

## 3.7: End-of-Chapter Material

### 3.7.1 Summary

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

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

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

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

### 3.7.2 YOU BE THE LEGISLATIVE ANALYST

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

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

### 3.7.3 Cases of Interest

- *South Dakota v. Asmussen*, 668 N.W.2d 725 (2003), discusses void for vagueness and overbreadth: [www.lexisone.com/lx1/caselaw/freecaselaw?action=OCLGetCaseDetail&format=FULL&sourceID=beehfd&searchTerm=ejDa.ecea.aadj.eddQ&searchFlag=y&l1loc=FCLOW](http://www.lexisone.com/lx1/caselaw/freecaselaw?action=OCLGetCaseDetail&format=FULL&sourceID=beehfd&searchTerm=ejDa.ecea.aadj.eddQ&searchFlag=y&l1loc=FCLOW).
- *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), discusses the First Amendment: [http://scholar.google.com/scholar\\_case?case=10772194664096336702&q=Christian+Legal+Society+v.+Martinez&hl=en&as\\_sdt=2,5](http://scholar.google.com/scholar_case?case=10772194664096336702&q=Christian+Legal+Society+v.+Martinez&hl=en&as_sdt=2,5).

- *U.S. v. Alvarez*, 617 F.3d 1198 (2010), discusses freedom of speech: [http://scholar.google.com/scholar\\_case?case=3332503989513069132&q=U.S.+v.+Alvarez&hl=en&as\\_sdt=2,5&as\\_ylo=2010](http://scholar.google.com/scholar_case?case=3332503989513069132&q=U.S.+v.+Alvarez&hl=en&as_sdt=2,5&as_ylo=2010).
- *Snyder v. Phelps*, No. 09-751 (2011), discusses the First Amendment: <http://www.law.cornell.edu/supct/html/09-751.ZO.html>.
- *Robinson v. California*, 370 U.S. 660 (1962), discusses cruel and unusual punishment: [caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=370&invol=660](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=370&invol=660).

### 3.7.4 Articles of Interest

- Selective incorporation: [www.law.umkc.edu/faculty/projects/ftrials/conlaw/incorp.htm](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/incorp.htm)
- Violent video games and the First Amendment: [http://www.huffingtonpost.com/2011/06/27/supreme-court-violent-video-games\\_n\\_884991.html](http://www.huffingtonpost.com/2011/06/27/supreme-court-violent-video-games_n_884991.html)
- Ohio abortion bill: <http://abcnews.go.com/Politics/ohio-heartbeat-bill-abortion-paves-roe-wade-challenge/story?id=12876224>
- Second Amendment and gun control: [http://usgovinfo.about.com/od/guncontrol/Gun\\_Control\\_and\\_the\\_Second\\_Amendment.htm](http://usgovinfo.about.com/od/guncontrol/Gun_Control_and_the_Second_Amendment.htm)
- Recent US Supreme Court case on three strikes and its application to juveniles: <http://www.correctionsone.com/juvenile-offenders/articles/2050079-High-Court-Calif-can-apply-3-strikes-law-to-juveniles>

### 3.7.5 Websites of Interest

- First Amendment information: [www.firstamendmentcenter.org/default.aspx](http://www.firstamendmentcenter.org/default.aspx)
- Hate crimes: [www.fbi.gov/about-us/investigate/civilrights/hate\\_crimes/hate\\_crimes](http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes/hate_crimes)
- Death penalty information: <http://www.deathpenaltyinfo.org>

### 3.7.6 Statistics of Interest

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

### 3.7.7 Answers to Exercises

From Section 3.1

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

### 3.7.8 Answers to Exercises

From Section 3.2

1. The ordinance is void for vagueness and overbroad, violating the First Amendment and the Fourteenth Amendment due process clause. The term *gang attire* is **void for vagueness** because it is imprecise, can mean different things to different people, fails to give notice of what is criminal, and gives too much discretion to law enforcement. The ordinance is **overbroad** because prohibiting all individuals from wearing gang attire probably includes First Amendment constitutionally protected conduct, such as wearing a gang-related Halloween costume or wearing a costume to act in a play or movie.
2. In *Smith*, the US Supreme Court held that the flag misuse statute was **void for vagueness**. The Court stated,  
  
But there is no comparable reason for committing broad discretion to law enforcement officials in the area of flag contempt. Indeed, because display of the flag is so common and takes so many forms, changing from one generation to another and often difficult to distinguish in principle, a legislature should define with some care the flag behavior it intends to outlaw. *Smith v. Goguen*, 415 U.S. 566, 582 (1974), accessed October 3, 2010, [http://scholar.google.com/scholar\\_case?case=14723025391522670978&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=14723025391522670978&hl=en&as_sdt=2&as_vis=1&oi=scholar).
3. In *Grayned*, the US Supreme Court held that the ordinance was *not* void for vagueness because, with *fair warning*, it criminalized actual or imminent and willful interference with school activity. The Court also held that the statute was not

overbroad because it prohibited only acts that “materially interfered with schoolwork,” which is not protected by the First Amendment.

- Justice O’Connor said that the Texas sodomy statute was unconstitutional pursuant to the **equal protection clause**. The statute only criminalized sodomy between *persons of the same sex*, so it targeted gay couples without a rational basis.

### 3.7.9 Answers to Exercises

From Section 3.3

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

### 3.7.10 Answers to Exercises

From Section 3.4

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

### 3.7.11 Answers to Exercises

From Section 3.5

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

### 3.7.12 Answers to Exercises

From Section 3.6

- The eye-for-an-eye statute is unconstitutional because it mandates an inhumane punishment under the Eighth Amendment. Torture is too severe a punishment for *any* crime.
- The defendant’s sentence was two consecutive terms of twenty-five years to life in prison under California’s three-strikes statute. The defendant’s crime(s) were stealing five videotapes from Kmart worth \$84.70 on one occasion and stealing four videotapes from Kmart worth \$68.84 on another, with two previous strikes. The US Supreme Court *upheld* the sentence and denied the defendant’s petition for habeas corpus.
- The US Court of Appeals for the Ninth Circuit held that the gas chamber under California’s protocol was *cruel and unusual punishment* in violation of the Eighth Amendment.

4. The US Supreme Court reversed the US Court of Appeals for the Eighth Circuit, which held that the sentence was unreasonable according to the US Sentencing Guidelines. The Court reaffirmed that the Guidelines were advisory, but stated that the trial court has *great discretion* in setting the sentence, as long as the basis of the sentence is explained on the record.

### 3.7.13 Answers to Law and Ethics Questions

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

### 3.7.14 Answers to You Be the Legislative Analyst

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

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