That is, statements must be the product of free and rational choice. The statements cannot be the result of promises, threats, inducements, or physical abuse. However, the U.S. Supreme Court has ruled that confessions that are neither voluntary nor intelligently made can in some instances be admissible if the coercion amounts to "harmless error."

In the case of *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court required that people being interrogated while in police custody must first be informed in clear and unequivocal language that they have the right to remain silent, that anything they say can and will be used against them in court, that they have the right to consult with a lawyer and to have a lawyer with them during interrogation, and that they have the right to an appointed lawyer to represent them if they are indigent. If police officers conduct a custodial interrogation without giving these warnings, they violate an accused's Fifth Amendment privilege against self-incrimination. In such a situation, a court may suppress the prosecution's use of the accused's statement at trial to prove his or her guilt. Such statements may, however, be admissible at trial to impeach the credibility of a testifying defendant.

The protections afforded by the *Miranda* warnings may be waived in certain circumstances. The standard is whether a defendant in fact knowingly and voluntarily waived his or her rights.

The *Miranda* decision was very controversial during the late 1960s, and Congress even went so far in 1968 as to enact a statute which was intended to "overrule" the Supreme Court's decision. The lower federal and state courts generally believed that the *Miranda* decision had been grounded in the U.S. Constitution. These courts essentially ignored the statute and went about applying *Miranda*'s principles to the many cases that were brought forward for decision. Things changed, however, in 1999, when the U.S. Court of Appeals for the Fourth Circuit reversed a federal district court's suppression order based on the 1968 statute. The Supreme Court reviewed the Fourth Circuit's action in the following case of *Dickerson v. United States*.

Charles T. Dickerson v. United States
U.S. Supreme Court
No. 99-5525
June 26, 2000

Chief Justice Rehnquist delivered the opinion of the Court

Petitioner Dickerson was indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence, all in violation of the applicable provisions of Title 18 of the United States Code. Before trial, Dickerson moved to suppress a statement he had made at a Federal Bureau of Investigation field office, on the grounds that he had not received "*Miranda* warnings" before being interrogated. The District Court granted his motion to suppress, and the Government took an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit. That court, by a divided vote, reversed the District Court's suppression order. It agreed with the District Court's conclusion that petitioner had not received *Miranda* warnings before making his statement. But it went on to hold that §§3501, which in effect makes the admissibility of statements such as Dickerson's turn solely on whether they were made voluntarily, was satisfied in this case. It then concluded that our decision in *Miranda* was not a constitutional holding, and that therefore Congress could by statute have the final say on the question of admissibility….

We begin with a brief historical account of the law governing the admission of confessions. Prior to *Miranda*, we evaluated the admissibility of a suspect's confession under a voluntariness test. The roots of this test developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy…. Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment….

> [F]or the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily … on notions of due process…. The due process test takes into consideration "the totality of all the surrounding

circumstances—both the characteristics of the accused and the details of the interrogation." …

We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily. But our decisions in *Malloy v. Hogan* … (1964), and *Miranda* … (1966) changed the focus of much of the inquiry in determining the admissibility of suspects' incriminating statements. In *Malloy*, we held that the Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States…. We decided *Miranda* on the heels of *Malloy*.

In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion…. Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that "[e]ven without employing brutality, the 'third degree' or [other] specific stratagems, … custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." … We concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment … not to be compelled to incriminate himself." … Accordingly, we laid down "concrete constitutional guidelines for law enforcement agencies and courts to follow." … Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings (which have come to be known colloquially as "*Miranda* rights") are: a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." …

Two years after *Miranda* was decided, Congress enacted §§3501. That section provides, in relevant part:

> "(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession … shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> "(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel, and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> "The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

Given §§3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and the instruction for trial courts to consider a non-exclusive list of factors relevant to the circumstances of a confession, we agree with the Court of Appeals that Congress intended by its enactment to overrule *Miranda*…. Because of the obvious conflict between our decision in *Miranda* and §§3501, we must address whether Congress has constitutional authority to thus supersede *Miranda*….

The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals…. Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution….

But Congress may not legislatively supersede our decisions interpreting and applying the Constitution… This case therefore turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction…. [T]he Court of Appeals concluded that the protections announced in *Miranda* are not constitutionally required….

We disagree with the Court of Appeals' conclusion….

The *Miranda* opinion itself begins by stating that the Court granted certiorari "to explore some facets of the problems … of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow." … In fact, the majority opinion is replete with statements indicating that the majority thought it was announcing a constitutional rule…. Indeed, the Court's ultimate conclusion was that the unwarned confessions obtained in the four cases before the Court in *Miranda* "were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege." …

The dissent argues that it is judicial overreaching for this Court to hold §§3501 unconstitutional unless we hold that the *Miranda* warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements…. But we need not go farther than *Miranda* to decide this case. In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession … a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something more than the totality test was necessary…. As discussed above, §§3501 reinstates the totality test as sufficient. Section 3501 therefore cannot be sustained if *Miranda* is to remain the law.

Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now…. While "*stare decisis* is not an inexorable command," … particularly when we are interpreting the Constitution … "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" …

We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture…. While we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings, … we do not believe that this has happened to the *Miranda* decision. If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.

The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his "rights," may nonetheless be excluded and a guilty defendant go free as a result. But experience suggests that the totality-of-the-circumstances test which §§3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner….

In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively. Following the rule of *stare decisis*, we decline to overrule *Miranda* ourselves. The judgment of the Court of Appeals is therefore Reversed.

Case Questions

1. Why did the Fourth Circuit believe the warnings could be dispensed with in Dickerson's case?
2. The Court's opinion defended the *Miranda* warnings requirement on legal grounds, but it went beyond such arguments to advance practical and cultural reasons for not abandoning *Miranda* warnings at this time. What were these arguments?

Searches and Seizures

Examinations of a person or premises are conducted by officers of the law in order to find stolen property or other evidence of guilt to be used by the prosecutor in a criminal action. With some exceptions, a warrant must be obtained by an officer before making a search. (See Figure 8.4.)

As in the case of an arrest warrant, the Fourth Amendment requires probable cause for searches and seizures. Although the Fourth Amendment does not prescribe the forms by which probable cause must be established, evidence of probable cause has traditionally been presented to a magistrate in a written application for warrant supported by oath

SEARCH WARRANT

To . . . . . ***[specify official or officials authorized to execute warrant]:***

Affidavit having been made before me by . . . . ***[affiant]*** that he has reason to believe that on the . . . . . [person of ***or*** premises known as] . . . . . ***[state name of suspect or specify exact address, including apartment or room number, if any, and give description of premises],*** in the City of . . . . . , State of . . . . . , in the . . . . . District of . . . . . , there is now being concealed certain property, namely, ... ***[specify, such as*** certain dies, hubs, molds and plates, fitted and intended to be used for the manufacture of counterfeit coins of the United States, in violation of . . . . ***(cite statute)],*** and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the . . . . . [person ***or*** premises] above . . . . . [named ***or*** described], and that grounds for issuance of a search warrant exist,

You are hereby commanded to search within . . . . [ten] days from this date the . . . . [person ***or*** place] named for the property specified, serving this warrant and making the search . . . . [in the daytime ***or*** at any time in the day or night], and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized, and promptly return this warrant and bring the property before me, as required by law.

Dated . . . . . , 20. . . . .

[Signature and title]

FIGURE 8.4 Sample Search Warrant FRCrP 41(c)

or affirmation, filed by someone who has personal information concerning items to be seized. Today it is increasingly common for statutes to provide for telephonic search warrants as seen in Figure 8.5.

A valid warrant must be specific and sufficiently descriptive. An officer conducting a search is prohibited from going outside the limits set by the warrant.

Courts prefer that searches and seizures are undertaken pursuant to warrants. The warrant process permits a neutral and detached magistrate, in lieu of police officers, to determine if probable cause exists to support a requested search and/or seizure. But the Supreme Court has recognized that warrantless searches and/or seizures are constitutionally reasonable in some circumstances. In an introductory chapter, it is not possible to explain each of the circumstances in which an exception to the warrant requirement has been recognized. However, the most common of these recognized exceptions can be found in Figure 8.6. Interested students can look up the cases on the Internet or at the library using the case names and corresponding citations.

The Exclusionary Rule

In 1914, the U.S. Supreme Court ruled in the *Weeks* case that the Fourth Amendment prevented the use of evidence obtained from an illegal search and seizure in federal prosecutions. This exclusionary rule remedy was incorporated into the Fourteenth Amendment's Due Process Clause and made binding on the states in the 1961 case of

968.12 Search warrant

(a) ***General rule.*** A search warrant may be based upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication, under the procedure prescribed in this subsection.

(b) ***Application.*** The person who is requesting the warrant shall prepare a duplicate original warrant and read the duplicate original warrant, verbatim, to the judge. The judge shall enter, verbatim, what is read on the original warrant. The judge may direct that the warrant be modified.

(c) ***Issuance.*** If the judge determines that there is probable cause for the warrant, the judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the judge's name on the duplicate original warrant. In addition, the person shall sign his or her own name on the duplicate original warrant. The judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony shall be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(d) ***Recording and certification of testimony.*** When a caller informs the judge that the purpose of the call is to request a warrant, the judge shall place under oath each person whose testimony forms a basis of the application and each person applying for the warrant. The judge or requesting person shall arrange for all sworn testimony to be recorded either by a stenographic reporter or by means of a voice recording device. The judge shall have the record transcribed. The transcript, certified as accurate by the judge or reporter, as appropriate, shall be filed with the court. If the testimony was recorded by means of a voice recording device, the judge shall also file the original recording with the court.

FIGURE 8.5 Excerpt from the Wisconsin Search Warrant Statute [968.12]

Exception	Case	Citation
Abandoned Property	***California v. Greenwood***	486 U.S. 35
Booking Searches	***Illinois v. Lafeyette***	462 U.S. 640
Consent Searches	***Schnecloth v. Bustamonte***	412 U.S. 218
Hot Pursuit	***Warden v. Hayden***	387 U.S. 294
Open Fields	***Oliver v. United States***	466 U.S. 170
	United States v. Dunn	480 U.S. 294
Plain View	***Arizona v. Hicks***	480 U.S. 321
Mobile Vehicles	***Carroll v. United States***	267 U.S. 132
	Chambers v. Maroney	399 U.S. 42
	Ross v. Moffit	417 U.S. 600
	California v. Acevedo	500 U.S. 386
Incident to Arrest	***Chimel v. California***	395 U.S. 752
	United States v. Robinson	414 U.S. 218
	Maryland v. Buie	494 U.S. 325
Vehicle Inventories	***South Dakota v. Opperman***	428 U.S. 364
	Colorado v. Bertine	479 U.S. 367

FIGURE 8.6 Some Common Exceptions to the Search Warrant Requirement

Mapp v. Ohio (367 U.S. 643). Although illegally obtained evidence may not be used by the government to prove the defendant's guilt, such evidence may be used to contradict (impeach) a defendant's trial testimony, thus showing that the defendant's testimony may be untruthful.

The exclusionary rule has been quite controversial because when applied it suppresses evidence which can lead to a failed prosecution. In recent decades, the rule has been severely limited by Supreme Court decisions. Procedural hurdles to its use have been established and judicial doctrines created to narrow the circumstances in which it can be used. Many of these devices are discussed in the next case, *Herring v. United States*. When a recognized exception applies, the evidence can still be admitted as evidence of guilt, despite the violation of the Fourth Amendment. Examples are the independent source exception (when an untainted source of evidence unrelated to the illegal search and seizure is shown to exist) and the good faith exception (which applies if the police acted reasonably in relying on what subsequently turned out to be a defective warrant in obtaining evidence).

The next case highlights a fundamental disagreement that exists among the justices of the U.S. Supreme Court. What is the proper scope of the exclusionary rule? In 2006, the Supreme Court decided *Hudson v. Michigan,* 547 U.S. 586. *Hudson* was a case in which both parties agreed that police officers had violated a Fourteenth Amendment requirement by failing to "knock and announce" their presence prior to forcibly entering Hudson's home and arresting him. Hudson claimed that evidence obtained in this manner should be suppressed. The justices split 5-4 in favor of the government. Justices Scalia (for the majority) and Breyer (joined by Justices Ginsburg, Souter, and Stevens) wrote conflicting opinions as to whether the exclusionary rule applied to these facts. In *Herring* v. *United States*, police officers honestly and reasonably believed that a warrant existed to arrest Herring and did not learn that no valid warrant actually existed until after they had arrested Herring and seized incriminating evidence. Herring sought to suppress the evidence obtained as a result of the arrest. In *Herring* the justices again split 5-4 in favor of the government. Chief Justice Roberts wrote for the majority and Justice Ginsburg authored a dissent which was joined by Justices, Souter, Stevens, and Breyer.

Herring v. United States

555 U.S. 1_(2009)
U.S. Supreme Court
January 14, 2009

Chief Justice Roberts delivered the opinion of the Court

1.

The Fourth Amendment forbids "unreasonable searches and seizures," and this usually requires the police to have probable cause or a warrant before making an arrest. What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee? The parties here agree that the ensuing arrest is still a violation of the Fourth Amendment, but dispute whether contraband found during a search incident to that arrest must be excluded in a later prosecution.

Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest....

I

On July 7, 2004, Investigator Mark Anderson learned that Bennie Dean Herring had driven to the Coffee County Sheriff's Department to retrieve something from his impounded truck. Herring was no stranger to law enforcement, and Anderson asked the county's warrant clerk, Sandy Pope, to check for any outstanding warrants for Herring's arrest. When she found none, Anderson asked Pope to check with Sharon Morgan, her counterpart in neighboring Dale County. After checking Dale County's computer database,

Morgan replied that there was an active arrest warrant for Herring's failure to appear on a felony charge. Pope relayed the information to Anderson and asked Morgan to fax over a copy of the warrant as confirmation. Anderson and a deputy followed Herring as he left the impound lot, pulled him over, and arrested him. A search incident to the arrest revealed methamphetamine in Herring's pocket, and a pistol (which as a felon he could not possess) in his vehicle….

There had, however, been a mistake about the warrant. The Dale County sheriff's computer records are supposed to correspond to actual arrest warrants, which the office also maintains. But when Morgan went to the files to retrieve the actual warrant to fax to Pope, Morgan was unable to find it. She called a court clerk and learned that the warrant had been recalled five months earlier. Normally when a warrant is recalled the court clerk's office or a judge's chambers calls Morgan, who enters the information in the sheriff's computer database and disposes of the physical copy. For whatever reason, the information about the recall of the warrant for Herring did not appear in the database. Morgan immediately called Pope to alert her to the mixup, and Pope contacted Anderson over a secure radio. This all unfolded in 10 to 15 minutes, but Herring had already been arrested and found with the gun and drugs, just a few hundred yards from the sheriff's office….

Herring was indicted in the District Court for the Middle District of Alabama for illegally possessing the gun and drugs…. He moved to suppress the evidence on the ground that his initial arrest had been illegal because the warrant had been rescinded. The Magistrate Judge recommended denying the motion because the arresting officers had acted in a good-faith belief that the warrant was still outstanding. Thus, even if there were a Fourth Amendment violation, there was "no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes."… The District Court adopted the Magistrate Judge's recommendation,… and the Court of Appeals for the Eleventh Circuit affirmed ….

The Eleventh Circuit found that the arresting officers in Coffee County "were entirely innocent of any wrongdoing or carelessness,…" The court assumed that whoever failed to update the Dale County sheriff's records was also a law enforcement official, but noted that "the conduct in question [wa]s a negligent failure to act, not a deliberate or tactical choice to act." … Because the error was merely negligent and attenuated from the arrest, the Eleventh Circuit concluded that the benefit of suppressing the evidence "would be marginal or nonexistent," … and the evidence was therefore admissible under the good-faith rule of *United States* v. *Leon*, 468 U. S. 897 (1984).

Other courts have required exclusion of evidence obtained through similar police errors, *e.g.*, *Hoay* v. *State*, [Arkansas], 71 S. W. 3d 573, 577 (2002), so we granted Herring's petition for certiorari to resolve the conflict….

