. The statute does not exempt a defendant from prosecution when this fact situation arises; to judicially declare such an additional exemption would be to improperly add words to the statute…. Also, such a judicial declaration would be contrary to the rationale for this type of statute; it is unrealistic to expect persons to be deterred from giving aid to their close relations. LaFave & Scott, *supra*.

We recognize that defendant was placed in a dilemma; if she answered truthfully she revealed the presence of her husband; if she lied she took the chance of being prosecuted….

Defendant contends we should follow two Arkansas decisions which support her position…. We decline to do so. Our duty is to apply the New Mexico statute, not the Arkansas law of accomplices.

The order of the trial court, which dismissed the information, is reversed. The cause is remanded with instructions to reinstate the case on the trial court's docket.

It is so ordered…

Lopez, Judge (dissenting)

I respectfully dissent. The majority holds that the defendant can be charged with the offense of harboring or aiding Andrew Needham … because she does not qualify under any of the exemptions listed in the statute with respect to Needham. It arrives at this holding in spite of the fact that the defendant could not have revealed the presence of Needham in the house without also revealing the presence of her husband. This holding negates the legislative intent of the statute to exempt a wife from being forced to turn in her husband. Under the majority ruling, the defendant would have had to turn in Needham to escape being charged under § 30–22–4, which would have been tantamount to turning in her husband.

Whether the rationale underlying the legislative exemption is a recognition "that it is unrealistic to expect persons to be deterred from giving aid to their close relations," LaFave and Scott, Criminal Law § 66 (1972), or an acknowledgment of human frailty, Torcia, Wharton's Criminal Law § 35 (14th ed. 1978), that rationale is ignored by requiring a wife to turn in her husband if he is with another suspect. Such a result requires a proverbial splitting of analytic hairs by attributing the defendant's action, in denying that Needham was at the house, to an intent to aid Needham rather than her husband….

The practical effect of the majority opinion, which requires a wife to turn in her husband if he is with a co-suspect, is to deny the wife's exemption in § 30–22–4. The reasons for refusing to force a wife to inform on her husband are the same whether or not he is alone. The statute should not be construed so narrowly as to frustrate the legislative intent to exempt a wife from turning in her husband…. Although the court should not add to the provisions of a statute, it may do so to prevent an unreasonable result…. Given the wife's exemption from turning in her husband contained in § 30–22–4, it would be unreasonable to require her to do just that by revealing Needham.

For the foregoing reasons, I cannot agree that the defendant in this case can be charged under § 30–22–4 for refusing to tell the police that Needham was in the house. I would affirm the action of the trial court in dismissing the information against the defendant.

Case Questions

1. Given the wording of the statute, did the majority have any flexibility in applying this law to the facts of this case? Do you think that Andrew Needham's presence in the house with Ricky Mobbley *ought* to warrant application of this legal rule?
2. Do you believe the statute should be amended to exempt individuals in Pam Mobbley's predicament from prosecution?
3. What would you have done if you had been in Pam's situation? Why?

Misprision of a felony is another common law crime. It makes it criminal for a person to fail to tell authorities of the commission of a felony of which he or she has knowledge. The history and rationale for this crime are explained in the following excerpt from the case of *Holland v. State*. In *Holland*, the court had to decide whether misprision is a crime in Florida.

Holland v. State of Florida
302 So.2d 806
Supreme Court of Florida
November 8, 1974

McNulty, Chief Judge

… As far as we know or are able to determine, this is the first case in Florida involving the crime of misprision of felony.

As hereinabove noted, we chose to decide this case on the fundamental issue of whether misprision of felony is a crime in Florida.

In any case, we now get on to the merits of the question we decide today. We begin by pointing out that almost every state in the United States has adopted the Common Law of England to some extent. Many of these states have done so by constitutional or statutory provisions similar to ours. But the nearly universal interpretation of such provisions is that they adopt the common law of England only to the extent that such laws are consistent with the existing physical and social conditions in the country or in the given state.

