POLS125 SPRING 2026



Connie Isais
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1.1: Chapter 11- Deism, the Indigenous Critique, Natural Rights, and the Declaration of Independence

> *"Nature is none other than God in things."*
> *"God…is everywhere in all things, not above, not outside, but present, not a being outside or above being, not a nature outside of nature, not a goodness outside of good."*
>
> *—Giordano Bruno [1548-1600] (1)*

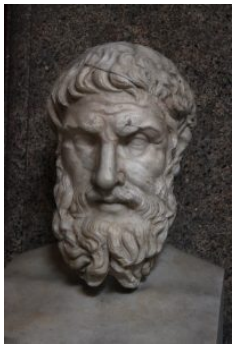
> *"Fix reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of a god; because, if there be one, he must more approve of the homage of reason than that of blindfolded fear."*
>
> *—Thomas Jefferson (2)*

Deism

Materialism is a category of ancient Greek thinking that held that nothing exists except matter, its movements, and modifications—matter is all that there is in the universe. Matter is composed of atoms that have always existed. It cannot be destroyed but is continually transformed and recycled into different forms throughout an infinite universe. Democritus (c.460–c.370 BC) is most commonly referred to as an early proponent of philosophical atomism and materialism. Similarly, the Greek philosopher **Epicurus** (341-270 BCE) espoused atomism, materialism, and an understanding of the gods that differed from the established view. If you've ever read ancient Greek myths, you know that traditionally they thought of the gods as directly intervening in human existence—tricking people, fathering children with people, and so forth. Seeing the material universe as infinite, Epicurus understood the gods to be detached from the experiences of humans. He also taught that man can attain the greatest good and a tranquil state, free from fear and pain, through reasoned and virtuous action.

Why is materialism important? Materialism contrasts with **Spiritualism**, which is the belief that a spiritual realm exists and is distinct from matter. Spiritualists argue that the spiritual world governs the material and is essentially unknowable except through faith and revelation—which means that the material world does not really follow any laws that humans can discern through their own reason. Philosophical spiritualism forms the impetus behind all the Western religions, and it should be fairly clear that philosophical materialism necessarily challenges any religion predicated on revealed truth from the spiritual realm.

What does the ancient Greek schism between philosophical materialism and spiritualism have to do with the American Declaration of Independence? The short answer is that during the centuries between Epicurus and Thomas Jefferson, materialism gave rise to Deism. You may have read that many—but certainly not all—of the American founders were Deists. Indeed, eighteenth century Deism strikes one as an updated version of Epicurus' heretical understanding of the Greek gods. **Deism** is the belief in a supreme being or creator—Nature's God—who does not intervene in the universe or interact with humankind, but who disappears into the natural rules that govern all matter. Just as Epicurus thought that the Greek gods did not intervene in human affairs, Deists saw the Judeo-Christian-Islamic god as similarly removed from human experience—a state of affairs that requires humans to develop workable ethical and political codes themselves rather than receive them through revelation.



Bust of Epicurus

The American philosopher Matthew Stewart referred to this legacy when he coined the phrase **Epicurus's dangerous idea** to refer to the notion attributed to Epicurus that talking about nature and talking about God are just two ways of talking about the same thing. This conclusion has tremendous theological and political implications. If the universe is infinite and has always existed, there is no role for an entity outside of matter and causation to play the role of a prime mover. No need for God in the Judeo-Christian-Islamic sense. Indeed, many people in the Epicurean-materialist tradition were persecuted and/or killed by Christian authorities for being atheists or for being Deists. Even the Jewish philosopher Baruch Spinoza was banned from the Amsterdam synagogue in 1656 for this kind of naturalistic view of God. Note the references in the Declaration of Independence to "the Laws of Nature and Nature's God" and to "their Creator." (3) These all fit with a Deist's understanding of the universe. Atheist and Deist approaches differ from Spiritualism, which sees a distinction between the material world and the spiritual one. People like Jefferson recoiled at that notion of spiritualism. Instead, they embraced secularism, Deism, and the Enlightenment's emphasis on reason.

The Indigenous Critique

The intellectual line from Epicurus' materialism to Thomas Jefferson's Deism is an important precondition for the ideas of the Declaration of Independence to flower in the late eighteenth century. Let's talk about another important intellectual tradition—one with which you are probably even less familiar. First, a bit of history.

From 1534 to 1763, France explored and colonized what is now northeastern Canada and the American Great Lakes region. French colonial leaders and Jesuit missionaries had many conversations and debates with leaders from the Huron and Iroquoian nations around the Great Lakes and northeastern Canada. Some of these conversations took place in France, while most took place in the Americas. We have some notes of these conversations from the Jesuit missionaries. The most famous of these conversations was with a Wendat (Huron) statesman named **Kandiaronk** (1649-1701), a famed debater and orator who spoke in Paris and who also debated Hector de Callière, the Governor of Montreal, in the Americas. The Jesuit historian, Charlevoix, said no Native American he had met "ever possessed greater merit, a finer mind, more valor, prudence or discernment in understanding those with whom he had to deal." (4) Much of what we know about Kandiaronk comes from the journals of Baron Louis-Armand Lahontan (1666-1716), which were published in 1703 as *New Voyages to North America*.

The **Indigenous Critique** refers to the stance of indigenous people like Kandiaronk—and others whose names are unfortunately lost to history—with respect to how best to organize a society and a political system. The Huron and Iroquoian intellectuals developed a sophisticated understanding of European society and did not like what they saw. They saw European society characterized by competitiveness, greed, selfishness, gross inequality, and hostility to true freedom. The Montagnais-Nskapi people of Labrador thought most French people were slaves because of their constant fear of violent punishment by their superiors. The Native Americans also noted the inequality of the sexes in Europe and the lack of sexual freedom.

Meanwhile, the Jesuit missionaries and the colonial leaders who gained an understanding of indigenous societies were similarly shocked. They could not understand the communitarian societies they encountered, replete with sexual freedom, relative equality of the sexes, leaders who gained their positions through respect rather than violence or inheritance, no incarceration for lawbreaking, no corporal punishment for children, and no real way for people to translate differences in individual wealth into political power. The indigenous people they encountered were vastly freer than almost all Europeans.

The contrasts between the freedom of indigenous people in North America and the lack of freedom in Europe was intellectually explosive. The anthropologist David Graeber and the archaeologist David Wengrow, in their book *The Dawn of Everything: A New History of Humanity*, make a compelling case that the Indigenous Critique had a tremendous impact on what we call the European Enlightenment. It stimulated thoughts about "the state of nature" and the "natural rights" people might have had prior to mankind getting "stuck" with bureaucratic government, wage labor, despotic rulers, and economic and political hierarchies. (5)

Natural Rights

Let's talk about the third intellectual tradition that comes together with Deism and the Indigenous Critique to form the basis for the Declaration of Independence. The Enlightenment overtook Europe in the seventeenth and eighteenth centuries and constituted the intellectual fertilizer in which American independence grew. Responding to both the Indigenous Critique and Epicurus' dangerous idea, Enlightenment thinkers argued that the laws of nature were subject to discovery, and the human condition could be improved through reason. In the area of political philosophy, people like **Thomas Hobbes** (1588-1679) and **John Locke** (1632-1704) were known as social contract theorists. They imagined how people might live in a state of nature that would allow mankind absolute

freedom, where there is no authority to limit individual behavior. Not having seen indigenous societies for themselves, they envisioned the state of nature as essentially an anarchical condition in which there was no government, and thus no authority to limit individual behavior. While anarchy is appealing to some philosophers, it definitely was not to Hobbes and Locke. Hobbes argued in *Leviathan* that the state of nature would result in a war of all against all, and that people's lives would be "solitary, poore, nasty, brutish, and short." He concluded that a strong state—the Leviathan—was necessary to provide order and at least a measure of freedom. (6) Locke did not have as pessimistic view, but he was worried that people would continually get into disputes with each other with no state or laws (as he understood them from his European point of view) to regulate conflicts. Another European philosopher, **Jean Jacques Rousseau** (1712-1778), saw the state of nature as a paradise, but one that we can never get back to because civilization and property resulted in our downfall and resulted in us being "in chains." Rousseau's best hope for us was to construct a governing system in which "the general will" would prevail.