II

When a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation. The very phrase "probable cause" confirms that the Fourth Amendment does not demand all possible precision. And whether the error can be traced to a mistake by a state actor or some other source may bear on the analysis. For purposes of deciding this case, however, we accept the parties' assumption that there was a Fourth Amendment violation. The issue is whether the exclusionary rule should be applied.

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," but "contains no provision expressly precluding the use of evidence obtained in violation of its commands," … Nonetheless, our decisions establish an exclusionary rule that, when applicable, forbids the use of improperly obtained evidence at trial…. See, *e.g.*, *Weeks* v. *United States*, 232 U. S. 383, 398 (1914). We have stated that this judicially created rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974).

In analyzing the applicability of the rule, *Leon* admonished that we must consider the actions of all the police officers involved…. ("It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination"). The Coffee County officers did nothing improper. Indeed, the error was noticed so quickly because Coffee County requested a faxed confirmation of the warrant.

The Eleventh Circuit concluded, however, that somebody in Dale County should have updated the computer database to reflect the recall of the arrest warrant. The court also concluded that this error was negligent, but did not find it to be reckless or deliberate….

B

1.

The fact that a Fourth Amendment violation occurred —*i.e.*, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies…. Indeed, exclusion "has always been our last resort, not our first impulse," … and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it "'result[s] in appreciable deterrence.' "…. We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. … Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future….

In addition, the benefits of deterrence must outweigh the costs…. "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence."… "[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." …. The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that "offends basic concepts of the criminal justice system." …. "[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application."…

These principles are reflected in the holding of *Leon*: When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted "in objectively reasonable reliance" on the subsequently invalidated search warrant…. We (perhaps confusingly) called this objectively reasonable reliance "good faith." … In a companion case, *Massachusetts* v. *Sheppard*, 468 U. S. 981 (1984), we held that the exclusionary rule did not apply when a warrant was invalid because a judge forgot to make "clerical corrections" to it….

Shortly thereafter we extended these holdings to warrantless administrative searches performed in good-faith reliance on a statute later declared unconstitutional…. Finally … we applied this good-faith rule to police who reasonably relied on mistaken information in a court's database that an arrest warrant was outstanding. We held that a mistake made by a judicial employee could not give rise to exclusion for three reasons: The exclusionary rule was crafted to curb police rather than judicial misconduct; court employees were unlikely to try to subvert the Fourth Amendment and "most important, there [was] no basis for believing that application of the exclusionary rule in [those] circumstances" would have any significant effect in deterring the errors…. [L]eft unresolved [was] "whether the evidence should be suppressed if police personnel were responsible for the error,"… an issue not argued by the State in that case, … but one that we now confront.

2.

The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. As we said in *Leon*, "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of applying the exclusionary rule … Similarly … "evidence should be suppressed '… if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."…

Indeed, the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. In *Weeks,* 232 U. S. 383 … the officers had broken into the defendant's home (using a key shown to them by a neighbor), confiscated incriminating papers, then returned again with a U. S. Marshal to confiscate even more…. Not only did they have no search warrant, which the Court held was required, but they could not have gotten one had they tried. They were so lacking in sworn and particularized information that "not even an order of court would have justified such procedure…." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920), on which petitioner repeatedly relies, was similar; federal officials "without a shadow of authority" went to the defendants' office and "made a clean sweep" of every paper they could find…. Even the Government seemed to acknowledge that the "seizure was an outrage…"

Equally flagrant conduct was at issue in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), which … extended the exclusionary rule to the States. Officers forced open a door to Ms. Mapp's house, kept her lawyer from entering, brandished what the court concluded was a false warrant, then forced her into handcuffs and canvassed the house for obscenity… a "flagrant or deliberate violation of rights" … An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place. And in fact since *Leon*, we have never applied the rule to exclude evidence… where the police conduct was no more intentional or culpable than this.

3.

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully

deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level….

The pertinent analysis of deterrence and culpability is objective, not an "inquiry into the subjective awareness of arresting officers,"… We have already held that "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal" in light of "all of the circumstances." …

4.

We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule. In this case, however, the conduct at issue was not so objectively culpable as to require exclusion. In *Leon* we held that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." … The same is true when evidence is obtained in objectively reasonable reliance on a subsequently recalled warrant.

If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation. … Petitioner's fears that our decision will cause police departments to deliberately keep their officers ignorant … are thus unfounded.

The dissent also adverts to the possible unreliability of a number of databases not relevant to this case…. In a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system….

Petitioner's claim that police negligence automatically triggers suppression cannot be squared with the principles underlying the exclusionary rule, as they have been explained in our cases. In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system … we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way." … In such a case, the criminal should not "go free because the constable has blundered." *People* v. *Defore*,…150 N. E. 585, 587 (1926) (opinion of the Court by Cardozo, J.).

The judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

It is so ordered.

Case Questions

1. What is according to the Chief Justice the primary purpose of the exclusionary rule?
2. How do you believe this opinion will be interpreted by law enforcement officials?
3. Critics claim that court rulings like those in Hudson and Herring establish bad precedents because they allow the prosecution to introduce evidence at trial that officers obtained by violating the Constitution. Do you agree with this argument?

INTERNET TIP

Herring v. United States was a 5-4 decision in the Supreme Court. Chief Justice Roberts on behalf of the court's majority explained its perspective that the exclusionary rule should be strictly confined in scope and rarely applied. The remaining four justices, however had an entirely different view. Justice Ginsburg authored an opinion on behalf of the four dissenters that makes the case in favor of an expansive use of the exclusionary rule. The Ginsburg dissent can be found on the textbook's website.

Investigatory Detentions (Stop and Frisk)

The requirement that police officers have probable cause to arrest makes it difficult for them to investigate individuals whose conduct has aroused their suspicions. The Supreme Court was asked in 1968 to balance police investigative needs against citizen privacy rights in the famous case of *Terry v. Ohio*. In *Terry*, the Supreme Court ruled that it was reasonable under the Fourth Amendment for police

officers to make brief seizures of individuals based on reasonable suspicion. The court interpreted the Fourth Amendment as permitting officers to detain suspiciously acting individuals so that their identity could be determined and so that officers could question them about their behavior. However, police officers must be able to articulate the specific facts and circumstances that created a reasonable suspicion in their minds that criminal activity has been, is being, or is about to be committed.

Further, the Supreme Court has ruled that officers who can articulate facts and circumstances that suggest that the stopped individual is armed have a right to make a "frisk." The frisk is less than a full search and consists of the pat-down of the outer clothing of a stopped individual in order to locate weapons that might be used against the officer. If an officer, while conducting the pat-down, feels an object that could be a weapon, the officer is entitled to reach inside the clothing and take the object. If a seized object or weapon is lawfully possessed, it must be returned upon the conclusion of the investigatory detention. If the weapon is unlawfully possessed, it can be seized and used in a criminal prosecution.

Stop and frisk is a very controversial technique in many communities. Police are frequently accused of making stops of individuals based on factors such as race, age, and choice of friends, rather than on actual evidence of impending criminal activity. Officers are also accused of making investigative stops and frisks for the purpose of conducting exploratory searches for evidence.

In the next case, Illinois State Trooper Craig Graham's narcotics detection dog sniffed around Roy Caballes's car while he was being stopped for speeding by Trooper Daniel Gillette. The dog alerted to drugs and the officers discovered marijuana in the trunk. The U.S. Supreme Court granted certiorari to determine "whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop."

Illinois v. Roy I. Caballes
543 U.S. 405
U.S. Supreme Court
January 24, 2005

Justice Stevens delivered the opinion of the Court.
Illinois State Trooper Daniel Gillette stopped respondent for speeding on an interstate highway. When Gillette radioed the police dispatcher to report the stop, a second trooper, Craig Graham, a member of the Illinois State Police Drug Interdiction Team, overheard the transmission and immediately headed for the scene with his narcotics-detection dog. When they arrived, respondent's car was on the shoulder of the road and respondent was in Gillette's vehicle. While Gillette was in the process of writing a warning ticket, Graham walked his dog around respondent's car. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested respondent. The entire incident lasted less than 10 minutes.

Respondent was convicted of a narcotics offense and sentenced to 12 years' imprisonment and a $256,136 fine. The trial judge denied his motion to suppress the seized evidence and to quash his arrest. He held that the officers had not unnecessarily prolonged the stop and that the dog alert was sufficiently reliable to provide probable cause to conduct the search. Although the Appellate Court affirmed, the Illinois Supreme Court reversed, concluding that because the canine sniff was performed without any "'specific and articulable facts'" to suggest drug activity, the use of the dog "unjustifiably enlarg[ed] the scope of a routine traffic stop into a drug investigation." …

The question on which we granted certiorari … is narrow: "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." … Thus, we proceed on the assumption that the officer conducting the dog sniff had no information about respondent except that he had been stopped for speeding; accordingly, we have

omitted any reference to facts about respondent that might have triggered a modicum of suspicion.

Here, the initial seizure of respondent when he was stopped on the highway was based on probable cause, and was concededly lawful. It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution…. A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. In an earlier case involving a dog sniff that occurred during an unreasonably prolonged traffic stop, the Illinois Supreme Court held that use of the dog and the subsequent discovery of contraband were the product of an unconstitutional seizure…. We may assume that a similar result would be warranted in this case if the dog sniff had been conducted while respondent was being unlawfully detained.

In the state-court proceedings, however, the judges carefully reviewed the details of Officer Gillette's conversations with respondent and the precise timing of his radio transmissions to the dispatcher to determine whether he had improperly extended the duration of the stop to enable the dog sniff to occur. We have not recounted those details because we accept the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop.

Despite this conclusion, the Illinois Supreme Court held that the initially lawful traffic stop became an unlawful seizure solely as a result of the canine sniff that occurred outside respondent's stopped car. That is, the court characterized the dog sniff as the cause rather than the consequence of a constitutional violation. In its view, the use of the dog converted the citizen-police encounter from a lawful traffic stop into a drug investigation, and because the shift in purpose was not supported by any reasonable suspicion that respondent possessed narcotics, it was unlawful. In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not.

Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment…. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy interest." … This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." … In *United States v. Place* … (1983), we treated a canine sniff by a well-trained narcotics-detection dog as "sui generis" because it "discloses only the presence or absence of narcotics, a contraband item." … Respondent likewise concedes that "drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband." … Although respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument. Moreover, respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk.

Accordingly, the use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view,"…—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States*, … (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." … The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

The judgment of the Illinois Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Case Questions

1. Why did the Illinois Supreme Court suppress the marijuana found by Trooper Gillette in the trunk of Roy Caballes's car?
2. Why did the U.S. Supreme Court vacate the Illinois Supreme Court's judgment?
3. Do you think that police officers could use the Supreme Court's ruling in this case to justify the use of dog sniffs of people and luggage on buses, boats, and trains and in public parks? How far do you think they could go before crossing the line and infringing on a reasonable expectation of privacy?

Bail

Although the U.S. Constitution does not guarantee criminal defendants the right to bail, at the present time, bail is authorized for all criminally accused persons except those charged with capital offenses (crimes for which punishment may be death). There is also much constitutional debate about whether legislatures can classify certain other noncapital offenses as nonbailable.

Under the traditional money bail system, the judge sets bail to ensure the defendant's attendance in court and obedience to the court's orders and judgment. The accused is released after he or she deposits with a clerk cash, a bond, or a secured pledge in the amount of bail set by the judge. In 1951 the U.S. Supreme Court declared that the Eighth Amendment prevents federal judges and magistrates from setting bail at a figure higher than an amount reasonably calculated to ensure the defendant's appearance at trial. However, the Eighth Amendment's prohibition against excessive bail has been interpreted to apply only to the federal government and has not been incorporated into the Fourteenth Amendment. Thus it is not binding on the states.

During the early 1960s there was considerable dissatisfaction with the money bail system in this country because it discriminated against low-income people. Reform legislation was enacted in many states. The bail reform statutes made it easier for criminally accused people to obtain their release, since judges were required to use the least restrictive option that would ensure that the accused appeared for trial. In appropriate cases, a defendant could be released on his or her own recognizance (an unsecured promise to appear when required), upon the execution of an unsecured appearance bond, or upon the execution of a secured appearance bond. A judge or magistrate could impose appropriate limitations on the accused's right to travel, as well as his or her contacts with other people. Such laws permitted judges to base their decisions on the defendant's offense, family roots, and employment history. The court was empowered to revoke bail if the accused was found in possession of a firearm, failed to maintain employment, or disregarded the limitations.

Public fear about crimes committed by individuals out on bail resulted in the enactment of legislation authorizing preventive detention in the Bail Reform Act of 1984. Under these laws, people thought to be dangerous who were accused of serious crimes, could be denied bail. The targeted crimes included violent crimes, offenses punishable by life imprisonment, and drug-related crimes punishable by a term of incarceration exceeding ten years. At a hearing a court would determine if the accused was likely to flee and if judicially imposed bail conditions would reasonably protect the public safety. In appropriate cases the court was authorized to deny bail and detain the accused until trial.

The Right to an Attorney

As said earlier, a defendant has an unqualified right to the assistance of retained counsel at all formal stages of a criminal case. An indigent defendant is entitled to a court-appointed attorney under much more limited circumstances. An indigent who is subjected to custodial interrogation by the police

is entitled to an appointed attorney in order to protect the Fifth Amendment privilege against self-incrimination. His or her Sixth Amendment right to counsel does not arise until after adversarial judicial proceedings have begun–and the government has formally initiated criminal proceedings against a defendant—usually, after the defendant's initial appearance before a court.

The Supreme Court has ruled that an indigent defendant cannot be sentenced to a term of incarceration for a criminal offense unless appointed counsel was afforded to the defendant at all "critical stages" of a prosecution. Postindictment line-ups for identification purposes, initial appearances, and preliminary hearings, as well as trials and sentencing hearings, are examples of such critical stages. Finally, the Court has recognized that indigents convicted of criminal offenses who want to appeal the trial court's judgment only have a Fourteenth Amendment right to appointed counsel for purposes of a first appeal.

The importance of a nonindigent Missouri defendant's right to be represented by the attorney of his/her choosing (if he or she is paying the bill) was reemphasized in the case of *U.S. v. Gonzalez-Lopez*. The defendant in this case, Cuauhtemoc Gonzalez-Lopez, was accused in federal district court of conspiracy to distribute more than 100 kilograms of marijuana. He rejected the lawyer hired by his parents (Fahle) and hired a California attorney named Low who was not licensed to practice law in Missouri. The district court judge initially permitted Low to represent Gonzalez-Lopez, pro hac vice ("for this case only"), but subsequently revoked this privilege. Gonzalez-Lopez still wanted Low to be his lawyer and so informed Fahle who was allowed to withdraw by the judge. Low made repeated attempts to be permitted to appear pro hac vice, all to no avail. With the trial approaching, Gonzalez-Lopez, while still preferring Low, agreed to be represented by an attorney named Dickhaus. The case was tried to a jury which convicted the defendant. The defendant appealed the district court's refusal to permit him the counsel of his choice to the federal court of appeals which ruled in his favor, reversed his conviction, and ordered a new trial. The U.S. Department of Justice then successfully petitioned the U.S. Supreme Court for certiorari. The government argued in the Supreme Court that while it agreed that Gonzalez-Lopez should have been permitted to be represented by Low, that this was a "harmless error"—it was a trivial mistake that had no bearing on the outcome of the trial. They argued that Gonzalez-Lopez had been effectively represented by Attorney Dickhaus. The government concluded that the appeals court was wrong to have ordered that the conviction be reversed and the case retried. The Supreme Court explains its decision in this case below. This opinion has been extensively edited because of limitations of space.

United States v. Cuauhtemoc Gonzalez-Lopez
548 U.S. 140
U.S. Supreme Court
June 26, 2006

Justice Scalia delivered the opinion of the Court
We must decide whether a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to a reversal of his conviction....

II
The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. The Government here agrees ... that "the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." ... the Government does not dispute the Eighth Circuit's conclusion in this case that the District

Court erroneously deprived respondent of his counsel of choice.