To some degree Florida courts have discussed this principle in other contexts. In *Duval v. Thomas*, for example, our Supreme Court said:

> "When grave doubt exists of a true common law doctrine … we may … exercise a 'broad discretion' taking 'into account the changes in our social and economic customs and present day conceptions of right and justice.' It is, to repeat, only when the common law is plain that we must observe it."

Moreover, our courts have not hesitated in other respects to reject anachronistic common law concepts.

Consonant with this, therefore, we think that the legislature in enacting § 775.01, *supra*, recognized this judicial precept and intended to grant our courts the discretion necessary to prevent blind adherence to those portions of the common law which are not suited to our present conditions, our public policy, our traditions or our sense of right and justice.

With the foregoing as a predicate, we now consider the history of the crime of misprision of felony and whether the reasons therefor have ceased to exist, if indeed they ever did exist, in this country. The origin of the crime is well described in 8 U. of Chi. L. Rev. 338, as follows:

> "Misprision of felony as defined by Blackstone is merely one phase of the system of communal responsibility for the apprehension of criminals which received its original impetus from William I, under pressure of the need to protect the invading Normans in hostile country, and which endured up to the Seventeenth Century in England. In order to secure vigilant prosecution of criminal conduct, the vill or hundred in which such conduct occurred was subject to fine, as was the tithing to which the criminal belonged, and every person who knew of the felony and failed to make report thereof was subject to punishment for misprision of felony. Compulsory membership in the tithing group, the obligation to pursue criminals when the hue and cry was raised, broad powers of private arrest, and the periodic visitations of the General Eyre for the purpose of penalizing laxity in regard to crime, are all suggestive of the administrative background against which misprision of felony developed. With the appearance of specialized and paid law enforcement officers, such as constables and justices of the peace in the Seventeenth Century, there was a movement away from strict communal responsibility, and a growing tendency to rely on professional police…."

In short, the initial reason for the existence of misprision of felony as a crime at common law was to aid an alien, dictatorial sovereign in his forcible subjugation of England's inhabitants. Enforcement of the crime was summary, harsh and oppressive; and commentators note that most prosecutors in this country long ago recognized the inapplicability or obsolescence of the law and its harshness in their contemporary society by simply not charging people with that crime….

Many courts faced with this issue have also found, though with varying degrees of clarity, that the reasons for the proscription of this crime do not exist. Moreover, as early as 1822 in this country Chief Justice John Marshall states in *Marbury v. Brooks:*

> "It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh for man." …

We agree with Chief Justice Marshall … that the crime of misprision of felony is wholly unsuited to American criminal law…. While it may be desirable, even essential, that we encourage citizens to "get involved" to help reduce crime, they ought not be adjudicated criminals themselves if they don't. The fear of such a consequence is a fear from which our

traditional concepts of peace and quietude guarantee freedom. We cherish the right to mind our own business when our own best interests dictate. Accordingly, we hold that misprision of felony has not been adopted into, and is not a part of, Florida substantive law.

Case Questions

1. The majority in *Holland* noted that American judges going back to the esteemed John Marshall have concluded that it is "un-American" for citizens to be criminally prosecuted for not reporting the commission of known felonies to the authorities. Is this position morally justifiable in your opinion?
2. Justice John Marshall is quoted in an 1822 case as follows: "It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge...." Do you think Marshall was referring to a moral duty, a legal duty, or both?

Traditionally individuals have not been legally obligated to intervene to aid other persons in the absence of a judicially recognized duty owed to that person. Courts have recognized the existence of a duty where a special relationship exists. The special relationships generally fall within one of the following categories: (a) where a statutory duty exists (such as the obligation parents have to support their children), (b) where a contractual duty exists (lifeguards are employed to try to make rescues on the beach), or (c) where a common law duty exists (such as when an unrelated adult has voluntarily assumed primary responsibility for bringing food to an isolated, incapacitated, elderly neighbor, and then stops without notifying authorities). In the absence of a legal duty to act, the law has generally left the decision as to whether or not to be a Good Samaritan up to each individual's conscience.