What these philosophers had in common was the idea that we could escape from the state of nature, with its unlimited freedoms that give rise to all sorts of conflicts, by setting up a government through a **social contract**, where the people agree to certain government-enforced restrictions on their liberties in exchange for a measure of security. Consequently, one is not entirely free in a civil society to do as one pleases with respect to others. George Washington put it eloquently in his letter transmitting the proposed Constitution to the Confederation Congress: "Individuals entering into society, must give up a share of liberty to preserve the rest…. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved." (7)

One way to draw the line to which Washington referred is to say that people retain their natural rights under the social contract. **Natural rights** are those rights that stem from the state of nature, and thus pre-date the government established by the social contract. Philosophers have tended to say that natural rights are granted by nature's God, or by virtue of being born. The important thing to remember is that government does not give you your natural rights, as when it establishes a bill of rights. The bill of rights merely recognizes, and perhaps specifies, your preexisting natural rights. Locke's classic statement of natural rights went as follows: "…the state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being the workmanship of one omnipotent, and infinitely wise maker…" (8)

A contemporary listing of natural rights follows Locke's lead and includes equality, life, liberty, and property. In the Declaration of Independence, **Thomas Jefferson**, acting as a scribe for the committee whose most vocal members were John Adams and Benjamin Franklin, substituted "pursuit of happiness" for "property," which is an intriguing turn of phrase that appears to have its proximate origin in Locke and its ultimate origin in Epicurus. In his *Essay Concerning Human Understanding*, Locke wrote that "the highest perfection of intellectual nature lies in a careful and constant pursuit of true and solid happiness," and we know how closely Jefferson read Locke. We also know that Jefferson ascribed to Epicurean philosophy which—aside from its materialism—held that it is only through reasoned and virtuous action that man can achieve true happiness. Perhaps the immediate source of the Declaration's reference to the pursuit of happiness was his colleague John Adams, who wrote in his *Thoughts on Government* (1776) that "the form of government which communicates ease, comfort, security, or, in one word, happiness, to the greatest number of persons, and in the greatest degree, is the best."

Those who believed in natural rights came to a conclusion that frightened monarchs throughout Europe: that if government is not upholding the natural rights of citizens, and instead is consistently undermining them, the people are entirely justified in taking up arms against their rulers. American revolutionaries had exactly this so-called right-of-revolution in mind as they expressed their growing dissatisfaction with British rule after the end of the French and Indian War in 1763. Therefore, when you read the Declaration of Independence, keep in mind that it is not only a ringing statement of natural rights philosophy—"We hold these truths to be self-evident: that all men are created equal…"—but is also a careful dissolution of the social contract between Americans and the British Crown. The American revolutionaries felt that being taxed without representation, having troops violate people's property without warrants, and being subject to arbitrary and capricious governance over a period of time were grievances sufficient to warrant a revolution. Indeed, in the words of the Declaration, it is the "duty" of the people under those circumstances, "to throw off such government, and to provide new guards for their future security." The goal of the revolution was not to go back to the state of nature, but to reconstitute the social contract in a form more amenable to Americans preserving their natural rights, safety, and collective happiness.

It's a long road from Epicurus through Kandiaronk and the Enlightenment philosophers to the Declaration of Independence. Ideas are indeed important, for they can help us get unstuck from the arrangements that oppress us. In *The Dawn of Everything*, Graeber and Wengrow remind us that people throughout human history and pre-history have tried in numerous ways to live freely, to envision societies without oppression, to prevent the wealthy from translating their wealth into political power, and to avoid having "to surrender their basic freedoms and submit to the rule of faceless administrators, stern priests, paternalistic kings, or warrior-politicians." (9) Few of these attempts at emancipation are as celebrated as is the American Declaration of Independence.

The Declaration of Independence

In Congress, July 4, 1776.

The unanimous Declaration of the thirteen united States of America, *When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.*

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness–That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, –That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.–Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For Quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

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1.2: Chapter 12- Articles of Confederation, Shays' Rebellion and the Road to the Constitution

> *"The Articles of Confederation, if one considers the circumstances of the times, were a remarkable creation."*
>
> *–Rowland L. Young (1)*

Many Americans do not realize that the United States has had more than one constitution in its history. They take pride in the current U.S. Constitution written in 1787 but forget the Articles of Confederation written in 1776 and 1777. However, there is much to be learned from our first constitution. Before we look at the details, let us make sure we familiarize ourselves with confederal government and how it differs from other forms. This is especially important given our history: when the Southern states seceded from the Union beginning in 1860, they formed themselves into a confederacy, so there must be something attractive about the confederal form to Americans.

Confederal, Federal, and Unitary Governments

Political scientists often classify governmental systems into one of three types: confederal, federal, and unitary. Governments are placed into one of these categories based on the relative power distribution between the central government and whatever the subordinate governments are called. We call these subunits states, while other countries might refer to them as provinces, cantons, departments, laender, or something else. In a **confederal system,** the states are very powerful relative to the weak central government. Indeed, the central government usually only carries out those functions that the states deem can be more efficiently run from one point. The states retain all other powers. Currently, there are no individual countries that have confederal governments. Some people see the European Union, a collection of European countries, as some form of confederacy, but it is a collection of sovereign nation-states. Historically, confederacies tend not to survive—either because they are defeated by external enemies or because they fragment internally. A **unitary system** is the opposite of a confederal system, in that the central government is very powerful relative to the states. Often, the states exist merely as central government administrative units with little autonomy to conduct their own policies. The majority of the world's governments are unitary. England, France, Israel, Sweden, and Japan are countries with unitary governments. In a **federal system** there is more of a power balance between the central government and the states, although in practice, the balance is often tilted in favor of the center. Under our current Constitution, the United States is one of several federal governments around the world: Canada, Mexico, Brazil, Germany, India, and Nigeria come to mind. As a rule, large diverse countries tend to have federal governments.

The Articles of Confederation



Protest Sign Referencing the Articles of Confederation

The idea of unifying the American colonies is older than most people imagine. In 1697, William Penn proposed just such a union. In 1754, Benjamin Franklin put forward his Albany Plan of Union, which proposed a national legislature to raise a military when needed, to make decisions on war and peace in North America, to deal with disputed western lands, and to levy taxes on the colonies. Franklin's proposal was not accepted. When Franklin joined the Second Continental Congress in 1775, he put forward yet another proposal for an Articles of Confederation and Perpetual Union, which was not taken up. After the Declaration of

Independence, however, Congress appointed a committee to draft a document for a confederation and chose John Dickinson to lead it. Dickinson would later become known as “the penman of the Revolution.” That committee used Franklin’s proposal as a starting point but produced a document that gave the states much more power than Franklin had originally proposed. (2)

Dickinson’s committee wrote the Articles of Confederation on the assumption that the best way to preserve individual liberty was to fragment political power among the thirteen states. Congress submitted the Articles to the states to ratify in 1777, but disputes over western land claims delayed it being formally adopted. Finally, in 1781, Maryland became the thirteenth state to ratify it. These Articles remained in effect until superseded by the Constitution in 1789.

At the national level, the government under the Articles of Confederation had no president or supreme court, as we understand them today. The central institution was a **unicameral**—one chambered—Congress in which each state had one vote. Nine of the thirteen states needed to consent for most congressional actions, and amendments to the Articles required unanimous approval in Congress.