III

Having concluded, in light of the Government's concession of erroneous deprivation, that the trial court violated respondent's Sixth Amendment right to counsel of choice, we must consider whether this error is subject to review for harmlessness. In *Arizona v. Fulminante*, … we divided constitutional errors into two classes. The first we called "trial error," because the errors "occurred during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." … These include "most constitutional errors." … The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affect the framework within which the trial proceeds," and are not "simply an error in the trial process itself." … Such errors include the denial of counsel… , the denial of the right of self-representation, … the denial of the right to public trial, … and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction…. We have little trouble concluding that erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" … Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds" … —or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

… To determine the effect of wrongful denial of choice of counsel, however, we would not be looking for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel—in matters ranging from questions asked on voir dire and cross-examination to such intangibles as argument style and relationship with the prosecutors. We would have to speculate upon what matters the rejected counsel would have handled differently—or indeed, would have handled the same but with the benefit of a more jury-pleasing courtroom style or a longstanding relationship of trust with the prosecutors. And then we would have to speculate upon what effect those different choices or different intangibles might have had. The difficulties of conducting the two assessments of prejudice are not remotely comparable….

IV

Nothing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them. As the dissent too discusses, … the right to counsel of choice does not extend to defendants who require counsel to be appointed for them…. Nor may a defendant insist on representation by a person who is not a member of the bar…. We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, … and against the demands of its calendar…. The court has, moreover, an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." … None of these limitations on the right to choose one's counsel is relevant here. This is not a case about a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel. However broad a court's discretion may be … the District Court here erred when it denied respondent his choice of counsel. Accepting that premise, we hold that the error violated respondent's Sixth Amendment right to counsel of choice and that this violation is not subject to harmless-error analysis.

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Case Questions

1. What did the government argue before the Supreme Court?
2. Why did the Supreme Court majority reject this argument?
3. This case was resolved in the Supreme Court on a 5–4 vote because the justices found it to be a very close question. If you were a justice, how would you have voted and why?

Line-ups

The police conduct line-ups before witnesses for the purpose of identifying a suspect. When formal charges are pending, an accused may not be in a line-up before witnesses for identification unless the accused and accused's counsel have been notified in advance. In addition, the line-up may not be conducted unless counsel is present, so that the defendant's counsel is not deprived of the right to effectively challenge the line-up procedures and any identifications that result. It is interesting to note that the U.S. Supreme Court has not required the presence of an attorney where an array of photographs is used in lieu of an actual line-up. Unlike a line-up, a photo array is not a trial-like confrontation that requires the presence of the accused.

Preliminary Hearing and Grand Jury

In order to weed out groundless or unsupported criminal charges before trial, a preliminary hearing is conducted or a grand jury is convened. In a preliminary hearing, the court examines the facts superficially to determine whether there is a strong enough case to hold the arrestee for further proceedings. The prosecution presents evidence before the court, without a jury, in order to determine if there is probable cause. The accused has a right to be present at the preliminary hearing, to cross-examine prosecution witnesses, and to present evidence. If there is no chance of conviction because of lack of evidence, the court dismisses the charges.

A grand jury, composed of people selected at random from the list of registered voters, decides whether there is reason to believe an accused has committed an offense, not whether the person is guilty or innocent. Thus, it determines whether a person should be brought to trial. The decision is based on evidence heard during a secret criminal investigation attended by representatives of the state and witnesses. The grand jury has the right to subpoena witnesses and documents for its investigation. The accused has no right to be present at the proceedings. A grand jury returns an indictment (an accusation in writing) to the court if it believes that the evidence warrants a conviction. (See Figure 8.7.)

For prosecutions involving crimes against the United States, the Fifth Amendment provides that all prosecution for infamous crimes (an offense carrying a term of imprisonment in excess of one year) must be commenced by a grand jury indictment. Virtually all states provide for a preliminary hearing for charges involving a felony. Approximately half of the states require a grand jury indictment, while the remainder use a bill of information (a formal charging document prepared by the prosecutor and filed with the court).

Arraignment

An arraignment follows a grand jury indictment or the judge's finding of probable cause at a preliminary hearing. At arraignments, accused people are advised of the formal charges against them as required by the Sixth Amendment. The description of the charges must be sufficiently clear so that the defendant may be able to enter an intelligent plea. The accused are also asked whether they understand the charges and whether they have an attorney. The court appoints counsel if the accused cannot afford an attorney. Finally, a trial date is set at the arraignment. Defendants and their counsel must be given adequate opportunity to prepare for trial.

UNITED STATES DISTRICT COURT
FOR THE . . . . . DISTRICT OF . . . . . .
. . . . . DIVISION

United States of America,
Plaintiff,
v.
_____)
Defendant.

Crim. No. . . . . .
(. . . . –USC § . . . . . .

INDICTMENT

The grand jury charges:

On or about the . . . . . day of . . . . . , 20 . . . . . , in the . . . . . District of . . . . . , ... ***[defendant]*** . . . . . ***[state essential facts constituting offense charged],*** in violation of . . . . . USC § . . . . . Dated . . . . . , 20. . . . .

A True Bill.

[Signature],
Foreman

. . . . . ,
United States Attorney.

FIGURE 8.7 Sample Indictment [FRCrP 7(c)]

The defendant is called on to enter a plea at the arraignment. This plea may be guilty, ***nolo contendere***, or not guilty. The plea of guilty is entered in the great majority of situations; it is simply a confession of guilt. The plea of *nolo contendere* is the same as a guilty plea, except that it cannot be used later against the accused as an admission. It is a confession only for the purposes of the criminal prosecution and does not bind the defendant in a civil suit for the same wrong. When the defendant pleads not guilty, the prosecution has the burden of proving him or her guilty beyond a reasonable doubt at the trial.

Plea bargaining is the process by which the accused agrees to enter a plea of guilty, often to a lesser offense, in exchange for a promise by the prosecuting attorney to recommend either a relatively light sentence or a dismissal of part of the charges. The judge does not have to accept the prosecutor's recommendations and will explain this to the defendant before accepting a negotiated plea.

THE CRIMINAL TRIAL

Every person who is charged with a crime has a constitutional right to a trial. In this way a defendant has the opportunity to confront and cross-examine the witnesses against him or her, testify and present evidence and arguments as a defense against the charges, have the assistance of an attorney in most cases, and take full advantage of the rights and protections afforded all people accused of crimes under the Constitution. Trial procedures are essentially the same in criminal and civil trials.

The prosecution is the plaintiff and must initially present legally sufficient evidence of the defendant's criminal culpability with respect to each element of the crime or the judge will dismiss the charges and terminate the trial. A criminal defendant, unlike a civil defendant, has a constitutional right not to testify at trial. This privilege is often waived by defendants, however, because they wish to explain their version of the facts to the jury or to the judge in a bench trial. Every criminal defendant (and juvenile charged with a criminal offense) is additionally protected by the constitutional due process requirement that the prosecution prove guilt beyond a reasonable doubt in order to be entitled to a judgment of conviction.[7]

The Sixth and Fourteenth Amendments guarantee criminally accused people many important rights, including notice of the charges, trial by jury, a speedy and public trial, and representation by counsel. Also protected by these amendments are the rights to present witnesses and evidence and to cross-examine opposing witnesses.

Trial by Jury

Accused people have a constitutional right to have their guilt or innocence decided by a jury composed of people representing a cross section of their community (this right to a jury trial does not extend to offenses traditionally characterized as petty offenses). The jury trial right is a safeguard against arbitrary and highhanded actions of judges.

Unless a jury trial is waived, the jury is selected at the beginning of the trial. The number of jurors ranges from six to twelve, depending on state law. A unanimous decision is not required for conviction in all states. However, twelve jurors are required in federal criminal courts, and a unanimous decision is necessary for a conviction. If a jury cannot agree on a verdict, it is called a hung jury and the judge dismisses the charges. In this situation, the prosecutor may retry the defendant before a new jury.

If a defendant pleads guilty, there are no questions of fact for a jury to decide, and the judge will proceed to the sentencing phase.

Fair and Public Trial and Cross-Examination

The right to be confronted by their accusers in an adversary proceeding protects accused people from being convicted by testimony given in their absence without the opportunity of cross-examination. The defendant also has a right to a public trial. This constitutional right prevents courts from becoming instruments of persecution through secret action. The right is not unlimited, however. It is subject to the judge's broad power and duty to preserve order and decorum in the courtroom. Judges may limit the number of spectators in order to prevent overcrowding or to prevent disturbances. Judges also have the power to impose sanctions on participants and observers for acts that hinder or obstruct the court in administering justice.

Right to a Speedy Trial

The accused's right to a speedy trial is interpreted as meaning that the trial should take place as soon as possible without depriving the parties of a reasonable period of time for preparation. This right, applicable to both the state and federal courts, protects an accused from prolonged imprisonment prior to trial, prevents long delay that could impair the defense of an accused person through the loss of evidence, and prevents or minimizes public suspicion and anxiety connected with an accused who is yet untried.

The right to speedy trial attaches when the prosecution begins, either by indictment or by the actual restraints imposed by arrest. How much time must elapse to result in an unconstitutional delay varies with the circumstances. The accused has the burden of showing that the delay was the fault of the state and that it resulted in prejudice.

The Prosecutor's Role

The sovereignty has the duty of prosecuting those who commit crimes; its attorney for this purpose is the prosecutor. As trial lawyer for the sovereignty, the prosecutor has extensive resources for investigation and preparation. The prosecutor is not at

liberty to distort or misuse this information, and must disclose information that tends to relieve the accused of guilt. Any conduct of a prosecutor or judge that hinders the fairness of a trial to the extent that the outcome is adversely affected violates the defendant's right to due process.

Sentencing

Following conviction or a guilty plea, judges determine the sentence that will be imposed on the convicted defendant in accordance with the laws of that particular jurisdiction. The sentencing options, depending on the sentencing structure of the jurisdiction, usually include confinement, fines, community service, restitution, and probation. A convicted person has the right to challenge the constitutionality of his/her sentence by arguing that it is cruel and unusual and in violation of the Eighth Amendment or that it violates the Equal Protection Clause of the Fourteenth Amendment.

Appeal

The federal and state constitutions guarantee defendants a fair trial, but not an error-free trial. In the federal and state judicial systems appellate courts determine if significant errors that warrant correction were committed by lower courts. The U.S. Constitution does not require states to provide for appellate review, although all defendants who enter a plea of not guilty are granted at least one appeal. The states differ in the number of discretionary appeals that are made available. A defendant who appeals has to exhaust all appellate opportunities at the state level and raise a federal question before petitioning the U.S. Supreme Court for a writ of certiorari. A person convicted of a crime in a federal district court can obtain review in the U.S. Court of Appeals, and then petition the U.S. Supreme Court for certiorari.

The prosecution is prohibited by the Fifth Amendment's double jeopardy clause, and by due process, from appealing a court's entry of a judgment of acquittal based on a jury verdict or on the insufficiency of the evidence. Statutes, however, may permit the prosecution to appeal (1) pretrial court orders suppressing evidence, (2) a trial judge's refusal to enter judgment on the jury's guilty verdict and the entry instead of judgment for the defendant (JNOV), (3) where the sentencing judge abused his or her discretion and imposed an "inadequate" sentence, and (4) from a judgment of acquittal for the sole purpose of clarifying the law.

Habeas Corpus

The writ of *habeas corpus* (Latin for "you have the body") is used to test the legality of a person's detention by government. It is frequently used by prisoners who have been unsuccessful in directly appealing their convictions and who are serving sentences of imprisonment. The writ of *habeas corpus* was recognized in Article 1, Section 9, of the U.S. Constitution. Congress extended the common law writ to federal prisoners in the Judiciary Act of 1789, and to state prisoners in 1867. Congress replaced the common law practices defining prisoners' use of the writ with legislation in 1948, and the U.S. Supreme Court expanded its scope during the 1960s and 1970s.

Federal *habeas corpus* has much strategic importance because it permits convicted people, whether convicted in a federal or state court, to seek collateral review of their sentences in a federal court. The *habeas* process permits local federal district courts to "take a second look" at the functioning of state judicial systems. There have been times when Congress essentially deferred to the judiciary as to the substantive scope of this writ and access to *habeas corpus* expanded when the Supreme Court felt it desirable to exercise more oversight over states. In 1976, however, the Supreme Court decided that the federal judiciary was being flooded with federal *habeas* petitions filed by prisoners in state prisons for drug offenses who wanted to challenge the constitutionality of police searches and seizures that led to their convictions. Because these petitioners' claims had already been fully litigated in state courts (albeit unsuccessfully), the court's majority concluded that there was no reason for continued federal oversight in these cases. The justices announced, in the case

of *Stone v. Powell*, 428 U.S. 465 (1976), that district courts could no longer review Fourth Amendment claims by way of *habeas corpus* if "the state has provided an opportunity for full and fair litigation of a Fourth Amendment Claim." This ruling meant that unless the U.S. Supreme Court granted a certiorari petition after a Fourth Amendment claim had been fully litigated in the state courts, the federal judiciary had essentially closed the door to such claims. It is interesting to note that the court has not adopted a similar strategy with respect to *habeas corpus* petitions based on the Fifth and Sixth Amendments. The most recent significant piece of federal legislation relating to *habeas corpus* review was enacted in 1996 when Congress greatly limited the scope of federal *habeas corpus* review in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[8]

The respondent in the next case, Michael W. Haley, was convicted of stealing a calculator from a Wal-Mart store in 1997, an offense punishable by incarceration for a minimum of six months and up to two years in state prison. Haley was also accused of being a habitual felony offender, because his official conviction records indicated that he had two prior convictions. His first conviction was for delivering amphetamines (October 18, 1991), and his second was for robbery (October 15, 1991). Haley was convicted of theft and found to be a habitual offender. As a convicted habitual offender, he was subject to an enhanced sentence on the theft charge, and he was sentenced to a prison term of sixteen years and 180 days. His appellate lawyer's direct appeal to the intermediate state appellate court was denied, and the Texas Court of Criminal Appeals refused to take the case on discretionary appeal.

Haley began serving his prison sentence. While in prison, he discovered that his sentence exceeded what was statutorily authorized. The sentence enhancement statute, he learned, required that the two convictions prior to the theft offense be chronological. Haley's were not. His conviction for the robbery (his second crime), became final three days prior to when his conviction for the drug offense (his first crime) became final. This mistake went unnoticed by his trial lawyer and his appellate attorney on direct appeal. Trial lawyers have an obligation to carefully look for error and make the necessary objections and motions in order to clarify the nature of any errors and specify the legal basis for any objections. They do this in order to "protect the record" and thereby "preserve" these issues for appeal. It is important that all alleged errors are identified as such in the official transcript of the proceedings, which is taken down by the official court reporter. The transcript and the documents in the court's file constitute the "record" of the trial. The trial record is the official version of what transpired at the trial and sentencing stages of the case. It is the primary source of factual information about what transpired at the trial level for appellate courts. Errors that are not preserved at trial are likely to be deemed waived and therefore ignored at the appellate level. Constitutional claims not properly preserved at trial become known as "defaulted constitutional claims."

Haley, despite having lost twice on direct appeal, still had one last chance within the Texas judicial process to have his claims heard. This option was to seek *habeas corpus* relief. He petitioned the state court of criminal appeals, claiming that his trial attorney had been ineffective and that because the evidence actually showed that the prior convictions relied upon to enhance his sentence were not chronological, his due process rights had been violated. His petition was denied.