Good Samaritan Laws

Many people feel that Americans today are less willing than in times past to play the role of Good Samaritan. But do bystanders, who have no special relationship to a person in need, have a moral obligation to intervene? Should they have a legal duty to either intervene or inform authorities if they can do so without placing themselves in jeopardy? Consider the following 1997 Las Vegas case in which an eighteen-year-old young man enticed a seven-year-old girl into a ladies' room stall in a Las Vegas casino and sexually assaulted and murdered her. The attacker had a male friend who allegedly watched some of the events in that stall and presumably knew that the little girl was in danger. The friend made no attempt to dissuade the attacker, save the girl, or tell authorities. He was not subject to prosecution under the laws of Nevada.

Should a person who is a passive observer, as in the above situation, be subjected to criminal prosecution for failing to act? The following Massachusetts statute was enacted in 1983 in response to a brutal rape at a tavern. This crime was the basis for the movie *The Accused*.

> *Massachusetts General Law Chapter 268, Section 40. Reports of Crimes to Law Enforcement Officials.*
>
> Whoever knows that another person is a victim of aggravated rape, rape, murder, manslaughter or armed robbery and is at the scene of said crime shall, to the extent that said person can do so without danger or peril to himself or others, report said crime to an appropriate law enforcement official as soon as reasonably practicable. Any person who violates this section shall be punished by a fine of not less than five hundred nor more than two thousand and five hundred dollars.

Why do you believe the Massachusetts legislature limited the scope of this duty to only these five crimes? Do you see any potential problems that may result because of this statute? Do you think that such laws will influence more bystanders to intervene? Should society enact legislation primarily to make a moral statement and put society on record as expecting citizens to act as members of a larger community? Do you agree with Lord Patrick Devlin that our society would disintegrate if we didn't criminalize immoral conduct? Devlin argues that such statutes encourage citizens to think similarly about questions of right and wrong and that this helps to bind us together as a people.[18] The following discussion focuses on the society's right to promote a common morality by enacting statutes that prohibit certain types of private sexual conduct between consenting adults.

Individual Choice Versus Social Control: Where Is the Line?

Members of our society often disagree about the extent to which the states are entitled to promote a "common morality" by criminalizing conduct that the proponents of such legislation believe to be morally offensive. When such statutes are enacted into law, those prosecuted for alleged violations often ask the courts to rule that the state has crossed an imprecise constitutional line separating the lawful exercise of the state's police power from the constitutionally protected privacy rights of individuals to engage in the prohibited conduct. State legislatures and supreme courts during the last forty years have confronted this issue with respect to the constitutionality of their respective deviant sexual intercourse statutes. Kentucky and Pennsylvania are examples, because their state supreme courts accepted the argument that it was up to individual adults to determine for themselves the nature of their voluntary, noncommercial, consensual, intimate relationships. The state, through the exercise of the police power, should not use the criminal law to "protect" such adults from themselves where the conduct in question doesn't harm any other person. The supreme courts in these states declared unconstitutional criminal statutes that made it a crime for consenting adults to engage in prohibited sexual conduct that the legislature deemed to be morally reprehensible.

The constitutional right of the federal and state legislatures to enact laws is discussed more thoroughly on pages 89–98; however, before reading *Lawrence v. Texas* it is necessary that readers know more about a legal concept known as the **police power**.

In general, the police power is a term that refers to each state's inherent right as a sovereign ("autonomous") government to enact laws to protect the public's health, welfare, safety, and morals. You will recall that the states were in existence prior to the adoption of the U.S. Constitution, and that they had traditionally exercised broad lawmaking powers to protect the citizens of their states. Congress's right to legislate, however, has no such historical underpinning. Congress does not have the right to legislate based on the police power because it derives all its authority from powers granted in the federal constitution. Because the states retained their right to exercise the police power when the U.S. Constitution was adopted, they continue to enact laws pursuant to this right today.