Under the **Articles of Confederation,** the central government’s limited power and weakness caused many problems for the new country, which is perhaps the most important thing to know about the U.S. under the Articles. Specifically, **Congress could not perform the following**:

Tax people directly—Under a requisition system, the central government relied on the states to collect taxes and forward the money to Congress. The requisition system did not work. The states gave Congress less than one-third of the tax revenue they were obligated to pay. This revenue deficiency required Congress to keep floating more debt, which adversely affected Congress’s ability to pay off those debts. By 1786, according to lawyer and historian George William Van Cleeve, “the Confederation’s financial position was unsustainable.” (3)

Raise a sufficient military force—The Confederation’s financial situation naturally impacted its ability to fight the Revolutionary War. About one-third of all free men served in the Continental army or the state militias. In addition, about 5,000 African Americans served—free and slave. And Van Cleeve noted that “at least twenty-thousand women worked to support the Continental army.” The central government was constantly short of money to pay for the Continental Army. The war itself caused economic disruption, causing the states to be even more reluctant to fulfill their fiscal responsibilities to the national government. Soldiers received “virtually nothing” in compensation during 1781-82, instead, receiving IOU’s. Farmers who supplied the military were in the same situation.

Regulate interstate or foreign commerce—The United States could not formulate a consistent trade policy with other countries. In 1784, Spain closed the Mississippi River to American craft. France stopped allowing American wheat and flour to be imported to the French Caribbean. Pirates actively raided American ships. Domestically, the situation was no better. In order to raise revenue and protect domestic business interests, states started taxing goods coming from other states and from British shippers. They also sometimes banned importing specific goods outright. Massachusetts banned fifty-eight items. Pennsylvania instituted protections for its refined iron, ship building, and joinery industries. During this time, there were several proposals to increase Congress’ power to regulate trade, but they were all defeated. Congress called the Annapolis Convention in 1786 to further discuss trade issues, but those at the meeting could only agree to call for a convention in Philadelphia in 1787.

Establish a sound money system—Ostensibly, Congress could regulate coinage. However, there were so many different foreign coins circulating that it was practically impossible to regulate their value. Furthermore, each state was free to print its own money, which they did at different rates. The paper money that both Congress and the individual states issued depreciated rapidly during the Confederacy.

Enforce treaties—Without enforcement power, the central government could not require states to abide by national treaties. For example, the 1783 Treaty of Peace between the United States and Britain required that America *not* restrict the British from collecting private prewar debts that Americans owed to them. However, Massachusetts, Pennsylvania, South Carolina, and Virginia did just that, and there was no way for Congress to force Americans to repay their debts to the British.

The Impact of the Confederal System

Under the Articles of Confederation, the national government’s main legislative accomplishment was the **Northwest Ordinance** of 1787. The Northwest Ordinance concerned the territories located in the Old Northwest—what is today north of the Ohio River and east of the Mississippi River. It allowed territories to enter the Union as states on the same equal legal footing as the original

thirteen states. In the territories that became Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota, the Northwest Ordinance also prohibited slavery and provided public education.

Following the Revolutionary War, the United States was in a very precarious economic, social, and diplomatic position. The government was unable to pay off war debts, such as loans from other countries, war bonds, and even IOU's given to soldiers in lieu of pay. Trade was being choked off by state tariffs, and the money system was a mess. Farmers were especially hard hit by excess taxes, interstate tariffs, and generally lacked confidence in the money supply. Consequently, many were losing their farms at bankruptcy auctions. Ultimately, farmers' rebellions broke out up and down the Atlantic seaboard.

The largest such rebellion was **Shays' Rebellion (1786-87)** in Massachusetts. Unable to make payments on their property and bitter that they were faced with increased taxes and scarce money due to the state legislature's policies in Boston, farmers did what they were supposed to in a republic: they peacefully petitioned the state legislature for redress. After the legislature refused to respond to their petitions, the farmers turned to mob violence in the summer of 1786 to prevent debt hearings and their property being seized for non-payment. The governor sent out a state militia, and Daniel Shays, who had been a captain in the Revolutionary War, organized a rebellion that was not put down until February of the following year. Shays' Rebellion was important not only because it was the biggest of these farmers' rebellions, but for two other reasons as well. It seemed to point out many of the deficiencies of the Articles of Confederation, and it was the topic of the day as a convention convened in Philadelphia. Unfortunately for the rebels, their actions ended up promoting the very thing they opposed. As historian Joseph Ellis has written, "The ultimate irony of Shays' Rebellion is that what began as a rural protest against centralized government actually ended up strengthening the advocates for a new U.S. Constitution, which consolidated political power at the federal level, in precisely the fashion that the rebels regarded as a betrayal of the American Revolution." (4)

The Constitutional Convention

Largely due to the efforts of people like Alexander Hamilton and James Madison—and because of the turmoil under the Articles of Confederation—Congress called on the states to send delegates to Philadelphia in May 1787. The delegates were to gather there "for the sole and express purpose of revising the Articles of Confederation." Every state except Rhode Island sent delegates to what we now know as the **Constitutional Convention**. Madison and Hamilton attended, as did George Washington, Benjamin Franklin, Roger Sherman, Robert Morris, Charles Pinckney, and others. **Thomas Jefferson** and **John Adams** did not attend, because they were representing the United States in Paris and London, respectively. Patrick Henry did not participate because he "smelt a rat," and opposed the Constitution once it was written. (5)

Of the original seventy-four delegates picked by the states, fifty-five actually attended the convention in Philadelphia. Some stayed away due to conscience, others because they were busy with other matters. By September 17, 1787, when the final draft was approved, only forty-two delegates were left. Three of those—**Edmund Randolph**, **George Mason**, and **Elbridge Gerry**—could not bring themselves to sign the Constitution. In the end, thirty-nine delegates signed what is now the current U.S. Constitution.

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1.3: Chapter 13- Key Features of the U. S. Constitution

> *"A government of our own is our natural right: And when a man seriously reflects on the precariousness of human affairs, he will become convinced, that it is infinitely wiser and safer, to form a constitution of our own in a cool deliberate manner, while we have it in our power, than to trust such an interesting event to time and chance."*
>
> *–Thomas Paine (1)*

> *"How is it that we hear the loudest yelps for liberty among the drivers of negroes?"*
> *–Samuel Johnson (2)*

Unless you happen to be one of those lawyers or political scientists who specialize in constitutional interpretation, you are not expected to know all the details of the U.S. Constitution. However, every citizen and resident of America should be familiar with the key features described in this section.

Balancing Large and Small States

One of the initial disputes among delegates at the 1787 Constitutional Convention in Philadelphia involved the relative weight of the individual states in the new government. Two competing proposals, the Virginia Plan and the New Jersey Plan, agreed on the need for a stronger central government but differed on how the states would be represented. The Virginia Plan proposed that the more populous states would have more seats in Congress than the smaller states. The New Jersey Plan proposed that they retain the scheme represented in the Articles of Confederation, with each state having one vote in Congress regardless of the state's population. Another notable difference between the two plans: The Virginia Plan proposed a bicameral legislature—a Congress with two chambers—while the New Jersey Plan proposed a unicameral legislature. This dispute was contentious enough that it threatened to bring the convention to an end. James Madison was especially interested in creating a strong central government, which he felt could not legitimately be done if each state was represented equally without regard to its population. "In all cases," he said, "where the General Government is to act on the people, let the people be represented and the votes be proportional" to state population. (3) However, delegates from small states were not happy unless their states got equal representation, which threatened to derail the Constitutional Convention.