Having no other source of relief under Texas law, Haley petitioned the U.S. District Court for the Eastern District of Texas for a writ of *habeas corpus*. The district court, after being apprised of the sentencing error, found in favor of Haley on due process grounds and according to page 4 of Haley's Supreme Court brief, "the final judgment provided that the State of Texas had ninety days to resentence Mr. Haley without the improper enhancement, and that if it failed to do so, his conviction would be reversed." Having disposed of the case on due process grounds, the district court did not address the ineffective counsel claim. Doug Dretke, who was in charge of Texas's correctional institutions, appealed the district court's decision to

the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the lower court's ruling on the due process claim. Meanwhile, because the ninety-day period established by the district court had expired, that court carried through on its threat and ordered that Haley's conviction be reversed and Haley, after serving six years of incarceration (four years more than the statutory maximum for the theft offense), was released from prison. Dretke decided to seek to overturn the precedent established by the Fifth Circuit, that the "actual innocence exception" to the procedural default doctrine could be applied in noncapital cases, and successfully petitioned the U.S. Supreme Court for a writ of certiorari. According to pages 5 and 6 of Haley's Supreme Court brief, Director Dretke "advised the District Court that he intend[ed] … to reincarcerate Mr. Haley for the remaining ten years of his admittedly erroneous sentence if this Court reverses the Fifth Circuit's decision."[9]

Doug Dretke v. Michael W. Haley
541 U.S. 386
U.S. Supreme Court
May 3, 2004

Justice O'Connor delivered the opinion of the Court. Out of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for *habeas corpus* absent a showing of cause and prejudice to excuse the default. We have recognized a narrow exception to the general rule when the *habeas* applicant can demonstrate that the alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense or, in the capital sentencing context, of the aggravating circumstances rendering the inmate eligible for the death penalty…. The question before us is whether this exception applies where an applicant asserts "actual innocence" of a noncapital sentence. Because the District Court failed first to consider alternative grounds for relief urged by respondent, grounds that might obviate any need to reach the actual innocence question, we vacate the judgment and remand.

I

In 1997, respondent Michael Wayne Haley was arrested after stealing a calculator from a local Wal-Mart and attempting to exchange it for other merchandise. Respondent was charged with, and found guilty at trial of, theft of property valued at less than $1,500, which, because respondent already had two prior theft convictions, was a "state jail felony" punishable by a maximum of two years in prison…. The State also charged respondent as a habitual felony offender. The indictment alleged that respondent had two prior felony convictions and that the first—a 1991 conviction for delivery of amphetamine—"became final prior to the commission" of the second—a 1992 robbery…. The timing of the first conviction and the second offense is significant: Under Texas' habitual offender statute, only a defendant convicted of a felony who "has previously been finally convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, … shall be punished for a second-degree felony." § 12.42(a)(2)…. A second degree felony carries a minimum sentence of 2 and a maximum sentence of 20 years in prison. § 12.33(a).

Texas provides for bifurcated trials in habitual offender cases…. If a defendant is found guilty of the substantive offense, the State, at a separate penalty hearing, must prove the habitual offender allegations beyond a reasonable doubt…. During the penalty phase of respondent's trial, the State introduced records showing that respondent had been convicted of delivery of amphetamine on October 18, 1991, and attempted robbery on September 9, 1992. The record of the second conviction, however, showed that respondent had committed the robbery on October 15, 1991—three days before his first conviction became final. Neither the prosecutor, nor the defense attorney, nor the witness tendered by the State to authenticate the records, nor the trial judge, nor the jury, noticed the 3-day discrepancy. Indeed, the defense attorney chose not to cross-examine the State's witness or to put on any evidence.

The jury returned a verdict of guilty on the habitual offender charge and recommended a sentence of 16½ years; the court followed the recommendation. Respondent appealed. Appellate counsel did not

mention the 3-day discrepancy nor challenge the sufficiency of the penalty-phase evidence to support the habitual offender enhancement. The State Court of Appeals affirmed respondent's conviction and sentence; the Texas Court of Criminal Appeals refused respondent's petition for discretionary review.

Respondent thereafter sought state postconviction relief, arguing for the first time that he was ineligible for the habitual offender enhancement based on the timing of his second conviction…. The state *habeas* court refused to consider the merits of that claim because respondent had not raised it, as required by state procedural law, either at trial or on direct appeal…. The state *habeas* court rejected respondent's related ineffective assistance of counsel claim, saying only that "counsel was not ineffective" for failing to object to or to appeal the enhancement…. The Texas Court of Criminal Appeals summarily denied respondent's state *habeas* application….

In August 2000, respondent filed a timely *pro se* application for a federal writ of *habeas corpus* … renewing his sufficiency of the evidence and ineffective assistance of counsel claims…. The State conceded that respondent was "correct in his assertion that the enhancement paragraphs as alleged in the indictment do not satisfy section 12.42(a)(2) of the Texas Penal Code." … Rather than agree to resentencing, however, the State argued that respondent had procedurally defaulted the sufficiency of the evidence claim by failing to raise it before the state trial court or on direct appeal…. The Magistrate Judge, to whom the *habeas* application had been referred, recommended excusing the procedural default and granting the sufficiency of the evidence claim because respondent was "'actually innocent' of a sentence for a second-degree felony." … Because she recommended relief on the erroneous enhancement claim, the Magistrate Judge did not address respondent's related ineffective assistance of counsel challenges…. The District Court adopted the Magistrate Judge's report, granted the application, and ordered the State to resentence respondent "without the improper enhancement." …

The Court of Appeals for the Fifth Circuit affirmed, holding narrowly that the actual innocence exception "applies to noncapital sentencing procedures involving a career offender or habitual felony offender." … Finding the exception satisfied, the panel then granted relief on the merits of respondent's otherwise defaulted sufficiency of the evidence claim. In so doing, the panel assumed that challenges to the sufficiency of noncapital sentencing evidence are cognizable on federal *habeas*….

The Fifth Circuit's decision exacerbated a growing divergence of opinion in the Courts of Appeals regarding the availability and scope of the actual innocence exception in the noncapital sentencing context…. We granted the State's request for a writ of certiorari….

II

The procedural default doctrine, like the abuse of writ doctrine, "refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." … [T]he doctrine has its roots in the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds…. That being the case, we have recognized an equitable exception to the bar when a *habeas* applicant can demonstrate cause and prejudice for the procedural default…. The cause and prejudice requirement shows due regard for States' finality and comity interests while ensuring that "fundamental fairness [remains] the central concern of the writ of *habeas corpus*." …

The cause and prejudice standard is not a perfect safeguard against fundamental miscarriages of justice … [and we have] recognized a narrow exception to the cause requirement where a constitutional violation has "probably resulted" in the conviction of one who is "actually innocent" of the substantive offense…. We subsequently extended this exception to claims of capital sentencing error…. Acknowledging that the concept of "actual innocence" did not translate neatly into the capital sentencing context, we limited the exception to cases in which the applicant could show "by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." …

We are asked in the present case to extend the actual innocence exception to procedural default of constitutional claims challenging noncapital sentencing error. We decline to answer the question in the posture of this case and instead hold that a federal court faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default….

Petitioner here conceded at oral argument that respondent has a viable and "significant" ineffective assistance of counsel claim…. Success on the merits would give respondent all of the relief that he seeks—i.e., resentencing. It would also provide cause to excuse the procedural default of his sufficiency of the evidence claim….

[I]t is precisely because the various exceptions to the procedural default doctrine are judge-made rules that courts as their stewards must exercise restraint, adding to or expanding them only when necessary. To hold otherwise would be to license district courts to riddle the cause and prejudice standard with ad hoc exceptions whenever they perceive an error to be "clear" or departure from the rules expedient. Such an approach, not the rule of restraint adopted here, would have the unhappy effect of prolonging the pendency of federal *habeas* applications as each new exception is tested in the courts of appeals. And because petitioner has assured us that it will not seek to reincarcerate respondent during the pendency of his ineffective assistance claim … the negative consequences for respondent of our judgment to vacate and remand in this case are minimal….

To be sure, not all claims of actual innocence will involve threshold constitutional issues. Even so, as this case and the briefing illustrate, such claims are likely to present equally difficult questions regarding the scope of the actual innocence exception itself. Whether and to what extent the exception extends to noncapital sentencing error is just one example. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Case Questions

1. Why did the Supreme Court refuse to decide whether the actual innocence exception was applicable to this case as held by the Fifth Circuit?
2. Considering the outcome, did the Texas department of corrections really "lose" anything because of this decision?
3. To what extent, if at all, do you believe that federal courts should "oversee" the workings of state judicial systems by means of the writ of *habeas corpus*?

The Remand to the Court of Appeals

In the last sentence of Justice O'Connor's opinion, the Court vacated (set aside) the Court of Appeals' judgment that the "actual innocence exception" to the procedural default doctrine could be applied in noncapital sentencing cases. It left that question for another day. The Court also remanded the case back to the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit responded as follows.

Doug Dretke v. Michael W. Haley
376 F.3d 316
U.S. Court of Appeals for the Fifth Circuit
June 25, 2004

Carl E. Stewart, Circuit Judge

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, the United States Supreme Court by an Opinion entered May 3, 2004, … held that a federal court faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address all nondefaulted claims of comparable relief and other grounds for cause to excuse the procedural default. Dretke and the State of Texas conceded before the Supreme Court that Haley has a viable and significant ineffective assistance of counsel claim, success on the merits would give respondent all of the relief that he seeks, i.e., resentencing, and also would provide cause to excuse the procedural default of his sufficiency of the evidence claim, and that the State will not reincarcerate Haley during the pendency of his ineffective assistance of counsel claim.

Accordingly, the judgment of this court, 306 F.3d 257, was vacated, and the case remanded for further proceedings consistent with its opinion. It is hereby ordered that this case be remanded to the district court for further proceedings to expeditiously resolve Haley's claim.

Conclusion After Remand to the District Court

Pursuant to the remand order, the U.S. District Court for the Eastern District of Texas subsequently awarded Haley summary judgment on his ineffective assistance of counsel claim and the matter was finally concluded.

CHAPTER SUMMARY

This chapter has provided students with a "taste" of what criminal law and criminal procedure are all about. Readers began with an introduction to the sources of American criminal law and learned about the common law influences, how the legislature came to replace the judiciary as the dominant policymaker, and how the Model Penal Code has greatly influenced the modern development of criminal law. Criminal law classifications such as *mala in se*, *mala prohibita*, felony, and misdemeanor were explained, as were the constitutional limitations on the imposition of criminal liability and criminal punishments.

The focus then shifted to learning about the basic components of a criminal offense: the wrongful act, guilty mind, the concurrence of act and intent, and, in some crimes, causation. This was followed by an overview of the inchoate crimes: solicitation, attempt, and conspiracy, which society relies upon to protect itself from people who have taken some steps toward, but have not yet completed, their intended criminal objectives. The criminal law portion of the chapter concluded with a discussion of some of the common recognized defenses, including affirmative defenses that can mitigate, justify, or excuse a defendant's conduct.

The next discussion focused on criminal procedure, which is the administrative process society has established for determining whether a crime has been committed and whether the person or persons accused are guilty of the crime. Readers learned that constitutional provisions limit this process, in particular the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

Next was an overview of several procedural stages that occur prior to the commencement of a criminal trial. These included the requirements for a valid arrest, custodial interrogations of suspects (*Miranda* rights), searches and seizures, and investigative detentions (stop and frisk). Other topics discussed included bail and the right to an attorney. The pretrial segment concluded with explanations of the preliminary hearing, the role of the grand jury, and what happens at an arraignment. This was followed by an overview of the criminal trial, the defendant's rights to a trial by jury, a fair and public trial, to cross-examine witnesses, and the right to a speedy trial. The chapter concluded with discussions of the prosecutor's role, sentencing, and a defendant's right to appeal and to petition for a writ of *habeas corpus*.

CHAPTER QUESTIONS

1. Holmes was convicted and received a death sentence for murdering, beating, raping, and robbing an eighty-six-year-old woman. Although his convictions and sentence were affirmed on appeal by the state courts, he was granted a new trial upon postconviction review. Holmes sought at the new trial to introduce evidence that the victim's attacker was another man named White.

   The trial court excluded Holmes's evidence that White had perpetrated the crime. The state supreme court affirmed the trial court ruling "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." Holmes

successfully petitioned for a writ of certiorari. He argued to the U.S. Supreme Court that he had a constitutionally protected right to introduce proof that White had committed the attack on the victim despite the introduction of forensic which, if believed, would "strongly support a guilty verdict." Was the state supreme court correct?

Holmes v. South Carolina, 126 S. Ct. 1727 (2006)

2. Brandon, a driver, was lawfully stopped by Colorado state police officers for speeding. Besides Brandon, there were two passengers in the vehicle—one male and one female. When the officer asked Brandon to produce evidence that he had the right to operate the vehicle, Brandon only produced an identification card. The officer then contacted his dispatcher to determine if Brandon was a licensed driver. While waiting for the dispatcher's response, the officer asked Brandon and the passengers questions as to their destination and the purpose of their trip. The officer became suspicious when Brandon's and the passengers' answers were inconsistent. The dispatch notified the officer that Brandon was licensed in California.

   The officer then asked for and was given permission to search the car by the vehicle's owner, the female passenger. Brandon, however, refused to consent to a search. The officer then put a police dog into the car and after the dog alerted to the presence of cocaine, it was seized, and Brandon was arrested. Brandon was convicted of possession of a controlled substance. He unsuccessfully moved to suppress the evidence of the cocaine. The trial court ruled that the female passenger had consented to the search that led to the discovery of the cocaine. The defendant then appealed to the state court of appeals. Should the appellate court reverse the trial court and suppress the evidence of cocaine?

   State of Colorado v. Brandon, 03CA1176 (2005)

3. James Brogan was unexpectedly visited one evening at his home by federal investigators. The officers had records indicating that Brogan had received cash payments from a company whose employees were members of a union in which Brogan was an officer. Such an act would have violated federal bribery statutes. The officers asked Brogan if he had received any cash or gifts from the company. Brogan answered "no." Brogan was charged with violating federal bribery laws and with lying to a federal officer who was in the course of performing his or her duty to investigate criminal activity, as prohibited by 18 U.S. Code Section 1001. Do you see any potential for the possible abuse of prosecutorial discretion if persons in Brogan's situation can be convicted of a federal felony for untruthfully answering an incriminating question posed by federal officers in the course of an investigation?

   Brogan v. United States, 96-1579 (1998)

4. Kalb County Police Officer Richardson stopped a motorist named Brown on Candler Road while it was raining for driving without using his headlights because he suspected that Brown might be DUI. Brown explained to the officer that he was not aware the lights were not on. When the officer asked Brown to produce his operator's license and evidence of insurance, Brown began a search for the requested documentation. While looking for the documents, Brown pulled an object out of one of his front pockets that the officer described as a "piece of paper" approximately one to two inches in diameter. When the paper fell in between Brown's legs onto the car seat, Brown immediately closed his legs. The officer asked Brown, "What are you trying to hide?" The trial testimony is silent as to Brown's reply. Officer Richardson then asked Brown to exit the car; however, Brown did not comply. He continued looking in the car for the documents until they were finally found. Brown appeared nervous and shaky while poking around the car. This made Richardson suspicious that Brown was attempting to hide something. After Brown produced the documents, Officer

Richardson asked him to step out of the car. Brown was given a Terry investigative pat-down, which produced neither weapons nor contraband, and he was then placed unarrested inside of Richardson's locked patrol car. The officer then proceeded to enter Brown's car to look for the piece of paper. Richardson found it, in plain view, on the car seat. This search disclosed the existence of several small plastic bags which were subsequently identified from field tests to be rock cocaine. Brown was then arrested for possession of cocaine. The officer did not know that anything was in the piece of paper at the time he conducted his search, and he did not see the cocaine in the paper until the officer subjected it to close examination. Did Officer Richardson have probable cause to make a warrantless search of Brown's car?

Brown v. State of Georgia, 504 S.E.2d 443 (1998)

5. Hillsborough County, New Hampshire, installed a teleconferencing system between the Nashua District Court and the Nashua Police Station. This system made it unnecessary to have police officers physically transport arrested persons to the courthouse for purposes of arraignment and setting bail. This procedure was intended to conserve time as well as money, and was approved by the state supreme court. Jay Larose and two other people were arraigned using this system, and bail was set, but they were unable to make bail. They subsequently petitioned for a writ of *habeas corpus*. The petitioners argued that this high-tech approach to arraignments violated their due process rights under the state and federal constitutions. They also maintained that the teleconferencing procedure violated a state statute which required that arrested persons "… shall be taken before a district or municipal court without unreasonable delay, but not exceeding 24 hours, Sundays and holidays excepted, to answer for the offense." What due process rights could they have claimed were infringed upon, based on these facts? How might the state respond to the claimed infringement of the statutory right?