The Texas legislature, in 1973, pursuant to the police power, repealed its laws that regulated noncommercial, sexual conduct taking place in private between consenting, heterosexual adults. At the same time, however, the legislature enacted a statute making it a misdemeanor for same-sex adults to engage in identical conduct, classifying such conduct in such circumstances as "deviate sexual intercourse."

In *Lawrence v. Texas*, the U.S. Supreme Court had to determine whether the Texas deviant sexual intercourse statute's restrictions on the behavior of same-sex adults constituted a lawful exercise of the police power or a constitutionally invalid infringement of individual liberty rights.

John Geddes Lawrence v. Texas

539 U.S. 55
U.S. Supreme Court
June 26, 2003

Justice Kennedy delivered the opinion of the Court. Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

I

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)."… The applicable state law is Tex. Penal Code Ann. §21.06(a) (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows:

(A) "any contact between any part of the genitals of one person and the mouth or anus of another person; or
(B) the penetration of the genitals or the anus of another person with an object." §21.01(1).

The petitioners exercised their right to a trial de novo in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution. Tex. Const., Art. 1, §3a. Those contentions were rejected. The petitioners, having entered a plea of *nolo contendere*, were each fined $200 and assessed court costs of $141.25….

The Court of Appeals for the Texas Fourteenth District … affirmed the convictions…. The majority opinion indicates that the Court of Appeals considered our decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), to be controlling on the federal due process aspect of the case. *Bowers* then being authoritative, this was proper.

We granted certiorari … to consider three questions:

1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of laws?
2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?
3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986) should be overruled?"…

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

II.

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*. There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, … but the most pertinent beginning point is our decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom….

After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt v. Baird* … (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause … but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights…. It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:

> "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship…. If the right of 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 opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade* … (1973). As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.

In *Carey v. Population Services Int'l* … (1977), the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both *Eisenstadt* and *Carey*, as well as the holding and rationale in *Roe*, confirmed that the reasoning of Griswold could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick*.

The facts in *Bowers* had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law….

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." … That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." … In academic writings, and in many of the scholarly amicus briefs filed to assist the Court in this case, there are

fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*…. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men…. Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men…. The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century…. Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault…. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

To the extent that there were any prosecutions for the acts in question, 19th-century evidence rules imposed a burden that would make a conviction more difficult to obtain even taking into account the problems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent….

American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880–1995 are not always clear in the details, but a significant number involved conduct in a public place….

It was not until the 1970s that any State singled out same-sex relations for criminal prosecution, and only nine States have done so…. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. See, e.g., *Jegley v. Picado*, 349 Ark. 600 … (2002); *Gryczan v. State*, 283 Mont. 433 … (1997); *Campbell v. Sundquist*, 926 S. W. 2d 250 (Tenn. App. 1996); *Commonwealth v. Wasson*, 842 S. W. 2d 487 (Ky. 1992); see also 1993 Nev. Stats. p. 518 (repealing Nev. Rev. Stat. §201.193).

In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." …

In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." …

Two principal cases decided after *Bowers* cast its holding into even more doubt. In *Planned Parenthood of Southeastern Pa. v. Casey*… (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford

constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education…. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."…

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.

The second post-*Bowers* case of principal relevance is *Romer v. Evans* … (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," … (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose….

As an alternative argument in this case, counsel for the petitioners and some amici contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders…. We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of at least four States were he or she to be subject to their jurisdiction…. This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.

The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*. When our precedent has been thus weakened, criticism from other sources is of greater significance. In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions…. The courts of five different States [Arkansas, Georgia, Montana, Tennessee, and Kentucky] have declined to follow it….

The doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command….

The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in *Bowers* Justice Stevens came to these conclusions:

> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married

persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."…

Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."… The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual….

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Case Questions

1. What did Justice Kennedy mean when he said in his opinion, "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual"?
2. According to Justice Kennedy, what public policy objective that is impermissible under the Fourteenth Amendment was the State of Texas trying to accomplish through this criminal statute?
3. What conclusion does the U.S. Supreme Court reach?
4. Why does the Court say it reached this conclusion?