On July 5, 1787, a committee dedicated to the state representation issue led by Roger Sherman of Connecticut proposed a solution that is now known as the **Connecticut** or **Great Compromise**. The Compromise called for a **bicameral** legislature and a different representational scheme for each chamber. In the House of Representatives, each state would have seats proportional to its population. The original formula was one representative for every 30,000 people. The Senate would have two senators from each state, regardless of population. Representatives would be elected by popular vote, while senators would be chosen by state legislatures. The Compromise narrowly passed the convention on July 16. It was a monumental decision that solved the dispute at hand, but with its passage, delegates sacrificed the basic democratic notion that one vote should weigh as much as another. The Connecticut compromise gave disproportionate power to smaller, rural, and less populous states, particularly after the Seventeenth Amendment passed when senators became elected directly by the people.

The Infamous Three-Fifths Compromise

A second dispute occurred related to state representation: If a state's population determined its seats in the House of Representatives, the question whether to count slaves or not became an important issue. While slavery was dying in most Northern states, the Southern economy was becoming increasingly dependent on slaves, and counting them in the census would add to Southern political power. The Northern states objected, and the convention settled the dispute via a mechanism eventually called the infamous **Three-fifths Compromise,** which resolved the dispute to the South's advantage. Essentially, one slave would be counted as three-fifths of a person. Article I, section 2 of the Constitution states, "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a term of Years, and excluding

Indians not taxed, three-fifths of all other Persons." This is one of several places where slaves are mentioned in euphemistic ways in the Constitution. The terms "slave" and "slavery" do not actually appear in the document.

By counting three-fifths of the slave population in the census, Southern states were allocated additional seats in the House of Representatives—twenty-five more than they deserved in 1833, for instance—and additional electors in the Electoral College. This extra representation had enormous consequences. As Paul Finkelman, law and public policy professor at Albany Law School, put it: "Southerners were able to block federal legislation hostile to slavery and get the House to pass numerous laws that protected slavery. The three-fifths clause allowed the extra pro-slavery representatives in the House to pass the following laws: the Missouri Compromise of 1820, which brought Missouri in as a slave state; Texas was annexed in 1845, which was described at the time as an 'empire for slavery'; the Fugitive Slave Act passed in 1850; the law allowing slavery in Utah and New Mexico passed; and the Kansas-Nebraska Act passed in 1854, which opened the Great Plains and Rocky Mountain territories to slavery. None of these laws could have been passed without the additional twenty-five pro-slavery representatives that were created by counting slaves under the three-fifths clause." (4) The Three-fifths Compromise, as it applied to slaves, was nullified when post-Civil War Amendments to the Constitution were passed.

Power to the Central Government



The U.S. Constitution

Compared to the Articles of Confederation, the Constitution's central government maintains more power than the states. Central government's legislative power is vested in the legislative branch. The Founding Fathers drew on a burgeoning philosophical tradition that held that the government's legislative aspect is the most important. In his Second Treatise on Government, John Locke argued that the legislative was "the supreme power in every commonwealth." In *Federalist #51*, James Madison wrote, "In republican government, the legislative authority necessarily predominates." You should be familiar with the major powers given to Congress in **Article I, section 8** of the Constitution. These include the power to tax, borrow money, raise armies and navies, establish lower federal courts, regulate the money supply, regulate interstate and foreign commerce, and declare war. These are called the **enumerated powers** of Congress because they are formally listed in the Constitution. When Congress exercises enumerated powers, they are relatively undisputed, although arguments have erupted over the years about definitional boundaries —like what activities fall under the phrase "interstate commerce"? We should be clear, however, that even when Congress is attempting to exercise an enumerated power, it cannot do so while violating another part of the Constitution. For example, law professor Kim Wehle notes that while Congress has the power to tax, it would violate the Fourteenth Amendment's Equal Protection Clause if it tried to tax only white people. (5)

At the end of these enumerated powers is the **Necessary and Proper** or **Elastic Clause**, which states that Congress has the power, *"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."* This has historically been a very important phrase in the Constitution because it has allowed the national government to expand its powers into a variety of areas that were not anticipated by the founders. For instance, Congress has forbidden child labor, set maximum-hour laws, and established a minimum wage—none of which are explicitly mentioned in the Constitution. All these measures have been justified with the Elastic Clause, combined with the enumerated power to regulate interstate commerce. When Congress does expand its powers, it justifies its new role by saying that it is only "carrying into execution" one of its enumerated powers. Following the precedent of *McCulloch v. Maryland (1819)*, the federal courts have usually agreed with Congress.

Constraining the States

The Constitution clearly reduces the power of the states. For example, in **Article I, section 10**, the states would no longer have the kind of autonomy they enjoyed under the Articles of Confederation. They could not conduct their own foreign policy, coin money, tax each other, impair contracts, or pass *ex post facto* laws. If there were any doubts that the power balance in the new federal system would be tilted in the central government's favor, one need only to read the **supremacy clause in Article VI:** *"This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."* Using this clause and the precedent-setting *McCulloch v. Maryland (1819)*, the Supreme Court has repeatedly struck down state laws that conflicted with federal laws, treaties, or the Constitution. In such disputes between a state law and a federal law, the state's only real chance of winning is to show that the federal law violates the U.S. Constitution. A current example that has not yet erupted into a legal battle centers on state initiatives that allow doctors to prescribe or recommend marijuana to their patients. These state laws are in direct violation of federal laws that consider marijuana so dangerous that doctors could not prescribe it, or even—for many years—study whether it was medicinally useful. Could states prove in court that such federal laws are unconstitutional? This and many other issues hint at the "messiness" of federal systems, which can cause people a great deal of confusion because issues are often decided in multiple political venues.

Since we've mentioned the importance of *McCulloch v. Maryland* (1819) twice now, perhaps we should pause a minute and make sure we understand that important early Supreme Court case. In 1816, the federal government chartered the Second Bank of the United States. The states did not like the Bank of the United States competing with state-chartered banks. So, the state government of Maryland placed a prohibitive tax on "any bank not chartered within the state" in an attempt to drive the Bank of the United States out since it was the only bank operating in Maryland that had not been chartered there. Instructed by his superiors, James McCulloch, Bank of the United States Baltimore branch cashier, refused to pay the tax. Maryland brought the case to tax to a state court and won—and even won on appeal—but lost when McCulloch appealed those lower decisions up to the Supreme Court. Two important issues were contested in ***McCulloch v. Maryland* (1819)**:

1. Since "establish a national bank" is not one of the enumerated powers in the Constitution, does Congress even have the ability to do that?
2. Can a state tax an activity of the U. S. government?

Regarding *McCulloch v. Maryland* (1819), Chief Justice **John Marshall**, *c*larified for a unanimous Court the Necessary and Proper Clause's meaning and its relationship to the enumerated powers. He wrote "let the ends be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." In other words, **if** Congress can legitimately tie its new exercise of power to one of the enumerated powers and **if** the new exercise of power is not expressly forbidden in the Constitution, then it is constitutional. Thus, it was constitutional for Congress to establish a Bank of the United States. Then Marshall went on to write that the "power to tax is the power to destroy," and that the **Supremacy *Clause*** meant that the states could not nullify and destroy legitimate exercise of federal authority. Maryland lost, and both the Necessary and Proper Clause and the Supremacy Clause were clarified in ways that expanded the central government *vis-a-vis* the states.