Larose v. Hillsborough County, 702 A.2d 326 (1997)

6. Bajakajian tried to take $357,000 in cash out of the United States without completing the necessary paperwork. After his conviction, the federal government asked the court to order that the entire sum be forfeited, as called for by the federal statute. Would this punitive forfeiture violate the requirements of the excessive fines clause of the Eighth Amendment?

United States v. Bajakajian, 96-1487 (1998)

7. The Edmonds Police Department received an anonymous tip contained in a mailed note that Robert Young was growing marijuana in his house. A police detective went to the address. He noted that the windows of the house were always covered, bright lights never could be seen inside, and there was no apparent odor of marijuana detectable from the public sidewalk. The detective obtained records of Young's electric power consumption and believed it to be unusually high—a factor that his prior experience suggested to him was consistent with the cultivation of marijuana. The detective contacted the federal DEA, which supplied an agent trained in the use of infrared thermal detection equipment. This equipment, when used at night, can detect manmade heat sources. Young's house was subjected to thermal surveillance, and the results suggested a pattern consistent with the growth of marijuana; the downstairs, for example, was warmer than the upstairs portion of the house. The detective used this information to establish probable cause for the issuance of a search warrant. Officers executing the search warrant found marijuana within the house, and Young was arrested and charged with possession of marijuana with intent to manufacture or deliver. Young sought to suppress the evidence on the grounds that the infrared surveillance of his home constituted an infringement of his

rights under the Fourth Amendment to the U.S. Constitution and a corresponding right under the Washington State Constitution.

Do you believe the suppression motion should be granted?

State of Washington v. Young, 867 P.2d 593 (1994)

NOTES

1. G. Jones, *The Sovereignty of the Law* (Toronto: University of Toronto Press, 1973), pp. 189–191.
2. Schwartz, *The Law in America* (New York: McGraw-Hill, 1974), p. 9.
3. Schwartz, pp. 12–18, 72, 73.
4. *Craig v. Boren*, 429 U.S. 197 (1976).
5. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
6. *Craig v. Boren*, 429 U.S. 197 (1976).
7. *In re Winship*, 379 U.S. 358 (1970).
8. The AEDPA was enacted by members of Congress who believed that the writ was being abused by desperate defendants seeking to postpone their execution dates.
9. The sources for this factual statement include Justice O'Connor's opinion and pages 1–5 of the "Statement of the Case" portion of the respondent's brief in the Supreme Court.

IX

Family Law

CHAPTER OBJECTIVES

1. *Understand the antecedents of American family law.*
2. *Describe differing configurations of a family.*
3. *Explain legal obligations that parents have vis-à-vis their children.*
4. *Understand how spousal relationships end.*
5. *Describe the basic stages of the adoption process.*
6. *Explain the two approaches to the division of property in divorce.*

People today conceptualize the family's role in society very differently than they did in seventeenth-century America. Back then, the economy was primarily agrarian. The family unit was responsible for providing care for all its members from the cradle to the grave. There was no social security for the old or unemployment security for those out of work. The family was responsible for performing functions within the home that today are often provided by others outside the home. There were no public schools to educate the young, no day-care centers, no hospitals to care for the sick, and no nursing homes to care for the elderly. Even religious instruction had to be provided by families within the home until churches could be established.[1] In the past, it was common for families to be larger than is typical today. It took many people to take care of the domestic tasks and work the farms. Uneducated children were not as mobile and had fewer opportunities to leave the family home and town. They were also subject to parental discipline for longer periods of time than is the case today.

Today, families headed by a single parent are common. The number of children under eighteen years of age living with a single parent has increased from 19.7 percent in 1980 to 28 percent in 2004, according to the U.S. Census Bureau.[2] Instead of working on a farm, today parents often work outside the home. They sometimes commute long distances to their jobs. It is the norm in two-parent families for both parents to work as they struggle to meet even the most basic needs of the nuclear family. Families today are often unable to provide care for elder family members.[3] Today's children, as they grow into adolescence, become more mobile and independent much sooner than in the past, and parents often find themselves having less ability to exercise influence and control.[4]

These changes in families have been accompanied by changes in society's legal expectations about family life.[5] **Family law**, also called *domestic relations law*, has been recognized as a legal subfield only since the early 1900s.[6] Despite the law's tardiness in formally recognizing family law, legal institutions have long been concerned with the rights and responsibilities of family members.

One of the most enduring features of the western tradition is the deference shown by the law to family self-governance, also called *family autonomy*.[7] This deference was recognized in Roman law[8] and was subsequently incorporated into Anglo-Saxon law;[9] canon law (the law applied in the English ecclesiastical courts, which historically handled domestic relations cases);[10] and the common law.[11]

Also dating from the time of the Roman emperors, however, is the legal recognition that society, through government, has a legitimate right to prevent the maltreatment and abuse of family members.[12] One example of this interest is the existence of laws in every state prohibiting child abuse and neglect. As the U.S. Supreme Court explained, governments today are expected to intervene to prevent "harm to the physical or mental health of [a] child…"[13]

These two legal principles, which accompanied the English immigrants who settled the eastern seaboard of North America, were widely accepted, although they were modified to meet the particular needs of each colony.[14]

In colonial America, the family was the most important unit of society. It was essential to preserving public order and producing economic stability.[15] After the Revolutionary War, the structure of the family was weakened by the ready availability of land, the shortage of labor, and the ease with which individuals could migrate.[16] Independence also brought a greater appreciation for the rights of individuals within the family and a corresponding decline in the outmoded view of a father's traditional rights (see Figure 9.1).[17] This trend has continued to the present time, and today mothers and fathers have equal rights and responsibilities.

Given the complexity of family law, the differences in the laws of the fifty states, and the limitations of available space, this chapter can provide only an introductory overview of the topic. This

From *Chapman v. Mitchell,* 44 A2d 392, 393 (1945)

" . . . the plaintiff [husband] is the master of his household. He is the managing head, with control and power to preserve the family relation, to protect its members and to guide their conduct. He has the obligation and responsibility of supporting, maintaining, and protecting the family and the correlative right to exclude intruders and unwanted visitors from the home despite the whims of the wife."

FIGURE 9.1 The Role of the Father—An Old-Fashioned View

discussion focuses on how families are created, the nature of the rights and responsibilities of family members, how family relationships are terminated, and emerging issues such as the evolving dispute about the nature of the family.[18]

WHAT IS A FAMILY?

Although it is apparent that a **family** always includes people in a relationship, major disagreements exist about the precise meaning of the term. There is no single universally accepted legal definition of family. The word is generally defined in operational terms by statute within a particular context (i.e., for purposes of specifying who is entitled to particular benefits).

Traditionally, families have been based on kinship and defined as the "customary legal relationship established by birth, marriage, or adoption."[19] This definition has been challenged recently on the ground that it is too rigid. Critics argue that even if they are unmarried, "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence"[20] should receive the same rights and benefits as those who have been married. Anthropologists such as Collier, Rosaldo, and Yanagisako have favored such a functional approach. They think of families as "spheres of human relationships" that "hold property, provide care and welfare, and attend particularly to the young—a sphere conceptualized as a realm of love and intimacy," as contrasted with other more "impersonal" relationships.[21]

The legal definition of family becomes important because special rights, benefits, and privileges favor family membership. Some of these benefits are intangible, such as the societal approval that accompanies birth, marriage, and to some extent adoption. Another example is the sense of identity that family members have as to who they are and how they fit into the larger society.[22] Many other benefits are more tangible. Federal law, for example, favors married taxpayers who file jointly, and it provides social security benefits to family members in some circumstances. State legislatures also provide economic and noneconomic benefits favoring family members. Although states differ greatly as to the nature and scope of the benefits provided, they often include housing rights, homestead acts that protect some family property from creditors, statutory provisions that determine inheritance rights in the event a family member dies without leaving a will, mutual spousal support obligations, evidentiary privileges that prohibit adverse spousal testimony and that protect private spousal communications, and limited tort immunities. Many employers also favor families. Employee fringe-benefit packages frequently provide family members with health and life insurance programs and 401k plans, as well as family leave and educational benefits.

Strong families perform essential tasks and help to create social and economic stability.[23] The family unit is expected to produce, and care for the needs of, the young. This includes raising children who will grow into responsible, well-adjusted, educated, and employable adults. Family members are expected to care for each other from "cradle to grave," especially in times of crisis. When families do not or cannot meet the most basic responsibilities, they have to be met at public expense.

In the following case, the City of East Cleveland sought to enforce a housing ordinance that restricted the occupancy of a dwelling unit to a single family. The ordinance defined "family" so restrictively that it was criminal for a grandmother to live under the same roof with one of her grandsons. As written, the law prohibited a grandmother, her adult son, and his child, Dale Jr., and another grandson, John (who was a first cousin of Dale Jr.), from living as a family. John had moved to his grandmother's house after the death of his mother. The grandmother, Inez Moore, was criminally charged, convicted of the crime, and sentenced to serve a jail term of five days and pay a $25 fine. Mrs. Moore appealed her conviction because she believed the statute violated her rights under the Due Process Clause of the Fourteenth Amendment. Notice the Supreme Court's sympathy for the concept of the extended family, as well as the roles played by race, culture, and economics in defining the nature of a family.

Moore v. City of East Cleveland, Ohio

431 U.S. 494
U.S. Supreme Court
May 31, 1977

Mr. Justice Powell announced the judgment of the Court, and delivered an opinion in which Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Blackmun joined

East Cleveland's housing ordinance, like many throughout the country, limits occupancy of a dwelling unit to members of a single family.... But the ordinance contains an unusual and complicated definitional section that recognizes as a "family" only a few categories of related individuals.... Because her family, living together in her home, fits none of those categories, appellant stands convicted of a criminal offense. The question in this case is whether the ordinance violates the Due Process Clause of the Fourteenth Amendment.

I

Appellant, Mrs. Inez Moore, lives in her East Cleveland home together with her son, Dale Moore, Sr., and her two grandsons, Dale, Jr., and John Moore, Jr. The two boys are first cousins rather than brothers; we are told that John came to live with his grandmother and with the elder and younger Dale Moores after his mother's death.

In early 1973, Mrs. Moore received a notice of violation from the city, stating that John was an "illegal occupant" and directing her to comply with the ordinance. When she failed to remove him from her home, the city filed a criminal charge. Mrs. Moore moved to dismiss, claiming that the ordinance was constitutionally invalid on its face. Her motion was overruled, and upon conviction she was sentenced to five days in jail and a $25 fine. The Ohio Court of Appeals affirmed after giving full consideration to her constitutional claims, and the Ohio Supreme Court denied review....

II

The city argues that our decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 (1974), requires us to sustain the ordinance attacked here.

But one overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only unrelated individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together, and in sustaining the ordinance we were careful to note that it promoted "family needs" and "family values." ...East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here.

When a city undertakes such intrusive regulation of the family ...the usual judicial deference to the legislature is inappropriate. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 ... (1974) ... But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation....

When thus examined, this ordinance cannot survive. The city seeks to justify it as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system. Although these are legitimate goals, the ordinance before us serves them marginally, at best. For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household. We need not labor the point. Section 1341.08 has but a tenuous relation to alleviation of the conditions mentioned by the city.

III

The city would distinguish the cases based on *Meyer* and *Pierce*. It points out that none of them "gives grandmothers any fundamental rights with respect to grandsons," ... and suggests that any constitutional

right to live together as a family extends only to the nuclear family—essentially a couple and their dependent children.

To be sure, these cases did not expressly consider the family relationship presented here. They were immediately concerned with freedom of choice with respect to childbearing, e.g., *LaFleur*, *Roe v. Wade, Griswold, supra*, or with the rights of parents to the custody and companionship of their own children, *Stanley v. Illinois, supra*, or traditional parental authority in matters of child rearing and education. *Yoder, Ginsberg, Pierce, Meyer, supra*. But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case….

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and], solid recognition of the basic values that underlie our society."

Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. Decisions concerning child rearing, which *Yoder, Meyer, Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of the children. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life. This is apparently what happened here.

Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State. *Pierce* struck down an Oregon law requiring all children to attend the State's public schools, holding that the Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." …By the same token the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.

Reversed.

Mr. Justice Brennan, with whom
Mr. Justice Marshall joins, concurring

I join the plurality's opinion. I agree that the Constitution is not powerless to prevent East Cleveland from prosecuting as a criminal and jailing a 63-year-old grandmother for refusing to expel from her home her now 10-year-old grandson who has lived with her and been brought up by her since his mother's death when he was less than a year old. I do not question that a municipality may constitutionally zone to alleviate noise and traffic congestion and to prevent overcrowded and unsafe living conditions, in short to enact reasonable land-use restrictions in furtherance of the legitimate objectives East Cleveland claims for its ordinance. But the zoning power is not a license for local communities to enact senseless and arbitrary restrictions which cut deeply into private areas of protected family life. East Cleveland may not constitutionally define "family" as essentially confined to parents and the parents' own children. The plurality's opinion conclusively demonstrates that classifying family patterns in this eccentric way is not a rational means of achieving the ends East Cleveland claims for its ordinance, and further that the ordinance unconstitutionally abridges the "freedom of personal choice in matters of … family life [that] is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." … I write only to underscore the cultural myopia of the arbitrary boundary drawn by the East Cleveland ordinance in the light of the tradition of the American home that has been a feature of our society since our beginning as a Nation—the "tradition" in the plurality's words, "of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children."…

…The line drawn by this ordinance displays a depressing insensitivity toward the economic and emotional needs of a very large part of our society.

In today's America, the "nuclear family" is the pattern so often found in much of white suburbia…. "The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. The "extended family" that provided generations of early Americans with social services and economic and emotional support in times of hardship, and was the beachhead for successive waves of immigrants who populated our cities, remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society. For them, compelled pooling of scant resources requires compelled sharing of a household.

The "extended" form is especially familiar among black families. We may suppose that this reflects the truism that black citizens, like generations of white immigrants before them, have been victims of economic and other disadvantages that would worsen if they were compelled to abandon extended, for nuclear, living patterns….

I do not wish to be understood as implying that East Cleveland's enforcement of its ordinance is motivated by a racially discriminatory purpose: The record of this case would not support that implication. But the prominence of other than nuclear families among ethnic and racial minority groups, including our black citizens, surely demonstrates that the "extended family" pattern remains a vital tenet of our society. It suffices that in prohibiting this pattern of family living as a means of achieving its objectives, appellee city has chosen a device that deeply intrudes into family associational rights that historically have been central, and today remain central, to a large proportion of our population…. Indeed, *Village of Belle Terre v. Boraas*, 416 U.S. 1 … (1974), the case primarily relied upon by the appellee, actually supports the Court's decision. The Belle Terre ordinance barred only unrelated individuals from constituting a family in a single-family zone. The village took special care in its brief to emphasize that its ordinance did not in any manner inhibit the choice of related individuals to constitute a family, whether in the "nuclear" or "extended" form. This was because the village perceived that choice as one it was constitutionally powerless to inhibit. Its brief stated: "Whether it be the extended family of a more leisurely age or the nuclear family of today the role of the family in raising and training successive generations of the species makes it more important, we dare say, than any other social or legal institution…. If any freedom not specifically mentioned in the Bill of Rights enjoys a 'preferred position' in the law it is most certainly the family." …The cited decisions recognized, as the plurality recognizes today, that the choice of the "extended family" pattern is within the "freedom of personal choice in matters of …family life [that] is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." …

Mr. Justice Stevens, concurring in the judgment

In my judgment the critical question presented by this case is whether East Cleveland's housing ordinance is a permissible restriction on appellant's right to use her own property as she sees fit…

There appears to be no precedent for an ordinance which excludes any of an owner's relatives from the group of persons who may occupy his residence on a permanent basis. Nor does there appear to be any justification for such a restriction on an owner's use of his property. The city has failed totally to explain the need for a rule which would allow a home-owner to have two children live with her if they are brothers, but not if they are cousins. Since this ordinance has not been shown to have any "substantial relation to the public health, safety, morals, or general welfare" of the city of East Cleveland, and since it cuts so deeply into a fundamental right normally associated with the ownership of residential property—that of an owner to decide who may reside on his or her property …East Cleveland's unprecedented ordinance constitutes a taking of property without due process and without just compensation. For these reasons, I concur in the Court's judgment.