Business Ethics

Business managers often encounter ethical questions as they attempt to increase profits, lower costs, and secure and preserve markets in their never-ending quest to maximize earnings and the return that stockholders receive on their investments. One of the most interesting debates presently taking place in academic and professional circles involves ethical challenges to the traditional definition of the role of the corporation in society. The question, which encompasses both legal and ethical dimensions, is Do corporations have ethical obligations beyond increasing stockholder equity? Do corporations, for example, have any ethical obligations to such other stakeholders as employees, suppliers, customers, and the community?[19] To what extent should law attempt to influence business decision makers to expand their perspectives and include in their calculus the concerns of a broad range of constituencies? Some authors argue that ethical managers are more likely to flourish where businesses view themselves as a "corporate community." In such an environment, it is suggested, the need to weigh and balance the corporate community's competing needs and interests will naturally lead policymakers to make ethical choices.[20]

Business people often employ lawyers to help them monitor legal developments in such highly relevant subject areas as contract, tort, property, and employment law. You may be familiar with traditional common law doctrines such as privity of contract and caveat emptor, the preference traditionally shown to landlords over tenants, and the at-will employment doctrine. Implicit in these judicial doctrines are assumptions about what constitutes

ethical business conduct. The trend in recent decades has been for legislatures and courts to use law as a catalyst for influencing companies to change or modify their business practices. Their apparent goal has been to encourage businesses to become more aware of the ethical implications and the societal consequences resulting from their business choices.

Between 1890 and 1914, Congress enacted a series of antitrust statutes to counter the perceived abuses of economic power by the dominant national monopolies of that era. The Sherman Act (1890), the Clayton Act (1914), and the Federal Trade Commission Act (1914) were intended to redress price discrimination and other monopolistic practices. Unethical business practices in the securities industry in the early 1930s led to the creation of the Securities and Exchange Commission. More recently, legal initiatives have produced implied warranty statutes, lemon laws, strict liability in tort, state and federal environmental protection standards, and protections against discrimination in employment.

The lawmaking process inherently requires legislative bodies to make prospective determinations as to what principles of fairness and equity require of people and interests in particular circumstances. For example, some states have laws that specify how the legislature believes financial responsibility for unintended injuries sustained by customers should be apportioned between businesses and their customers. This overlap between law and equity appears in the next case. The Connecticut statute involved in the case prescribed how that state's legislature believed financial responsibility for unintended injuries sustained by customers should be apportioned. In staking out its policy, the legislature expressed itself as to how the conflicting interests of business and consumers could best be reconciled with the public interest as a whole.

Author's Preview: *Reardon v. Windswept Farm, LLC*

The author has prepared a preview of the next case because some readers will need assistance in understanding it. The author hopes that this preview will give readers a clear understanding of the basic facts so that they can begin to think about the ethical and legal implications of the case.

The Parties and the Trial Windswept Farm, the defendant in the next case, is a family-owned and operated horse-riding academy. Jessica Reardon, the plaintiff and the riding academy's customer, was seriously injured when she fell off of one of the defendant's horses while participating in a riding lesson. The plaintiff contended that the defendant had unintentionally violated a legal duty by not acting reasonably under the existing circumstances and was legally at fault for her having fallen from the horse. She argued that the defendant was obligated to compensate her financially for her injuries. The trial court disagreed, ruling that the defendant was entitled to summary judgment because the plaintiff had executed a release exempting the defendant from liability. The plaintiff appealed the trial court's ruling to the Connecticut Supreme Court.

The Appeal The Connecticut Supreme Court turned to a state statute in which the legislature spelled out its views as to the equitable way to allocate financial responsibility for the risk of injury to riding academy customers.