Separation of Powers and Checks and Balances

One can hardly fail to notice that the Constitution is organized according to a principle known as the **separation of powers**. *J*ohn Locke argued for the separation of the legislative and executive powers. In ***The Spirit of the Laws* (1748)**, legal theorist **Baron de Montesquieu** similarly argued that governmental power could be divided into three types and that they ought to be separate:

1. **Legislative**—the power to make law: the Congress
2. **Executive**—the power to enforce law: the Presidency
3. **Judicial**—the power to interpret law, both generally and in particular cases: the Supreme Court and lower federal courts

Note that the Constitution does not set up a hierarchy with the president at the top, nor does it give a president "the right to do whatever I want," as President Trump once famously claimed. (6) The Congress, the Presidency, and the Supreme Court are coequal branches of the federal government. A central tenet of good governance is to structure the political institutions so that

different people from different constituencies would perform the legislative, executive, and judicial functions. The American founders expressly agreed with this approach to governance. On November 15, 1775, **John Adams** wrote this to Richard Henry Lee: *"A Legislative, an Executive and a Judicial power, comprehend [encompass] the whole of what is meant and understood by Government. It is by balancing each one of these Powers against the other two, that the Effort in human Nature towards Tyranny can alone be checked and restrained and any degree of Freedom preserved in the Constitution."* (7)

According to its advocates, **separation of powers** provides **two benefits**. **First**, it tends to slow legislation down, because of the squabbling between the naturally egotistic people who occupy legislative, executive, and judicial positions. Democracy requires time for deliberation, argumentation, and compromise. Legislative speed is a virtue only in rare crisis situations. **The second advantage of separation of powers** is that it helps avoid tyranny. Much like *R.M.S. Titanic*, which was supposed to be unsinkable due to its compartmentalization, a government of separated powers can stay afloat even though tyrannical leaders take over one branch. Presumably, the other two institutions would stand up for liberty. Of course, as the *Titanic's* maiden voyage demonstrated, any ship will sink if you poke enough holes in it. Moreover, the United States has only three compartments, and they are functionally related. A dictator wannabe as president is bad enough, but presumably they would have partisan supporters in Congress and would be able to lace the federal courts with judges who are keen to secure and expand his tyrannical powers.

Separation of powers is not without its detractors. In fact, most other economically developed countries that purport to be democracies have rejected separation of powers in favor of parliamentary systems that dispense with bicameral legislatures and meld executive and legislative powers. This typically takes the form of a prime minister who is simultaneously a sitting member of the legislature and also head of what we in the United States would call the executive branch. As political scientist Douglas Amy argues effectively, the main problem with separation of powers is the frequency of paralyzing **gridlock** that undermines the power of ordinary people and serves the interests of corporations and the wealthy who want to block government initiatives. (8) Even when gridlock can be overcome, the resulting policies are inevitably compromises that are weaker more fragmented than they should be. Professor Amy suggests that America's fragmented and weak anti-poverty measures are a classic example of separation of powers at work. We might also add America's convoluted and overly expensive healthcare system as a casualty of separation of powers.

Not only does the Constitution separate governmental powers, but it adds a twist in the form of **checks and balances**. The three separate government institutions are allowed to meddle in each other's business. The term "checks and balances" does not appear in the Constitution, but the practice is woven throughout the document in a very intentional and strategic fashion. Key checks and balances include the following:

- Congress passes legislation, but the president can veto it.
- Congress can override the president's veto with a super majority in both chambers.
- Legislation passed by Congress and signed by the president can be declared unconstitutional by the Supreme Court.
- Presidential or executive branch actions can be declared unconstitutional by the Supreme Court.
- Supreme Court decisions can be undone if Congress and the states pass a constitutional amendment.
- Presidential appointments to the judicial and executive branches require Senate approval.
- Treaties signed by the president require Senate approval.
- The president can pardon those convicted by the federal courts.
- Congress can impeach and remove executive officials and federal judges from office who violate the law.

Finally, we should note that as a check on the president's commander-in-chief power, the Constitution mandates that only Congress can declare war. This is one check that has not worked particularly well. Congress has not declared war since World War II, even though presidents have directed the massive use of military force on numerous occasions including Korea, Vietnam, Grenada, Panama, the Persian Gulf War, and the invasion of Iraq. After the 9-11 attacks, Congress passed a very broad Authorization for the Use of Military Force (AUMF) against terrorists and nation-states that might be aiding them. The AUMF, which has no reporting requirement to Congress, was so broad and open-ended that it was used by the Bush, Obama, and Trump administrations to justify the using military force in the Middle East, Africa, and Asia decades after it was passed.

What if . . . ?

What if you were transported back in time as a "consultant from the future" to the attendees at the Constitutional Convention? What would you tell them about American history that could better inform them as they write the Constitution? What events would

you highlight for them? Why?

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1.4: Chapter 14- The Battle for Ratification and the Bill of Rights

> *"The Bill of Rights we have is…different in many ways from the one the Constitution's critics wanted. It says nothing about 'no taxation without representation' and 'no standing armies in time of peace.'"*
>
> *—Pauline Maier (1)*

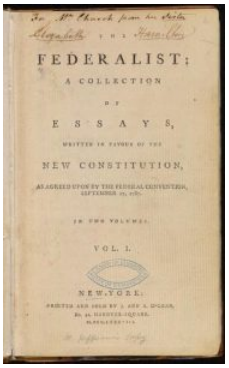
> *"No free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles."*
>
> *–Virginia Declaration of Rights, 1776*

Nine States to Ratify

The delegates to the Constitutional Convention finished their work on September 17, 1787. Knowing that neither the Congress nor the state legislatures would approve the new Constitution, they created a ratification process in which each state would hold a special convention on the Constitution. The delegates agreed that if nine out of the thirteen states voted to ratify, that would be sufficient to implement the Constitution. The new Constitution was presented to Congress. But first, Congress debated for two days whether to censure the delegates for having gone beyond their mandate. Congress chose not to censure, instead, it directed state legislatures to hold elections for state ratifying conventions, as called for in Article VII of the new document.

The period from 1787 to 1790 was a unique one in world political history because the people of the United States engaged in a serious debate about the best form of government for a free people. Delaware was the first state to ratify the Constitution on December 7, 1787. Rhode Island initially rejected the Constitution in a popular referendum in March of 1788. New Hampshire became the necessary ninth state to ratify the Constitution in June of that year, but it was vitally important that the large states of New York and Virginia join the project. They both narrowly did so later that summer. North Carolina ratified the Constitution after Congress proposed a Bill of Rights in 1789, and Rhode Island held a ratifying convention in 1790 to unanimously approve the new government.

Federalists and Anti-Federalists



First Collection of the Federalist Papers.

Those who supported the Constitution called themselves **Federalists**, while opponents have come to be known as **Anti-Federalists**—although that was a label put on them. It was a bitter and acrimonious debate. Their arguments took the form of newspaper editorials, pamphlets, letters, disagreements in pubs and churches, and debates at ratification conventions. The most famous documents in this debate came out of New York, where Alexander Hamilton recruited James Madison and John Jay to help him write a series of eighty-five essays from 1787 into 1788 in favor of the Constitution. These essays, published serially in newspapers under the pseudonym Publius, have since been published together as the **Federalist Papers**. They do constitute a brilliant defense

of the Constitution, but keep in mind that many Federalists in other parts of the country were also writing their own works, and the *Federalist Papers* didn't achieve their fame and influence until well after the Battle for Ratification was over. (2)

We tend to forget that many prominent people opposed the Constitution, including Samuel Adams, Richard Henry Lee, George Mason, Robert Yates, Patrick Henry, Elbridge Gerry, Edmund Randolph, James Monroe, and George Clinton. The Anti-Federalists worried that the new government would be too powerful, resulting in a tyranny the states would be powerless to stop. (3) The Anti-Federalists had a large list of Constitutional features to which they objected. They saw the "necessary and proper" clause as giving the central government too much power. They saw the vice president as giving too much power to the state from which he hailed. They feared the president's pardon power. They were suspicious of the president and the Senate's ability to coordinate together to negotiate and ratify treaties that might damage particular states or regions because neither were elected by the people. They feared the supremacy clause.