Case Questions

1. What is the Supreme Court plurality's underlying criticism of the City of East Cleveland ordinance?
2. This case involves due process, a concept discussed in Chapter I. How does due process apply in this instance?
3. Why does Justice Stevens write a concurring opinion?

Justice Powell's plurality opinion links the legal meaning of substantive due process to moral values and the institution of the family. What is Powell's point?

CREATING FAMILY RELATIONSHIPS

An individual's family relationships are primarily created through marriage, the formation of a civil union/domestic partnership, and parenthood through birth, adoption, or (to a much lesser extent) foster care placements. Each of these relationships is examined in turn.

Marriage

When two people decide to marry, they are voluntarily seeking to enter into a number of relationships involving personal, economic, social, religious, and legal considerations. It is often said that marriage is a contract, and to an extent that is true, but it is unlike other civil contracts because of the extent of governmental regulation. In 1888 the U.S. Supreme Court noted that "[other] contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[24]

Marriage is regulated by the states, and each state determines who may marry, the duties and obligations of marriage, and how marriages are terminated. Although eligibility requirements for marriage differ from state to state, they generally include minimum age thresholds, prohibitions on marriage between close relatives, monogamy (it is illegal to marry someone who is already married), and competency (neither party can be mentally incompetent). Furthermore, as of this writing, except in Massachusetts, Connecticut, Iowa, New Hampshire, and Vermont, the parties must not be of the same sex. A U.S. District Court's ruling that California's Proposition 8, which prohibits same-sex marriages, is unconstitutional was recently appealed to the U.S. Court of Appeals for the Ninth Circuit. It is widely expected that the losing party in that lawsuit will petition the U.S. Supreme Court for certiorari.

Parties seeking to marry must be acting voluntarily. They indicate their consent to the marriage by jointly applying for a license. Issuance of the license certifies that the applicants have complied with the relevant marriage eligibility requirements. Although states have broad rights to regulate marriage, there are constitutional limitations on this power. This was demonstrated in 1967 in a case argued before the U.S. Supreme Court involving a Virginia criminal statute prohibiting interracial marriages. In the case of *Loving v. Virginia*, the Supreme Court was asked to determine whether such a statute was constitutionally permissible under the Fourteenth Amendment's Due Process and Equal Protection Clauses. The court ruled that the "freedom to marry a person of another race resides with the individual and cannot be infringed by the state."

Loving v. Commonwealth of Virginia

388 U.S. 1
U.S. Supreme Court
June 12, 1967

Mr. Chief Justice Warren delivered the opinion of the Court

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia antimiscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes and, after modifying the sentence, affirmed the conviction. The Lovings appealed this decision … the two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 20–58 of the Virginia Code:

> "*Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20–59."

Section 20–59, which defines the penalty for miscegenation, provides:

> "*Punishment for marriage*.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

…The Lovings have never disputed in the course of this litigation that Mrs. Loving is a "colored person" or that Mr. Loving is a "white person" within the meanings given those terms by the Virginia statutes.

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person," a prohibition against issuing marriage licenses until the issuing

official is satisfied that the applicants' statements as to their race are correct, certificates of "racial composition" to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against racial intermarriage.

I

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim v. Naim* … as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy…. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power … the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment…. Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose…. In the case at bar, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race…. There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." …At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," …and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose …which makes the color of a person's skin the test of whether his conduct is a criminal offense." …

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival…. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the

principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed. It is so ordered. Reversed.

Case Questions

1. Virginia argued to the Supreme Court that its miscegenation statute did not constitute an invidious classification scheme based on race. What was the basis for this position?
2. What response did the Supreme Court make to Virginia's restrictions on an individual's right to decide whether to marry a person of another race?
3. Do you see any merit to the argument often made today that statutes which restrict marriage to heterosexual couples deny same-sex couples wishing to marry the equal protection of the law?

When *Loving v. Virginia* arrived at the U.S. Supreme Court, Virginia and fifteen other states had statutes on the books that made it a crime for blacks and whites to intermarry. These statutes, called *antimiscegenation laws*, were common in former slave states, and had existed in Virginia since Colonial times. The justices of the U.S. Supreme Court declared. "there is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." Which ethical tradition is most reflected in the Court's opinion in this case?

INTERNET TIP

The Supreme Court in 1978 struck down a Wisconsin statute that required Wisconsin residents who were also parents and who were not current in their child support payments to obtain a court order granting them permission to marry. The court concluded that the statute violated the requirements of the Equal Protection Clause of the Fourteenth Amendment. Persons interested can go to the Internet materials for this chapter and read *Zablocki v. Redhail*.

Marriage Solemnization Ceremonies

States generally require that persons intending to marry solemnize their union with either a civil or a religious ceremony. The solemnization ceremony provides tangible and public evidence that a marriage has occurred. It demonstrates that the parties mutually desire to marry and are legally qualified.[25]

Common Law Marriages

Some jurisdictions recognize privately created, informal marriages by agreement that dispense with licenses and solemnization ceremonies.[26] They are called **common law marriages**.

Although each state that recognizes such marriages has its own particular requirements, most require that the parties be of age, and unmarried. Most important, the parties must have established the relationship of husband and wife, live together as a married couple, and present themselves to the world as being married. Living together, jointly owning property, and having a child are insufficient acts, in themselves, to establish a common law marriage. Montana and Iowa have statutes protecting the validity of such marriages.[27] Other jurisdictions recognize their validity by court decisions. Georgia, Oklahoma, Idaho, Pennsylvania, and Ohio only recognize common law marriages that were formed

Title 1 United States Code § 7. Definition of "marriage" and "spouse"

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

FIGURE 9.2 Definition of "Marriage" and "Spouse" under Federal Law

prior to a specified date, and New Hampshire only recognizes such marriages in conjunction with probating an estate.

Civil Unions, Domestic Partnerships, and Same-Sex Marriage

At the present time, America's ongoing political, social, and cultural disagreement about the definition of marriage continues. This disagreement reflects the reasons for having a federal form of government. It allows for states to differ in significant ways. If one examines how the states line up as to **same-sex marriages**, it is clear that most Americans favor limiting marriage to heterosexual relationships. However, there is considerable support for expanding the traditional concept of marriage in the New England region of the country. Only five states have declared themselves as supporting the concept of same-sex marriages. It was the judiciary that decided the issue in 2003 in Massachusetts (*Goodrich v. Department of Public Health,* 798 N.E.2d 94); in 2005 in Connecticut (*Kerrigan v. Commissioner of Public Health,* 957 A.2d 407); and in 2009 in Iowa (*Varnum v. Brien,* 763 N.W.2d 862). Same-sex marriage laws have been enacted in Vermont and New Hampshire. Such marriages became legal in Vermont on September 1, 2009 (Title 15 V.S.A Sec.8) and in New Hampshire on January 1, 2010 (Title 43 Chapter 457:1)

Several states that continue to prohibit same-sex marriages have enacted laws that permit same-sex couples to enter into state-recognized "**civil unions**" or "**domestic partnerships**." These laws, depending on the state, provide qualifying same-sex couples with some economic benefits and privileges. The scope of the benefits and privileges so conferred vary by jurisdiction. The U.S. Code (the federal statutes) defines marriage in the traditional manner as indicated in Figure 9.2.

It is also important to note that federal law does not recognize same-sex couples as being married. Thus same-sex couples who were lawfully married in New Hampshire and other states recognizing same-sex marriages are not recognized as married by the federal government, and are not entitled to marital benefits under the social security and federal income tax laws (see Figure 9.3).

The Defense of Marriage Acts and Recognition Issues

Although the parameters of the U.S. Constitution's **Full Faith and Credit Clause** (Article IV, Section I) with respect to the enforcement of same-sex marriages remains undefined, all states have traditionally recognized persons as married who were parties to a valid marriage in some other state. But in the aftermath of Vermont's **Civil Union law** and Massachusetts' approval of gay marriage, both Congress and many state legislatures have had second thoughts about this practice.

The federal **Defense of Marriage Act** defines the term "effect," a term used in the U.S. Constitution's Full Faith and Credit Clause, as not requiring any state, against its will, to recognize same-sex marriages as valid. The states overwhelmingly agree with Congress. Thirty-seven states have adopted

Defense of Marriage Act—28 USC §1738C

§1738C. Certain acts, records, and proceedings and the effect thereof

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

(Added Sept. 21, 1996, P. L. 104-199, '2(a), 110 Stat. 2419.)

FIGURE 9.3 Excerpt from the Defense of Marriage Act—28 USC § 1738C

state "Defense of Marriage" statutes and thirty states have constitutional amendments that prohibit same-sex marriages. This opposition creates serious legal problems for same-sex couples because most states that favor "traditional marriage" will not recognize same-sex marriages and civil unions that were created in other states. See *Varnum v. Brien*, 763 N.W. 2d 862.

The next case is illustrative. John Langan and his same-sex partner formally entered into a Vermont civil union. Langan's partner subsequently died after being struck by a car while in New York. Langan then sued St. Vincent's Hospital seeking damages for the wrongful death of his partner. The hospital moved to dismiss the case, claiming that Langan had no standing to bring the suit. The hospital appealed the trial court's ruling in favor of Langan to New York's intermediate appellate court, the Appellate Division of the Supreme Court of New York (which, despite its name, is not New York's court of last resort—that court is called the New York Court of Appeals).

John Langan v. St. Vincent's Hospital
25 A.D.3d 90
Appellate Division of the Supreme Court of New York, Second Department
October 11, 2005

Lifson, J.

The underlying facts of this case are not in dispute. After many years of living together in an exclusive intimate relationship, Neil Conrad Spicehandler (hereinafter Conrad) and John Langan endeavored to formalize their relationship by traveling to Vermont in November 2000 and entering into a civil union. They returned to New York and continued their close, loving, committed, monogamous relationship as a family unit in a manner indistinguishable from any traditional marital relationship.

In February 2002 Conrad was hit by a car and suffered a severe fracture requiring hospitalization at the defendant St. Vincent's Hospital of New York. After two surgeries Conrad died. The plaintiff commenced the instant action which asserted …a claim …to recover damages for the decedent's wrongful death. The defendant moved …to dismiss that cause of action on the ground that the plaintiff and the decedent, being of the same sex, were incapable of being married and, therefore, the plaintiff had no standing as a surviving spouse to institute the present action. The Supreme Court …denied that motion and the instant appeal ensued…. An action alleging wrongful death, unknown at common law, is a creature of statute requiring strict adherence to the four corners of the legislation…. The relevant portion of EPTL 5-4.1 [Estates, Powers, and Trusts Law] provides as follows:

> "The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an

> action to recover damages for a wrongful act, neglect or default which caused the decedent's death."

…The class of distributees is set forth in EPTL 4-1.1. Included in that class is a surviving spouse. At the time of the drafting of these statutes, the thought that the surviving spouse would be of the same sex as the decedent was simply inconceivable and certainly there was no discriminatory intent to deny the benefits of the statute to a directed class. On the contrary, the clear and unmistakable purpose of the statute was to afford distributees a right to seek compensation for loss sustained by the wrongful death of the decedent….

Like all laws enacted by the people through their elected representatives, EPTL 5-4.1 is entitled to a strong presumption that it is constitutional…. The plaintiff claims that application of the statute in such a manner as to preclude same-sex spouses as potential distributees is a violation of the Equal Protection Clauses of the Constitutions of the United States and the State of New York. However, any equal protection analysis must recognize that virtually all legislation entails classifications for one purpose or another which results in the advantage or disadvantage to the affected groups…. In order to survive constitutional scrutiny a law needs only to have a rational relationship to a legitimate state interest even if the law appears unwise or works to the detriment of one group or the other…. Thus, the plaintiff must demonstrate that the denial of the benefits of EPTL 5-4.l to same-sex couples is not merely unwise or unfair but serves no legitimate governmental purpose. The plaintiff has failed to meet that burden. In the absence of any prior precedent, the court would have to analyze whether the statute imposes a broad and undifferentiated disadvantage to a particular group and if such result is motivated by an animus to that group…. However, in this instance, it has already been established that confining marriage and all laws pertaining either directly or indirectly to the marital relationship to different sex couples is not offensive to the Equal Protection Clause of either the Federal or State constitutions. In *Baker v. Nelson* …the Supreme Court of Minnesota held that the denial of marital status to same-sex couples did not violate the Fourteenth Amendment of the United States Constitution. The United States Supreme Court refused to review that result…. The plaintiff herein cannot meet his burden of proving the statute unconstitutional and does not refer this court to any binding or even persuasive authority that diminishes the import of the Baker precedent.

On the contrary, issues concerning the rights of same-sex couples have been before the United States Supreme Court on numerous occasions since Baker and, to date, no justice of that court has ever indicated that the holding in Baker is suspect. Although in *Lawrence v. Texas* …the Supreme Court ruled that laws criminalizing activity engaged in by same-sex couples and potentially adversely affecting their liberty interests could not withstand constitutional scrutiny, every justice of that court expressed an indication that exclusion of marital rights to same-sex couples did promote a legitimate state interest. Justices Scalia, Thomas, and Rehnquist concluded that disapprobation of homosexual conduct is a sufficient basis for virtually any law based on classification of such conduct. The majority opinion of Justices Kennedy, Stevens, Ginsberg, Souter, and Breyer declined to apply an equal protection analysis and nonetheless expressly noted that the holding (based on the penumbra of privacy derived from *Griswold v. Connecticut* …) did not involve or require the government to give formal recognition to any relationship that homosexuals wish to enter…. Justice O'Connor, in her concurring opinion based on an equal protection analysis, specifically excluded marriage from the import of her conclusions, stating simply "…other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." …

Similarly, this court, in ruling on the very same issue …not only held that the term "surviving spouse" did not include same-sex life partners, but expressly stated as follows:

> Based on these authorities [including Baker …], we agree with Acting Surrogate Pizzuto's conclusion that 'purported [homosexual] marriages do not give rise to any rights …pursuant to … EPTL 5-1.1 [and that] no constitutional rights have been abrogated or violated in so holding'"

…. Although issues involving same-sex spouses have been presented in various contexts since the perfection of this appeal, no court decision has been issued which undermines our obligation to follow our own precedents. Recently, in the somewhat analogous case of *Valentine v. American Airline* … the Appellate Division, Third Department, in denying spousal status to same-sex couples for purposes of Workers Compensations claims, cited both Baker and Cooper with approval. Thus, no cogent reason to depart from the established judicial precedent of both the courts of the United States and the courts of the State of New York has been demonstrated by the plaintiff or our dissenting colleagues.

The fact that since the perfection of this appeal the State of Massachusetts has judicially created such right for its citizens is of no moment here since the plaintiff and the decedent were not married in that jurisdiction. They opted for the most intimate sanctification of their relationship then permitted, to wit, a civil union pursuant to the laws of the State of Vermont. Although the dissenters equate civil union relationships with traditional heterosexual marriage, we note that neither the State of Vermont nor the parties to the subject relationship have made that jump in logic. In following the ruling of its Supreme Court in the case of *Baker v. State of Vermont* …the Vermont Legislature went to great pains to expressly decline to place civil unions and marriage on an identical basis. While affording same-sex couples the same rights as those afforded married couples, the Vermont Legislature refused to alter traditional concepts of marriage (i.e., limiting the ability to marry to couples of two distinct sexes)…. The import of that action is of no small moment. The decedent herein, upon entering the defendant hospital, failed to indicate that he was married. Moreover, in filing the various probate papers in this action, the plaintiff likewise declined to state that he was married. In essence, this court is being asked to create a relationship never intended by the State of Vermont in creating civil unions or by the decedent or the plaintiff in entering into their civil union. For the same reason, the theories of Full Faith and Credit and comity have no application to the present fact pattern.

The circumstances of the present case highlight the reality that there is a substantial segment of the population of this State that is desirous of achieving state recognition and regulation of their relationships on an equal footing with married couples. There is also a substantial segment of the population of this State that wishes to preserve traditional concepts of marriage as a unique institution confined solely to one man and one woman. Whether these two positions are not so hopelessly at variance (to all but the extremists in each camp) to prevent some type of redress is an issue not for the courts but for the Legislature. Unlike the court, which can only rule on the issues before it, the Legislature is empowered to act on all facets of the issue including, but not limited to, the issues of the solemnization and creation of such relationships, the dissolution of such relationships and the consequences attendant thereto, and all other rights and liabilities that flow from such a relationship. Any contrary decision, no matter how circumscribed, will be taken as judicial imprimatur of same-sex marriages and would constitute a usurpation of powers expressly reserved by our Constitution to the Legislature. Accordingly, the order must be reversed insofar as appealed from….