The state legislature could have drafted its law to primarily benefit the riding academies by making the customers financially responsible for all injuries attributable to anyone's negligence. A "pro-business" approach would have made the customer responsible for injuries he/she sustained while engaged in academy-sponsored horse-riding activities irrespective of whether they were attributable to the customer's own negligence or were a result of negligent conduct on the part of riding academy employees. But would such a policy produce "the greatest good for the greatest number" of people? If riding academies were protected from all financial risk resulting from negligence, what incentive would they have affirmatively to develop policies and procedures that would reduce the known risks of injury and keep their customers safe?

Alternatively, the law could have been drafted to be primarily "pro-consumer" by making the

riding academies exclusively responsible for injuries sustained by consumers irrespective of whether they were attributable to the customer or to the business. On the surface, the second option appears to be very advantageous to consumers because it would theoretically provide financial resources to all customers injured as a result of negligence. This would significantly benefit customers who lacked or had inadequate medical insurance. However, such a "pro-consumer" approach would likely devastate the riding academies. Because of the high cost of insurance, the cost of riding lessons and other sponsored programs would have to increase dramatically. These increases could easily translate into riding academies going out of business as their customers reluctantly decide to abandon horseback riding in favor of more affordable recreation.

The Connecticut legislature wisely chose a middle course. It provided that the customer was responsible for "any injury to … [his/her] person or property arising out of the hazards inherent in equestrian sports, unless the injury was proximately caused by the negligence of …. [the riding academy which was] providing the horse…." Thus, in this case, if the defendant exercised reasonable care in its dealings with the plaintiff and the plaintiff became injured, the plaintiff would be totally responsible for the costs resulting from her injury. The defendant would only be liable if it were determined that it was the legal cause (in legal jargon, the "proximate cause") of the plaintiff's injuries. To be the legal cause of plaintiff's injuries, the defendant's action or inaction would have to have directly or indirectly contributed to the plaintiff's injuries. Secondly, the conduct would have to have been very significant and important to justify holding the defendant legally responsible. And lastly, the defendant could only be held responsible for risks it could reasonably be said to have foreseen.

The Contract of Adhesion The defendant, however, devised a strategy for evading the statute and achieving the "pro-business" outcome. It decided to require customers to "agree" contractually to release the riding academy of its statutory liability.

Some release "agreements" are substantively unfair because they are one-sided, overreaching, and exclusively for the benefit of the party drafting the document. They are often also procedurally unfair in that they typically consist of a printed form with "take it or leave it" (nonnegotiable) terms that are often presented to the other party for signature at the last minute. Agreements of this type are called *adhesion contracts*. Even though a party has voluntarily entered an agreement, courts will sometimes refuse to enforce adhesion contracts where the terms are both substantively and procedurally unfair to the non-drafting party to such an extent that the court finds the drafting party's conduct "unconscionable" and/or a violation of public policy.

The fact that Reardon presumably read the agreement and signed it was not contested. Her appeal was based on the hope that the Connecticut Supreme Court would refuse to enforce the liability release.

As you read this case, keep in mind that courts in other states might well have decided other cases with similar facts differently than did the Connecticut Supreme Court.

Jessica Reardon v. Windswept Farm, LLC
905 A.2d 1156
Supreme Court of Connecticut.
October 3, 2006.

Borden, J.
The … issue in this appeal is whether a release signed by the plaintiff, Jessica Reardon, indemnifying the defendants, Windswept Farm, LLC, and its owners, William Raymond and Mona Raymond, from an action brought in negligence, precludes the plaintiff from recovering damages. More specifically, the question before this court is whether the release signed by the plaintiff violates public policy pursuant to our holding *Hanks v. Powder Ridge Restaurant Corp*…. (2005). The

plaintiff appeals from the judgment of the trial court granting the defendants' motion for summary judgment. The plaintiff claims that … in light of this court's holding in *Hanks*, the release violates public policy….

The plaintiff brought this personal injury action against the defendants alleging negligence. The defendants moved for summary judgment, arguing that the release signed by the plaintiff was clear and unambiguous…. The trial court agreed that the plaintiff had signed a well-drafted waiver of liability in the defendants' favor, granted the defendants' motion for summary judgment, and rendered judgment thereon. This appeal followed.