The Anti-Federalists supported stronger state governments and a weaker national one because they feared that a national government would become tyrannical. An anonymous Anti-Federalist writing in the Virginia press under the name Philanthropus concluded that "The new constitution in its present form is calculated to produce despotism, thraldom [a state of subjugation or bondage] and confusion, and if the United States do swallow it, they will find it a bolus [drug], that will create convulsions to their utmost extremities." (4)

The Bill of Rights

Even though they ultimately lost the argument, and the Constitution was ratified, the Anti-Federalists made an important contribution by stressing the Constitution's major deficit: it lacked a **Bill of Rights** to protect the people. It is clear that their agitation in the ratifying conventions contributed to winning the argument to add a list of rights to the Constitution. (5) Interestingly, the Bill of Rights is said to have been fathered by two men—one Federalist and one Anti-Federalist. Anti-Federalist **George Mason** is sometimes called the father of the Bill of Rights because he wrote the Virginia Declaration of Rights in 1776 and constantly criticized the U.S. Constitution for omitting this important feature. In his "Objections to the Constitution," published on November 19, 1787, in the *Virginia Journal* and the *Alexandria Advertiser*, Mason decried the fact that "there is no declaration of rights," and that the federal government's supremacy over the states would mean that "the declarations of rights in the separate States are no security" for the people's freedom. He was not the only Anti-Federalist to protest the lack of a Bill of Rights. After the Pennsylvania convention approved the Constitution, twenty-one delegates who voted against it published a dissent in the *Pennsylvania Packet and Daily Advertiser*, December 18, 1787, arguing that the "omission of a Bill of Rights" jeopardized "those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty." (6)

Largely as a result of pressure in several ratifying conventions, the Federalists promised to add a Bill of Rights to the Constitution. Rhode Island and North Carolina even refused to approve the Constitution until they saw the Bill of Rights in place. Federalist **James Madison** is considered to be the second father of the Bill of Rights. He came reluctantly to the task, because he originally thought such a listing of liberties was unnecessary—he called them "parchment barriers" to government tyranny in a letter to Thomas Jefferson. (7) Nevertheless, when he ran for Congress, he promised his constituents that he would support a Bill of Rights, and he came to realize that adding the Bill of Rights was the best way to tamp down opposition to the Constitution. Madison originally wanted to weave the various protections into the language of the Constitution, but Congress instead decided to add them to the end of the document. (8) On September 25, 1789, the first Congress under the new Constitution jointly resolved to consider adding twelve amendments in the Bill of Rights.

All twelve amendments passed Congress, but the states only ratified ten by 1791. The two amendments that weren't ratified at that time sought to prevent establishing a political aristocracy—a key Anti-Federalist concern—and aimed to better connect the national legislators with the people. One amendment said that Congress can vote to raise its pay, but the raise doesn't take effect until after an election. It was finally ratified in 1992 as the Twenty-seventh Amendment. The other was a rather complicated amendment that attempted to keep the number of Congressional representatives in proportion to the number of state residents. It fell one state short of ratification. (9)

Source Material for the Bill of Rights

What were the sources of the Bill of Rights? That's a good question. Some of the sources for the Bill of Rights were proximate to the time period when it was written, but others pre-date the document by hundreds of years. The American Bill of Rights clearly is a great, great, great—many times removed—grandchild of similar historical British assertions of rights. We can go back to the *Magna Carta Libertatum*—the Great Charter of Liberties, or Simply the **Magna Carta**—a settlement in 1215 between England's King John and his barons. The Magna Carta was not a statement of liberties for ordinary people, but it was nevertheless historically significant for firmly establishing due process for free men. In all, four specific rights in the American Bill of Rights can be traced to the Magna Carta: due process, jury trials, prohibiting unlawful seizures, and prohibiting excessive fines.

Additionally, in the **1628 Petition of Right** against Charles I, Parliament prohibited quartering soldiers in civilian households against the civilian's will. The **English Bill of Rights of 1689**—a document forced upon William and Mary as they were invited to replace James II after the Glorious Revolution—first addressed the right of subjects to petition the King and stated that "Protestants may have arms for their defence suitable to their conditions and as allowed by law." In all, seven specific protections in the U.S. Bill of Rights trace their heritage to English precedents. **The majority of the Bill of Rights language**—free speech, free exercise of religion, prohibitions against illegal searches, freedom of assembly, the right to counsel, etc.—**came from the American colonial context**. There are two possible sources to note: delegates at state ratifying conventions proposed amendments and assertions of rights that had already been written into state constitutions. The assertions of rights were particularly important. As political theorist Donald Lutz has clearly documented, "The states' constitutions and their respective bills of rights, not the amendments proposed by state ratifying conventions, are the immediate source from which Madison derived what became the U.S. Bill of Rights." (10) Interestingly, in those early state constitutions, the assertions of rights were included as prefaces that began those documents, whereas the U. S. Bill of Rights was appended at the end of the U. S. Constitution. For example, the Virginia state constitution of 1776 began this way: (11)

Virginia Declaration of Rights

I *That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*

II *That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.*

III *That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.*

IV *That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge be hereditary.*

V *That the legislative and executive powers of the state should be separate and distinct from the judicative; and, that the members of the two first may be restrained from oppression by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.*

VI *That elections of members to serve as representatives of the people in assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.*

VII *That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people is injurious to their rights and ought not to be exercised.*

VIII *That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgement of his peers.*

IX *That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.*

X *That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.*

XI *That in controversies respecting property and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.*

XII *That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.*

XIII *That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power.*

XIV *That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.*

XV *That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.*

XVI *That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.*

–Adopted unanimously June 12, 1776 Virginia Convention of Delegates. Drafted by Mr. George Mason

Important Features of the Bill of Rights

We should highlight several features of the Bill of Rights. First, as noted above, unlike several state constitutions of the day, the **federal Constitution does not begin with a declaration of rights**. Instead, the first ten amendments—and subsequent amendments over the years—are grafted onto the end of the Constitution to modify or add to the original text. The next thing to note is **how absolute the guarantees are in the Bill of Rights** compared to its historical and contemporary antecedents. With respect to individual liberties, previous documents often used words like “ought” and “should.” For example, note how in the Virginia Declaration of Rights, the right to trial by jury “ought to be held sacred,” and excessive bail and cruel and unusual punishments “ought” not to be imposed. The Bill of Rights is much more direct and prohibitive, using language like “shall make no law” and “shall not be violated” and “shall be preserved.” In other words, the **Bill of Rights** went further than any previous document had in vigorously articulating individual liberties and freedom from an oppressive government. In that sense, the Bill of Rights is a ringing pronouncement that abstract concepts like natural rights have real meaning in our lives and that government needs to respect them.

Having said that, however, we should also note that **the liberties enunciated in the Bill of Rights are not, in fact, absolute**. It is fair to say that all these liberties are subject to legislation. A person cannot threaten to assassinate a political leader and hide behind the First Amendment’s freedom of speech. Your neighbors cannot start a toxic waste dump in their back yard and hide behind the Fifth Amendment’s property rights. A person’s right not to be searched does not protect them against lawfully issued warrants, and it does not protect them in situations where authorities do not have a warrant but have probable cause that a crime has been committed. You may not start a religion that sacrifices a virgin to your god on the summer solstice and claim that such an atrocity is ok because you are freely exercising your religion.

Here is the Bill of Rights—the first ten amendments—passed by Congress, ratified by the states, and appended to the U. S. Constitution:

The Bill of Rights

Amendment I *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

Amendment II *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

Amendment III *No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.*

Amendment IV *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

Amendment V *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Amendment VI *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.*

Amendment VII *In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.*

Amendment VIII *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

Amendment IX *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*

Amendment X *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

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1.5: Chapter 15- A Federal Republic

> *"Over time, federalism forces politicians on both sides of the aisle to do what they are supposed to do— politick, find common ground, and negotiate a compromise that no one likes but everyone can tolerate."*
>
> *–Heather K. Gerkin (1)*

A Federal Republic is Fairly Uncommon

The American political system is a federal republic. Let's tackle the last part of that phrase first. A republic is a political system in which supreme authority rests with the people, who elect representatives to make decisions. Thus, a republic differs from a monarchy in which authority rests with a king or queen. Most of the world's political systems are republics, at least in name. Those in which a single party or very small group of people are actually in charge might still call themselves republics, but only those that vest sovereignty with the people are true republics.