ORDERED that the order is reversed insofar as appealed from …and the cause of action to recover damages for wrongful death is dismissed.

Fisher, J. dissents and votes to affirm the order

The majority's forceful defense of the Legislature's prerogative to define what constitutes a marriage in New York seems to me to miss the point. This case is not about marriage. The plaintiff does not claim to have been married to the decedent, and clearly he was not, either under the laws of New York or in the eyes of Vermont.

What this case is about is the operation of a single statute, New York's wrongful death statute that controls access to the courts for those seeking compensation for the loss of a pecuniary expectancy created and guaranteed by law. The statute provides such access to a decedent's surviving spouse because the wrongful death of one spouse deprives the other of an expectation of continued support which the decedent would have been obligated by law to provide…. But, as applied here, the statute does not permit the surviving member of a Vermont civil union to sue for wrongful death, even though, like spouses, each member of the civil union is obligated by law to support the other…. The principal question presented, therefore, is whether, as it currently operates to permit spouses but not partners in a Vermont civil union to sue for wrongful death, the law draws a distinction between similarly—situated persons on the basis of sexual orientation and, if so, whether the distinction bears some rational relationship to any conceivable governmental objective promoted by the statute. Because I conclude that the statute as applied here does classify similarly-situated persons on the basis of sexual orientation without a rational relationship to any conceivable governmental purpose furthered by the statute, I respectfully dissent.

Case Questions

1. What was the plaintiff's claim in the intermediate appellate court?
2. What was the appellate court's decision?
3. What rationale did the court give for its decision?

Adoption

Informal adoptions existed in this country from its earliest days, and into the 1860s orphans were often apprenticed to masters so that they could pay for their room and board.[28] Since adoption was unknown to the common law, adoption law in the United States is traced to 1851, when Massachusetts enacted the first statute.[29]

Although modern statutes permit the adoption of adults, subject to some exceptions,[30] most adoptions involve children. **Adoption** is both a social and a legal process by which the rights and duties accompanying the parent-child relationship are transferred from birth parents to adoptive parents. State adoption statutes were originally intended primarily to help qualified childless couples "normalize" their marriages,[31] but today the statutes encourage adoption in part to provide families for many abandoned, abused, deserted, neglected, or unwanted children, who might otherwise need to be supported at public expense. Adoptions can be classified as either independent or agency placements. In **agency adoptions**, the birth parents consent to the termination of their parental rights and surrender the child to an adoption agency that selects the adoptive parent(s) and places the child. **An independent adoption** takes place when the birth parent(s) themselves interview prospective adoptive parents and make a selection without agency involvement. Some states prohibit independent adoptions and require that agencies participate in the process.

Becoming an adoptive parent is highly regulated, and the procedures vary by state and by the type of adoption. It often makes a difference whether the adoption involves an agency or is independent, is between relatives, or is of an adult. In adoptions between related persons, for example, where a stepparent wishes to adopt his or her spouse's child, the investigative process is often simplified or eliminated. In an independent adoption, the nature and scope of any investigation is left up to the birth parent(s). They interview prospective adoptive parents and place the child without agency participation. When a public or private agency licensed by the state places a child for adoption, the law usually requires close scrutiny. Adoptive parents who are unrelated to an adopted child are carefully investigated to determine whether the placement is suitable and in the best interests of the child. This investigation is often very detailed and probes most areas of an applicant's life. The probe results in a report that includes information on the applicant's race, age, marital status, and financial condition, the "adequacy of the home environment," and information about very personal matters such as religious preferences, current romantic interests, and sexuality.[32]

Matching

The investigative process makes it possible for agencies to rank prospective adoptive parents in terms of how closely they match the agency's conception of the ideal family for the child. Those who most closely fit the profile are often matched with the most "desirable" adoptees.[33] Petitioners who are married generally rank higher than those who are unmarried, younger applicants ranked higher than older, able bodied higher than disabled, and heterosexuals higher than homosexuals.[34]

Interracial adoption has long been a topic heavily laden with emotion. Most of the fury arises when whites seek to adopt nonwhite children. Questions are frequently raised about whether white adoptive parents have the ability to develop fully a nonwhite child's racial identity and appreciation for the richness of his or her culture.[35]

Congress, however, declared the nation's public policy as to interracial adoption in 1994 when it enacted the **Multiethnic Placement Act** (MEPA) of 1994, and again in 1996 when it amended MEPA by enacting the **Interethnic Adoption Provisions** (IEP). The two acts are generally known as the MEPA-IEP; these laws essentially

1. Prohibit adoption agencies that receive federal funds from using an aspiring adoptive or foster parent's race, color, or national origin against him or her for purposes of denying such parent the placement of a child.

2. Make it illegal to delay or deny a child an adoptive or foster care placement because of his or her race, color, or national origin.

The MEPA-IEP intends that placement decisions be made on a case-by-case basis, and cultural needs cannot routinely be used to prevent white adoptive parents, for example, from adopting nonwhite children. Congress's intent could not be more clear, because it included a provision in the IEP which repealed language in the original MEPA that expressly permitted agencies to consider a "child's cultural, ethnic, and racial background and the capacity of the prospective foster or adoptive parents to meet the needs of a child from this background" in the making of placement decisions. Many states had to amend their adoption statutes in order to comply with MEPA-IEP. An example of a post MEPA-IEP state adoption statute can be seen in Figure 9.4. Notice how the Arkansas statute prohibits discrimination on the basis of race, color, or national origin, creates legal preferences favoring adult relatives over nonrelatives, and authorizes religious matching.

Despite Congress' clear definition of public policy, it is difficult to determine in practice the extent to which the law is being followed. How can prospective white adoptive parents, who have been told that because of the child's cultural needs they will not be permitted to adopt a nonwhite child, know whether this justification is merely a pretext for invidious racial discrimination? It is likely that categorical discrimination in which placements are based on legally impermissible factors still occur. Similarly, discrimination in placements based on religion, educational levels, and socioeconomic status are other areas in which informal "blanket" policies may continue to exist.

9-9-102. Religious preference—Removal of barriers to interethnic adoption—Preference to relative caregivers for a child in foster care.

(a) In all custodial placements by the Department of Human Services in foster care or investigations conducted by the Department of Human Services pursuant to court order under § 9-9-212, preferential consideration shall be given to an adult relative over a nonrelated caregiver provided that the relative caregiver meets all relevant child protection standards and it is in the child's best interest to be placed with the relative caregiver.

(b) The Department of Human Services and any other agency or entity which receives federal assistance and is involved in adoption or foster care placement shall not discriminate on the basis of the race, color, or national origin of the adoptive or foster parent or the child involved nor delay the placement of a child on the basis of race, color, or national origin of the adoptive or foster parents.

(c) If the child's genetic parent or parents express a preference for placing the child in a foster home or an adoptive home of the same or a similar religious background to that of the genetic parent or parents, the court shall place the child with a family that meets the genetic parent's religious preference, or if a family is not available, to a family of a different religious background which is knowledgeable and appreciative of the child's religious background.

(d) The court shall not deny a petition for adoption on the basis of race, color, or national origin of the adoptive parent or the child involved.

FIGURE 9.4 Arkansas Code Section 9-9-102

The U.S. Supreme Court has strongly indicated that government should remain neutral in religious matters,[36] and has supported parental choice regarding the religious upbringing of children. But the Court has not attempted to answer, as a general proposition, whether religious matching is in the best interest of adoptive children. (see Figure 9.4).

As we have just seen, state statutes sometimes express a preference that adoptive parents be of the same religion as the adoptee or birth parent(s). Should adoptive parents who are of mixed religions, who adhere to obscure faiths, or who are atheists, be legally disadvantaged in placement decisions?[37] Should adoptive parents have the right to choose the religion of their adoptive child, or must they raise the child in the faith chosen by the birth parents? Does it matter whether the adoptive child's religion differs from that of the other members of the adoptive family?[38] Questions like these are easy to ask, but they raise policy issues that are difficult to resolve.

Another area of current controversy involves the placement of adoptees with gay and lesbian adoptive parents. Although many states permit single gays and lesbians to adopt, the laws are unclear as to adoptions by same-sex couples. Florida, explicitly prohibits gay/lesbian adoptions (see Figure 9.5), and Arkansas requires all adoptive parents to be married, which is a back-door way of precluding same-sex couples from adopting.

The Florida statute's constitutionality was affirmed by U.S. Court of Appeals for the Eleventh Circuit in the case of *Steven Lofton v. Secretary of the Department of Children & Family Services*. This court concluded that the determination of public policy regarding gay and lesbian adoptions did not involve the federal constitution and was a matter for the state legislature.

INTERNET TIP

Interested readers can find an edited version of *Steven Lofton v. Secretary of the Department of Children & Family Services* on the textbook's website.

Where no statutes prevent them, gay/lesbian adoptions have been permitted, at least for the most difficult-to-place children.[39] However, the preference of agencies for married couples is sometimes used as a convenient justification for opposing placements that are really rejected because the adoptive parents are gays or lesbians. The stated reasons for rejecting gays and lesbians as adoptive parents are often based on the perceived incompatibility of the "'gay lifestyle' with social mores and on a fear that an adoptive child would be exposed to an increased risk of contracting AIDS."[40] Some courts have been more flexible. One of the earliest was the Massachusetts Supreme Judicial Court, which ruled in the 1993 case *Adoption of Tammy* that two lesbians could jointly become adoptive parents.

INTERNET TIP

Interested readers will find *Adoption of Tammy*, 619N.E.2d 315 (1993), with the Chapter IX Internet materials on the textbook's website.

The next case, *Boseman v. Jarrell,* when viewed narrowly, is simply another legal battle between two parents who, after splitting up, fight about who should have custody and visitation rights with their son. Viewed more broadly, this case is also about the right of lesbians to adopt.

The parties to this action began a same-sex relationship in 1998 and had been domestic partners. Because from the early days of their

Fla. Stat. § 63.042(3):

"No person eligible to adopt under this statute may adopt if that person is a homosexual."

FIGURE 9.5 Florida Statutes Annotated Sec. 63.042

relationship both parties aspired to be parents, Melissa Jarrell was artificially inseminated and gave birth to a son in 2002. Their personal relationship strong at that time, the parties agreed that Julia Boseman would become the child's co-mother through adoption. One significant legal hurdle, however, stood in their path. A state statute provided that in adoptions, the birth mother's parental rights had to be terminated. Jarrell filed suit asking a court to waive this statutory provision. She was successful in 2005 when a court ordered the waiver and declared both women to be the little boy's parents. The parents subsequently ended their personal relationship and separated. Melissa, after the break-up, no longer wanted Julia to have contact with the child. Julia, still the child's parent, felt it necessary to go to court to establish firmly her right to joint custody of the child and visitation rights. The trial court ultimately ruled that Melissa and Julia would jointly have custody and that the child's primary placement would be with Melissa. Melissa appealed the trial court's decision to the intermediate court of appeals. She claimed, among other things, that the trial court had wrongfully refused to declare the adoption decree void *ab initio* (from the beginning).

Julia Catherine Boseman v. Melissa Ann Jarrell
681 S.E.2d 374
Court of Appeals of North Carolina
August 18, 2009

Bryant, Judge

…Jarrell first contends that the trial court erred in denying her … motion … that it [had]… "jurisdiction to declare void an Order or Decree of another District Court Judge sitting in another Judicial District of North Carolina." … We agree.

Here, the trial court denied Jarrell's motion under the misapprehension that it lacked the necessary jurisdiction to declare the adoption decree void. This constituted an abuse of discretion by a failure to exercise the discretion conferred by law and we vacate the trial court's …order. In order to expedite resolution of this matter in the best interest of the minor involved, we next address defendant's second argument: whether the adoption decree was in fact void.

Jarrell moved for relief…contending that the adoption decree entered by the District Court in Durham County ("the adoption court") was void ab initio [from the beginning]. After careful review, we conclude that the adoption decree, even if erroneous or contrary to law, was not void….

Jarrell, a party to the adoption, cannot question its validity based on "any defect or irregularity, jurisdictional or otherwise." …. Therefore, the only avenue by which Jarrell can contest the adoption is to show that it was void *ab initio*, a legal nullity….

Our State's case law distinguishing void versus voidable judgments is easy to state, but often thorny to apply…. "To have validity a judgment must be rendered by a court which has authority to hear and determine the questions in dispute and control over the parties to the controversy or their interest in the property which is the subject matter of the controversy…."

Here, the parties essentially agree on the law as stated above, but differ in their portrayal of the actions of the adoption court. Jarrell argues that the adoption court "had no statutory authority to enter [a] same-sex Adoption Decree," and thus acted in excess of its jurisdiction. Boseman contends that the adoption court had subject matter jurisdiction to handle adoption proceedings involving North Carolina residents pursuant to the explicit terms of Chapter 48, and that any deviations from that Chapter's mandates are, at most, contrary to law. We must look to the language of Chapter 48 as an expression of our General Assembly's intent to determine whether the irregularities in the adoption here exceeded the adoption court's jurisdiction or were merely contrary to law.

Chapter 48 of our General Statutes covers adoptions and establishes subject matter jurisdiction in these special proceedings. The version of section 48-2-100, titled "Jurisdiction," in force at the time of the adoption at issue here…, provided, in pertinent part, that jurisdiction over adoption proceedings

commenced under this Chapter exists if, at the commencement of the proceeding:

> (1) The adoptee has lived in this State for at least the six consecutive months immediately preceding the filing of the petition or from birth, and the prospective adoptive parent is domiciled in this State; or
>
> (2) The prospective adoptive parent has lived in or been domiciled in this State for at least the six consecutive months immediately preceding the filing of the petition.

… Thus, statutory subject matter jurisdiction is determined by the residence of the parties to the adoption. In this case, Jarrell, Boseman and the minor child had all resided in Wilmington, North Carolina for at least several years prior to the adoption proceeding.

Jarrell counters that Chapter 48 does not permit "same-sex adoptions,"… and indeed that phrase appears nowhere in the chapter. Chapter 48 specifically addresses three basic types of adoptions of minors: (1) agency placements, in which the agency has obtained custody of the minor through parental relinquishment or the termination of parental rights; (2) direct placement of a child, in which "a parent or guardian … personally select[s] a prospective adoptive parent," either with or without the assistance of third-parties; and (3) adoptions by step-parents…

The parties here sought to arrange a direct placement adoption with certain variations from the relevant statutory provisions…. In her motion to the adoption court, Jarrell explained that she wanted her child to have the benefits and protections of "two legal parents" and that obligating Boseman to provide these protections to her child was in the child's best interest and thus consistent with purposes of Chapter 48. The adoption court, after reviewing oral arguments, legal memoranda, a home study and other documents, agreed that the adoption would be in the minor's best interest, granted the waiver, and subsequently entered the decree of adoption. While the factual circumstances of the parties' relationship is discussed in the order granting the waiver, no mention of the parties' sexual orientation is contained in the decree, which merely notes that the petitioner (Boseman) was a "single female." Thus, the adoption here was not explicitly a same-sex adoption; it is better characterized as a direct placement adoption with a waiver of the full terms of parental consent and legal obligations specified in N.C.G.S. §§ 48-1-106(c) and 48-3-606.

While we acknowledge that section 48-3-606 is titled "Content of consent; mandatory provisions," the intent and purpose of subsection (9) quoted above are to ensure that a biological parent or guardian is fully informed about the ramifications of adoption and are intended for the protection of that consenting individual, not the minor…. Similarly, under N.C.G.S. § 48-1-106(c), an adoption decree severs the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents. After the entry of a decree of adoption, the former parents are relieved of all legal duties and obligations due from them to the adoptee, except that a former parent's duty to make past-due payments for child support is not terminated, and the former parents are divested of all rights with respect to the adoptee.