The following facts are relevant to our analysis of the plaintiff's claims. The defendants are in the business of providing horseback riding lessons to the general public. In October, 2002, the plaintiff came to the defendants' property and requested a horseback riding lesson. As a condition to riding one of the defendants' horses, the plaintiff was required by the defendants to sign a release and indemnity agreement (release). The release was printed on a single page and consisted of three sections entitled, "Warning,"… "RELEASE,"… and "INDEMNITY AGREEMENT."… It is undisputed that the plaintiff signed and dated the release prior to commencing her horseback riding lesson with the defendants. Similarly, it is undisputed that the plaintiff identified herself on the release as an "[e]xperienced [r]ider" and as someone who had "[r]idden [horses] frequently" several years earlier.

Subsequent to the plaintiff signing the release provided by the defendants, the defendants paired the plaintiff with one of the horses from their stables and with one of the instructors in their employ. During the course of the plaintiff's horseback riding lesson, the horse provided by the defendants became excited, bucked back and forth suddenly and without warning, and threw the plaintiff to the ground, causing her serious injuries.

The plaintiff brought an action in August, 2003, alleging that she had been injured due to the defendants' negligence. In particular, the plaintiff alleged that her injuries were caused by the "carelessness, recklessness and negligence of the defendants" including, among other things, that (1) the "defendants failed to ensure that the horse on which [she] was placed was an appropriate horse commensurate with [the plaintiff's] skill and experience"; (2) the "defendants failed to prevent, warn or protect the plaintiff from the risk of a fall"; (3) the "defendants knew of the horse's propensity to buck yet failed to warn [the plaintiff] of the same"; and (4) the "defendants failed properly to hire and train their riding instructor…." In their answer, the defendants raised a special defense, namely, that "[t]he plaintiff [had] assumed the risk and legal responsibility for any injury to her person per … General Statutes [§]52-557p,"… and that "[t]he plaintiff's claims [were] barred [due to the fact] that she signed a waiver/release of all claims in favor of the defendants."…

…[I]n *Hanks*, we concluded that the enforcement of a well drafted exculpatory agreement that releases a provider of a recreational activity from prospective liability for personal injuries sustained as a result of the provider's negligence may violate public policy if certain conditions are met…. In general, we noted that "[t]he law does not favor contract provisions which relieve a person from his own negligence …. This is because exculpatory provisions undermine the policy considerations governing our tort system … [which include] compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct…." Moreover, we recognized that "it is consistent with public policy to posit the risk of negligence upon the actor and, if this policy is to be abandoned, it has generally been to allow or require that the risk shift to another party better or equally able to bear it, not to shift the risk to the weak bargainer." ….

Additionally, when assessing the public policy implications of a particular release or waiver of liability, we concluded that "[n]o definition of the concept of public interest [may] be contained within the four corners of a formula," and that "[t]he ultimate determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations."…. Our analysis in *Hanks* [included]…, among other things, a consideration as to whether the release pertains to a business thought suitable for public regulation, whether the party performing the service holds himself out as making the activity available to any member of the public who seeks it, and whether the provider of the activity exercises superior bargaining power and confronts the public with a standard contract of adhesion.

In the context of snowtubing, which was the recreational activity at issue in *Hanks*, we placed particular emphasis on: (1) the societal expectation that family oriented activities will be reasonably safe; (2) the illogic of relieving the party with greater expertise and information concerning the dangers associated with the activity from the burden of proper maintenance of the snowtubing run; and (3) the fact that the release at issue was a standardized adhesion contract, lacking equal bargaining power between the parties, and offered to the plaintiff on a "'take it or leave it'" basis…. Moreover, we recognized the clear public

policy in favor of participation in athletics and recreational activities.... ("[v]oluntary recreational activities, such as snowtubing, skiing, basketball, soccer, football, racquetball, karate, ice skating, swimming, volleyball or yoga, are pursued by the vast majority of the population and constitute an important and healthy part of everyday life").