Federalism is not a common governing system. Of the nearly 200 countries in the world, only about two dozen divide power and sovereignty between a central government and subordinate governments. In addition to the United States, other federal systems include Canada, Mexico, Brazil, Nigeria, India, and Germany. A rule of thumb is that large geographically and culturally diverse countries are more likely to have federal systems, but most countries do not. The vast majority of countries rely on a unitary system of governance, in which the central government is much more powerful than the subordinate (state) governments.

Struggles Over Federalism at the Constitutional Convention

The U.S. Constitution created the first modern federal system. Up until 1787, the political philosophy of **shared sovereignty**—the federal ideal that states and the central government would share authority over the same territory—hadn't really been considered. And, even if they had wanted to, it wasn't practical or politically feasible for the Constitution's writers to make the move from the Articles of Confederation all the way to a unitary system with the central government as the sole sovereign. For one thing, the transportation and communication systems of 1787 were simply inadequate to support a unitary political system that stretched from Maine to Georgia. And regional differences were too great, anyway, for one set of laws to fit all matters affecting so large a territory. Moreover, there was no support among the delegates or the population to drastically reduce state power and create a unitary government. As we saw from the ratification debates, the Constitution as written was viewed by the Anti-Federalists—no small part of the population—as a document that went too far in centralizing power.

The delegates at the Constitutional Convention may not have wanted to establish a unitary system, but they agreed that the weak central government under the Articles of Confederation needed to be strengthened. Almost all the delegates to the convention ended up being federalists—that is, they supported the Constitution—but they differed on how much power to give to the central government. Political scientist David Brian Robertson distinguishes between the narrow nationalists and the broad nationalists. **Narrow nationalists** included people like Roger Sherman, Oliver Ellsworth and most of the delegates from the small states like Connecticut, Delaware, Maryland, and New Jersey. They wanted to give the national government limited and well-defined powers. **Broad nationalists** like James Madison, Alexander Hamilton, James Wilson, and Gouverneur Morris wanted to give the national government more expansive powers. (2) For example, Madison and the broad nationalists proposed that the national government have a legislative veto over state laws. This would mean that majority votes in Congress would allow the national government to nullify state public policies—not because they were unconstitutional, *per se*, but because the national legislators thought them unwise. That proposal was defeated. In the end, the broad and the narrow nationalists compromised on modern federalism: shared sovereignty between the central government and the states, central government's enumerated powers, powers reserved to the states, limits on state power, and the Supremacy Clause combined with the Supreme Court, which implied that state laws could be struck down on constitutional rather than policy grounds.

Balancing Federal and State Power

Ever since 1787, the states and the central government have struggled over a proper balance of power. The Anti-Federalists may have lost the debate over ratification, but echoes of the Federalist/Anti-Federalist argument can be heard all the time in

contemporary American politics as clashes over power continue. And what is even more interesting, the arguments often defy ideological categories. One would think that conservatives would consistently *oppose* central government's power while progressives—aka liberals—would consistently *support* it. This has often been the case. For example, in response to the 1950s and 60s civil rights movement, both Democrat and Republican conservatives—don't get hung up on party labels, because conservatism has a place in both parties—opposed the central government exerting authority, while progressives embraced it. On the other hand, conservatives have moved to increase the central government's power to tap phone calls and internet activity, to dictate educational policy, and to define the terms of marriage, a power that had always been a state responsibility. Of course, the Supreme Court struck down the conservative-inspired federal definition of marriage that discriminated against gay couples. Moreover, conservatives have wanted to empower states to control environmental regulations, knowing that large multi-national corporations can more easily sway most state legislatures into setting lower standards. Sometimes that backfires, such as when California led several states to evade the Trump administration's attempt to weaken automobile emission standards. (3)

The Supreme Court case ***McCulloch v. Maryland* (1819)** was a tremendously important case because it set the stage for central government to expand power. Much of what the central government does is tied to its ability to use the Necessary and Proper Clause to extend the reach of one of its enumerated powers. This is especially true in government regulation, justified under Congress' power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Thanks to *McCulloch v. Maryland* (1819), Congress has often used the Commerce Clause in conjunction with the Necessary and Proper Clause to expand central government power. Recently, however, the Supreme Court has been unwilling to extend federal power tied to the Commerce Clause. For instance, the Court struck down the Violence Against Women Act in 2000 because the majority felt that the central government was unjustifiably intruding into the states' prerogatives and that the Commerce Clause did not entitle the federal government to allow women to sue in federal court for gender related violence. (4) We are likely to see similar future rulings because the Court's conservative majority is more likely to endorse limiting central government's authority regarding social welfare or environmental regulation.

How States Interact under the Constitution

An important part of our federal system is the way in which the Constitution manages how states interact with each other. Four provisions of the Constitution are important here, although one became irrelevant when slavery was abolished.

Article IV, section 1 contains the **Full Faith and Credit Clause**: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." This appears straightforward but opens the door to all sorts of interesting possibilities. Consider the days before the Supreme Court struck down the Defense of Marriage Act, which allowed states to refuse to acknowledge gay marriages performed in other states. Gay couples who married in permissive states and who moved to states that banned gay marriage were suddenly no longer married, despite what the full faith and credit clause said.

Privileges and Immunities—Article IV, section 2 reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This clause meant that as free men and women traveled out of their state, other states were obligated not to discriminate against them with respect to civil rights. But the nondiscrimination terms were set by the state being visited. As Ahkil Amar has put it, "If a free black man from Massachusetts went to Virginia, he could be held to whatever rules Virginia applied to its own free black adult males. Out-of-state women would get the civil rights of in-state women; so, too, with children." (5) When determining whether to protect citizenship privileges across state lines, the Supreme Court looks at whether the privilege is "sufficiently basic to the livelihood of the Nation," and then at whether a limitation of that privilege is related to a substantial interest the state is asserting. For example, the Court has held that states may restrict Freedom of Information requests to its own citizens. (6)

Extradition—Article IV, section 2 goes on to say that "A person charged in any State with Treason, Felony or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime." This is fairly straightforward and prevents people from fleeing justice across state lines. It allows interstate extradition.

Runaway Slaves—Finally, Article IV, section 2 says that "No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour,

but shall be delivered up on Claim of the Party to who such Service or Labour may be due." This is one of three places in the Constitution that refers to slaves and slavery without using those exact words. This clause not only forbid Northern states from freeing a slave who had fled from the South, it pledged to give the slave back to his/her master if the master came to claim the slave.

The Advantages of Federalism

Federalism is reputed to have several advantages. One of the most famous is the **laboratories of democracy** idea put forth by Supreme Court justice Louis Brandeis in 1932. He wrote that "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country."(7) States have experimented with welfare policies, pollution control policies, laws against child labor, laws allowing doctor-assisted euthanasia, legalizing marijuana, capital punishment, and so forth. Many states and local governments have begun to act on climate change because of what they see as Washington obstructing this issue. Some of these state experiments eventually get translated into national policy, such as Wisconsin's 1932 initiative on unemployment compensation, three years before the national government implemented it. The COVID-19 pandemic illustrated how different states responded to the public health challenge and the possibilities for re-opening their economies following the quarantines that most had put in place.

In a related idea, federalism also allows for regional differences in a country as large and diverse as the United States. Without federalism, policies in Connecticut, Louisiana, and Kansas would essentially be the same. Large, diverse nation-states tend to find federalism attractive precisely because it allows regional political subcultures to develop that reflect the local population's desires. One state may want to execute murderers, while another may not. One state might want to make access to abortion very difficult, while another might not.