As with section 48-3-606(9), any waiver of this provision accrues to the detriment only of the would-be former parent, while actually conferring benefits on the minor who gains an additional adult who is legally obligated to his care and support. Again, Jarrell herself makes this point in her motion for waiver to the adoption court where she notes that the waiver will avail the minor of additional health and governmental benefits, as well as provide stability and "a legal framework for resolving any disputes regarding custody or visitation that may arise after the adoption." This is exactly the end achieved by the adoption in this case. Following unforeseen circumstances, namely the end of the parties' domestic partnership, the minor's interests, both financial and emotional, are protected. Because of the adoption here, the minor will still be entitled to the support and care of the two adults who have acted as his parents and they will both remain fully obligated to his welfare. This result is fully in accord with the stated intent of Chapter 48…

…Here, the evidence before the adoption court tended to show that Boseman and Jarrell planned the conception and birth of the minor and both had acted in a parental capacity providing the minor with "love, care, security, and support." In addition, the General Assembly in Chapter 48 seeks "to promote the integrity and finality of adoptions" and "to encourage prompt, conclusive disposition of adoption proceedings…" Further, our General Assembly has directed that:

> (c) In construing this Chapter, the needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor.
>
> (d) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies.

…. Thus, here we must put the minor's "needs, interests, and rights" above those of either Boseman or Jarrell. Finally, because "the right of adoption is not only beneficial to those immediately concerned but likewise to the public, construction of the statute should not be narrow or technical … [but rather] fair and reasonable … where all material provisions of the statute have been complied with…." Having reviewed the intent and purposes of Chapter 48, as well as the specific provisions at issue here, we conclude that the adoption court acted within its authority in granting the direct placement adoption decree, and that the grant of waiver of certain provisions was, at most, erroneous and contrary to law. Thus, the adoption decree is not void. We remand to the trial court for entry of an order containing the required findings of fact and denying defendant's Rule 60(b)(4) on grounds that the adoption decree was not void and that N.C.G.S. § 48-2-607(a) prohibits defendant from contesting its validity.

We note that both parties have made extensive arguments related to the same-sex nature of their former relationship and whether our State and its agencies sanction adoptions by same-sex couples. While acknowledging that such issues are matters of great public interest and of personal significance to Boseman and Jarrell, we emphasize that the specific nature of the parties' relationship or marital status was not relevant to resolution of the instant appeal. The same result would have been reached had the parties been an unmarried heterosexual couple. While Chapter 48 does not specifically address same-sex adoptions, these statutes do make clear that a wide range of adoptions are contemplated and permitted, so long as they protect the minor's "needs, interests, and rights…."

…The order dismissing the declaratory judgment for lack of jurisdiction is vacated and the matter is remanded for entry of an order consistent with this opinion. In addition, based on the validity of the adoption, the trial court did not err in ruling that Boseman was a legal parent of the child. This argument by Jarrell is overruled….

Conclusion

Because the adoption decree was not void and Jarrell may not challenge its validity, Boseman is a legal parent of the child. As discussed above, we affirm in part, and vacate and remand in part for entry of orders consistent with this opinion.

Case Questions

1. Jarrell made essentially two arguments on appeal—what were they?
2. What conclusion did the appeals court reach with respect to each issue?

Is it morally right for states to disqualify gay men and lesbians categorically from becoming adoptive parents because of moral considerations?

Boseman v. Jarrell Update

The North Carolina Supreme Court has agreed to hear oral arguments in this case during September 2010. That will be too late for inclusion in this textbook. After that court has announced its decision, it will be posted with the Internet materials for Chapter IX on the textbook's website.

Voluntary/Involuntary Adoption

Adoptions may be classified as voluntary or involuntary. Involuntary adoptions occur after a court has formally terminated the parental rights of the birth parent(s) on grounds such as abuse, abandonment, or neglect. In such a situation, an agency is generally responsible for placement. If the adoption is voluntary, the birth parent(s) consent to the termination of their parental rights and surrender the child either to an agency for placement or to adoptive parents of their choosing.

The Adoption Petition

The adoption process starts with the filing of a petition for adoption by the adoptive parents and the serving of a summons on all affected parties (the

child, the agency, birth parents, guardian, etc.). In voluntary adoptions, care must be taken to account for all relevant parties, and obtaining the consent of necessary third parties is a major consideration. When both birth parents have an intact marriage, they must jointly consent to a proposed adoption of their child. If the parents are not married to each other, and both the noncustodial and custodial parents have taken an active role in fulfilling parental obligations, each has the right to withhold or grant consent to the adoption of their child.

The birth parents and adoptive parents are not the only individuals who have legal interests in adoptions. An adoptee, if over a specified age (often twelve or fourteen), has a right to refuse to be adopted. Additionally, grandparents may have legally enforceable visitation rights even after the birth father's parental rights have been terminated. We will see more about this topic later on in this chapter when addressing child custody and visitation rights after a divorce.

In addition to providing notice to affected individuals, the petition for adoption will also indicate whether the parental rights have been voluntarily or involuntarily terminated and will allege that the adoption is in the best interests of the child.

INTERNET TIP

Interested readers can find an edited version of *Lehr v. Robertson,* a case in which the U.S. Supreme Court ruled no consent to adopt is required from a noncustodial parent who has only sporadically visited and supported his child and who has otherwise shown little or no interest in functioning as a parent, online at the textbook's website.

Interim Orders

After the adoption petition has been filed, the parties properly served, and all necessary consents obtained, the court will frequently issue interim orders. In voluntary adoptions the court will order the birth parents' rights terminated and grant the adoptive parents temporary legal custody of the child, pending issuance of the final decree. A hearing can then be scheduled to take testimony about whether the final decree of adoption should be approved by the court. State statutes usually require that the adoptive parents have temporary custody of the adopted child for a statutorily determined minimum period of time so that the court will have evidence that the adoptive parents and child are making a successful adjustment. This waiting period is usually waived in related adoptions. After the waiting time has passed, the court will enter a final decree declaring that the adopted person is now the child of the petitioner(s), and a new birth certificate will be issued to reflect this change.[41]

Confidentiality and Privacy Considerations in Adoptions

One of the most important decisions in adoptions is the extent to which, if at all, the adoptive parent(s) and the birth parent(s) share identification information with one another. This decision as to whether the adoption will be "open." "closed," or something in between has great significance to all involved parties. Whether the adopted child will be able to learn the identity of the birth parents varies from state to state. In recent years, there has been some movement away from permanently sealing such information. Today, although many states maintain the confidentiality of adoption records, the trend is toward more openness.[42] Almost all states have established some type of registry system whereby consenting birth parents and their subsequently adopted children can mutually indicate a desire for contact.[43] Adoptees frequently wish to learn more about their birth parents, not only out of curiosity, but also to gain information about their parents' medical histories.

INTERNET TIP

Readers interested in learning more about state laws regarding open/closed adoptions should visit the following website: http://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.cfm

Foster Care

According to U.S. Department of Health and Human Services, preliminary estimates based on fiscal year 2008 **Adoption and Foster Care Analysis and Reporting System (AFCARS)** data indicate that 463,000 children are currently in foster care in the United States.[44] Some parents voluntarily place their children in foster care for a brief time. Most foster placements, however, result from court intervention because of alleged child abuse or neglect.[45] Once a court determines that a child is abused or neglected, it next determines whether foster care is the most appropriate disposition under the circumstances. In many situations, foster care provides temporary care for children while the biological parents work to fulfill the requirements of a case plan. The objective in such situations is reunification of the family, once caseworkers have helped the family to work out its problems. If the birth parents address the problems that gave rise to the judicial intervention in the first place, the child will generally be returned to the parents. If the parents are uncooperative or fail to complete the intervention plan, the court may ultimately decide that it is in the best interests of the child to terminate the parental rights and place the child for adoption.

According to preliminary estimates that were based on fiscal year 2008 AFCARS data, 19 percent of the foster children leaving the foster care system in 2008 were adopted, and over 60 percent were ordered returned to their birth parents or other relatives.[46] State governments license foster homes, and federal and state resources financially support foster children. The foster care system has in the past been criticized as underfunded, overwhelmed with cases, and staffed by persons who are not trained as social workers.[47]

Congress took action to improve this situation when it enacted the Adoption and Safe Families Act of 1997. This legislation created financial incentives and performance expectations for states in an effort to speed up the adoption process and increase the numbers of children placed for adoption.

Critics have complained that federal financial support to the states has been insufficient, especially since the states have moved increasing numbers of children from the foster care system into adoption placements. In September of 2009, however, the U.S. Department of Health and Human Services announced an Adoptive Incentives Program through which it was awarding $35 million dollars to thirty-eight states for the express purpose of increasing the adoption of children currently in foster care. Special incentives rewarded states that were able to move qualifying special needs children and children who are 9 years old or older from foster homes to adoptive families.[48]

FAMILY RELATIONS IN ONGOING FAMILIES

Where families are intact, the law recognizes that spouses and children assume obligations to each other and are entitled to certain rights and benefits. Some of these rights, benefits, and obligations are economic and others are noneconomic.

Spousal Property Rights

Although modern marriages are essentially partnerships, historically husbands and wives were legally considered to be a single unit with the husbands holding the preferred status as head of the household.[49] Before the enactment of married women's property statutes in the 1800s, wives did not generally own property in their own names. Upon marriage, a wife's property was generally controlled by her husband. An exception was created by equitable courts that allowed fathers to establish trusts for their daughters. This device was used to keep family assets out of the control of sons-in-law, but few women from the lower and middle classes were the beneficiaries of such arrangements. A husband, while benefiting from his preferred status as head of the household, was also legally obligated to provide

economic support for his wife. The term traditionally associated with this responsibility for support is *necessaries,* usually defined to include food, clothing, shelter, and medical care.[50] In earlier times this obligation only applied to husbands; however, it is now shared by both spouses.

Courts were initially resistant to statutory reforms expanding women's property rights, and often construed them very narrowly.[51] Today, in common-law title states, married women have essentially achieved legal equality. Each spouse retains title to property owned prior to marriage, has the separate right to his or her own earnings, and has title to property acquired separately during marriage. The judge in **common-law title** jurisdictions is charged with "equitably" distributing the property between the spouses. This means that fairness and not equality is the goal. The court considers each spouse's contributions to the marriage and financial circumstances and all other relevant factors when determining what constitutes a fair apportionment of the marital assets.

In **community property states** (see Figure 9.6), each spouse is legally entitled to a percentage of what the state defines as community property, which will vary by jurisdiction. Although states differ, community property is usually defined as including the earnings of both spouses and property rights acquired with those earnings during the marriage. State statutes, however, usually exclude from community property rights acquired prior to marriage and spousal inheritances and gifts received during the marriage. These are classified as separate property. Community property states differ on whether earnings from separate property should be treated as community property.

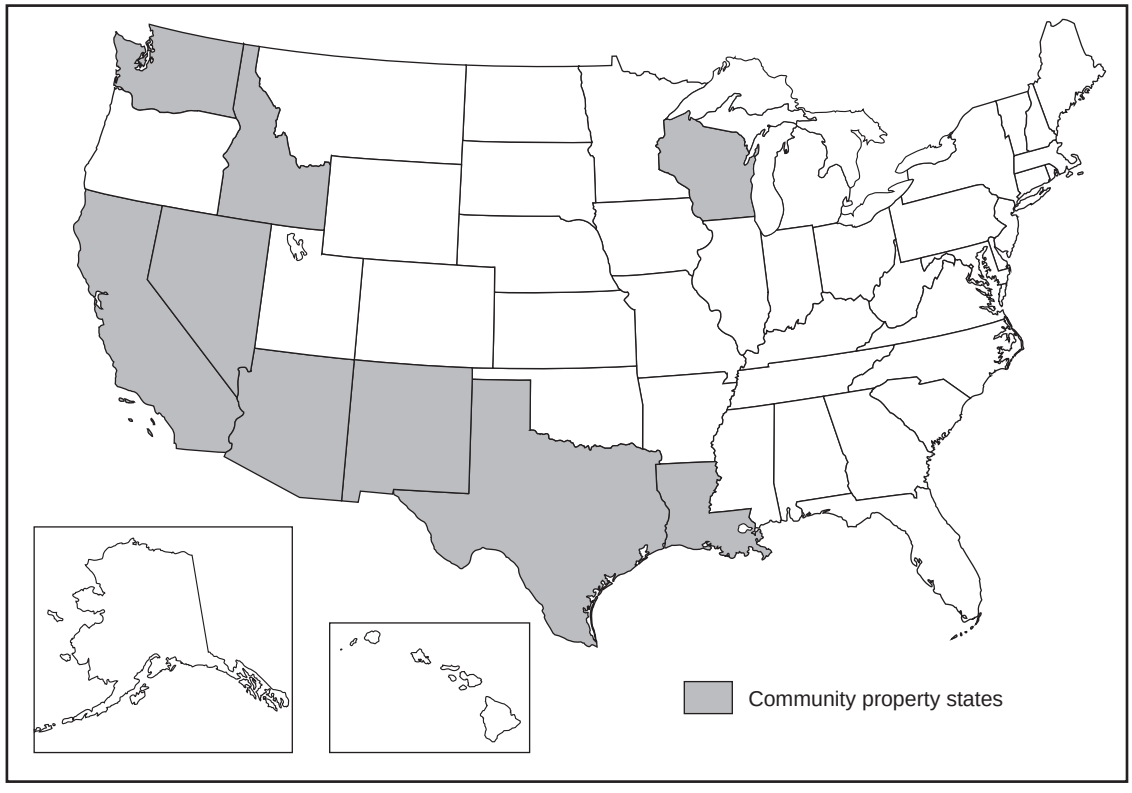

FIGURE 9.6 Community Property States

Decision Making Within Traditional Families

The U.S. Supreme Court has reinforced family autonomy by ruling that married couples have the right to make decisions regarding the use of birth control[52] and whether they will become parents. If they do, it is they who will decide how many children they will have and how those children will be raised.[53] This right to raise children includes decisions about the nature and extent of their education and their religious upbringing.

Spouses also have great latitude in deciding how their households will operate. Decisions about who is responsible for particular household chores, about how recreational time is used, and about having children and child rearing are often jointly made. Of course, a woman's decision to obtain an abortion early in a pregnancy can be made unilaterally—without regard to the wishes of the putative father. A married woman also has the right to retain her own surname, if she chooses.

Because of **spousal privileges** contained within state and federal rules of evidence, a spouse may refuse to testify against his or her spouse in a criminal trial and may also refuse to testify about confidential communications that occurred between spouses during their marriage.

INTERNET TIP

Parents have traditionally exercised primary responsibility for determining the religious upbringing of their children. In *Yoder v. Wisconsin,* Amish parents were criminally prosecuted by the State of Wisconsin for violating a compulsory school-attendance law. These parents withdrew their children from the public schools after they had completed the eighth grade. The parents appealed their convictions and claimed that the law infringed on their constitutionally protected right to determine the religious development of their children. You can read the U.S. Supreme Court's decision in this case on the textbook's website.

Family Status and the Obligation to Minor Children

Historically, parents have been legally responsible for the financial costs of providing their children with food, clothing, shelter, medical care, and education. This duty exists irrespective of whether the parents are married, divorced, separated, living together, or living apart. The breach of this duty is treated by most states as a criminal offense and can also result in civil actions for nonsupport and child neglect. The government is most eager to identify and locate "deadbeat parents" and to hold them financially accountable for their children so that the public doesn't have to bear these costs.

The exact nature and extent of the parental support obligation varies and depends on the child's needs as well as on each parent's financial condition. Though all states require that parents fulfill support obligations, some have gone so far as to require stepparents[54] and grandparents[55] to provide child support. When marriages break up, a court will usually require the noncustodial parent to pay child support until the child attains the age of majority, marries, becomes emancipated, or dies. Even after a child reaches the age of majority, parents often have a continuing support obligation if their offspring are disabled or haven't completed high school, or if such an obligation exists pursuant to a separation agreement.

One of the areas of recent conflict relates to a parent's duty to pay for a child's college education, an expense that usually isn't payable until after the child has passed the age of majority. Although parents in intact families have no legal duty to fund college educations for their children, as we see in the next case, some courts have ruled that a parent's support obligation can include funding their child's college education.