We conclude that, based on our decision in *Hanks*, the totality of the circumstances surrounding the recreational activity of horseback riding and instruction that was offered by the defendants demonstrates that the enforcement of an exculpatory agreement in their favor from liability for ordinary negligence violates public policy and is not in the public interest. First, similar to the situation at issue in *Hanks*, the defendants in the present case provided the facilities, the instructors, and the equipment for their patrons to engage in a popular recreational activity, and the recreational facilities were open to the general public regardless of an individual's ability level. Indeed, the defendants acknowledged that, although the release required riders to indicate their experience level, it also anticipated a range in skills from between "[n]ever ridden" to "[e]xperienced [r]ider," and that the facility routinely had patrons of varying ability levels. Accordingly, there is a reasonable societal expectation that a recreational activity that is under the control of the provider and is open to all individuals, regardless of experience or ability level, will be reasonably safe.

Additionally, in the present case, as in *Hanks*, the plaintiff "lacked the knowledge, experience and authority to discern whether, much less ensure that, the defendants' [facilities or equipment] were maintained in a reasonably safe condition." ... Specifically, although the plaintiff characterized herself as an experienced rider, she was in no greater position then the average rider ... to assess all the safety issues connected with the defendants' enterprise. To the contrary, it was the defendants, not the plaintiff or the other customers, who had the "expertise and opportunity to foresee and control hazards, and to guard against the negligence of their agents and employees. They alone [could] properly maintain and inspect their premises, and train their employees in risk management."... In particular, the defendants acknowledged that they were responsible for providing their patrons with safe horses, qualified instructors, as well as properly maintained working equipment and riding surfaces.

In the context of carrying out these duties, the defendants were aware, and were in a position continually to gather more information, regarding any hidden dangers associated with the recreational activity including the temperaments of the individual horses, the strengths of the various riding instructors, and the condition of the facility's equipment and grounds. As we concluded in *Hanks*, it is illogical to relieve the defendants, as the party with greater expertise and information concerning the dangers associated with engaging in horseback riding at their facility, from potential claims of negligence surrounding an alleged failure to administer properly the activity.

Furthermore, the release that the plaintiff signed broadly indemnifying the defendants from liability for damages resulting from the defendants' own negligence was a classic contract of adhesion of the type that this court found to be in violation of public policy in *Hanks*. Specifically, we have noted that "[t]he most salient feature [of adhesion contracts] is that they are not subject to the normal bargaining processes of ordinary contracts," and that they tend to involve a "standard form contract prepared by one party, to be signed by the party in a weaker position, [usually] a consumer, who has little choice about the terms ...." In the present case, signing the release provided by the defendants was required as a condition of the plaintiff's participation in the horseback riding lesson, there was no opportunity for negotiation by the plaintiff, and if she was unsatisfied with the terms of the release, her only option was to not participate in the activity. As in *Hanks*, therefore, the plaintiff had nearly zero bargaining power with respect to the negotiation of the release and in order to participate in the activity, she was required to assume the risk of the defendants' negligence. This condition of participation violates the stated public policy of our tort system because the plaintiff was required to bear an additional risk despite her status as a patron who was not in a position to foresee or control the alleged negligent conduct that she was confronted with, or manage and spread the risk more effectively than the defendants.

We are also mindful that ...recreational horseback riding is a business thought suitable for public regulation, but that the legislature has stopped short of requiring participants to bear the very risk that the defendants now seek to pass on to the plaintiff by way of a mandatory release. In particular, the legislature has prescribed that "[e]ach person engaged in recreational equestrian activities shall assume the risk and legal responsibility for any injury to his person or property arising out of the hazards inherent in equestrian sports, unless the injury was proximately caused by the negligence of the person providing the horse or horses to the individual ...." This language establishes that the plaintiff assumed the risk for certain injuries when riding at the defendants' facility due to the