Another possible advantage of federalism is that the states often serve as training grounds for national-level politicians. Many representatives, senators, and presidents develop expertise and networks at the state level before moving on to federal government positions. Because the states have dual sovereignty with the central government, state and local politicians don't just implement policies decided by Washington. Thus, they often bring a wealth of experience with respect to how central government policies impact states.

Finally, federalism brings government closer to the people and gives them ample opportunities to participate. Important decisions get made at the state and local levels, which are often more accessible and responsive to local pressure groups. New parties have an easier time starting at the local level. Reformers who want to take existing parties in new directions can also begin that process at the local level.

The Disadvantages of Federalism

Despite the above advantages, federalism is also problematic. Chief among the disadvantages is how politics fragment in a federal system. When you count the total number of discrete governments in this country—including the central government, states, cities and towns, counties, school districts, and a myriad of special districts—there are nearly 88,000 of them! Critics rightly ask, Who is responsible for what in this mess? How can any citizen keep up with issues at multiple levels? Can they cast informed votes in presidential, congressional, gubernatorial, state legislative, city, county, school district, and water district elections? This doesn't even count those places where judges are elected, which adds a whole different twist to the confusion.

In federal systems, state and local governments' purported closeness and accessibility is often a mirage. For one thing—perhaps due to the issue just raised above—turnout rates in state and local elections are often considerably lower than in national races. State and local governments also tend to listen intently to local economic interests that may or may not have local people's interests in mind. And because state and local politics gets very little media attention, policies are more likely to be passed there without being properly scrutinized and considered. This is especially true in states that have partisan gerrymandering that guarantees many safe seats in the state legislature.

Political scientists are finding that Louis Brandeis' vision of states as laboratories of democracy is often inaccurate. David Pepper, a professor of election law and former chair of the Ohio Democratic Party, argues that federalism has devolved into a situation where states are **laboratories of autocracy**. When he looks across the country, Pepper sees state legislatures that "have atrophied as broadly representative bodies and become easily captive to narrow interests," which means they respond to "twisted, perverse

incentives that reward serving private, often corrupt, ends while undermining public outcomes." (8) Similarly, political scientist Jacob Grumbach refers to many states as **laboratories against democracy**. Grumbach's work is fascinating. He created a state democracy index with over 60 indicators such as restrictions on voter registration drives, gerrymandering, voter registrations rejected, and whether a state allows no-fault absentee voting. Applying the state democracy index over the 2000-2018 time period he found no real change in democratic performance in Democratically led states or states where control of state government was relatively split between the parties. However, he came to a "remarkably clear" conclusion that "Republican control of state government reduces democratic performance. The magnitude of democratic contraction from Republican control is surprisingly large." (9)

The federal nature of the U.S. system also allows large economic interests to play states off against each other. Very often, corporations will announce that they plan to build a new factory somewhere in the United States. They invite states to compete against each other, then states offer the company incentive packages that may include reduced taxes, free land, or developed infrastructure. The company chooses the best offer, which means that the "winning" state pays dearly for whatever new jobs are created. It's often a fool's bargain because taxes are increased or services are cut on ordinary people to keep the corporations happy. (9)

Finally, federalism has sometimes allowed a few states to block initiatives that had majority support. Take the case of education equality. In 1954, the Supreme Court ruled that segregated schools were unconstitutional, but because education is—even more so then than now—primarily a local responsibility, Southern school districts defied the Court's ruling in *Brown v. Board of Education*. Even ten years after the case was decided, most school districts in the South were still racially segregated.

Federal Grants and Mandates

The federal government (10) provides a tremendous amount of money to state and local governments. According to 2021 official records, this amount totaled over $1.2 trillion. (11) Federal money comes to states in two basic forms.

1. **Categorical grants**, as the name implies, provide money to states and local governments to spend on specific delineated categories or purposes. Aside from requiring that the money be spent for specific purposes, categorical grants come with certain strings. For instance, states or local governments receiving the grants must abide by federal nondiscrimination laws, and they may have to pay wages at certain levels. There are two types of categorical grants.
    1. **Project grants** are open on a competitive basis and require an often elaborate application process. Indeed, many entities such as state governments, city governments, and colleges employ people to draft grant applications.
    2. **Formula grants** are pots of money that get distributed to state and local governments based on some pre-established formula, which might entail giving money based on population, per capita income, chance of being hit by terrorists, or some other such reasonable criteria.
2. **Block grants** are the second form of federal money that state and local governments receive. Block grants are looser than categorical grants. They grant states money to use for a broad public policy area, such as the welfare block grants that replaced existing federal welfare programs in the mid-1990s. State governors and legislators tend to like block grants because they prefer the accompanying freedom to design their own solutions to social problems.

By giving money to states and local governments, the federal government gains leverage over some aspects of state policies. In the 1980s, for example, the federal government made it clear that highway construction and repair money would be contingent on states raising their minimum drinking age to twenty-one. Needless to say, the minimum age for purchasing alcohol is twenty-one across the land. The federal government also places requirements on states in the form of **federal mandates**, which command that states undertake certain public policies or enforce certain restrictions. Very often, states cry that these requirements are **unfunded mandates**, meaning that states must pick up the bill for what is essentially a decision made in Washington, D.C. A great example is the No Child Left Behind Act of 2001, which enforced new performance standards on individual schools and school districts. States complained that the federal government did not provide nearly enough money to restructure curricula, target struggling students, administer tests, and hire qualified teachers. Unfunded mandates also affect private companies. For example, the Clean Air Act requires energy companies to buy expensive equipment to mitigate pollution.

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9. Jacob M. Grumbach, *Laboratories Against Democracy: How National Parties Transformed State Politics*. Princeton, New Jersey: Princeton University Press, 2022. Page 177.
10. Bryce Covert, “The Enduring Scam of Corporate Tax Breaks,” *The New Republic*. September 28, 2018. Here.
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1.6: Chapter 16- The Historical Development of Federalism

> *"After a third of a century of power flowing from the people and the states to Washington, it is time for a New Federalism in which power, funds, and responsibility will flow from Washington to the states and to the people."*
>
> *—President Richard Nixon (1)*

The Definitional Period of American Federalism

A truism about federal systems around the world is that political power is never equally balanced between the central government and the states. The central government ends up being stronger than the states. This generalization is true in the United States as well. However, as the first modern federal governing system, the United States has experimented inordinately with federalism and has gone through several historical stages.

The first stage doesn't have an official name, but it was marked by states challenging federal authority, which ultimately gave way to officially recognizing federal supremacy. Let's call it the **Definitional Period of American Federalism**. The country went through wrenching—and ultimately deadly—struggles over federal versus state power. This period is easy to date—from 1789 to 1865. We can think of this period in another way: states went from sovereign powers under the Articles of Confederation to subordinate units under the Constitution practically overnight, and then it took 76 years for that fact to sink in. This period was marked by several key struggles, all of which resolved in favor of central government power.

***McCulloch v. Maryland* (1819)**—We've already talked about this case. States objected to establishing the second Bank of the United States. The Supreme Court ruled that states could not tax federal operations and that Congress had broad implied powers when its enumerated powers were combined with the Necessary and Proper Clause.

***Gibbons v. Ogden* (1824)**—This case centered on interpreting Congress' power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," which is also known as the commerce clause. In the early nineteenth century, New York state gave Robert Fulton and Robert Livingston a monopoly on steam navigation, which they in turn licensed out to Aaron Ogden to operate steam powered ferries between New York and New Jersey. At the same time, the federal government gave Thomas Gibbons a license to operate ferries in interstate waters. Gibbons' route competed with Ogden's route. Ogden sued Gibbons. Ogden won the suit in the New York state courts, but Gibbons appealed up to the Supreme Court and won. The Court made several important decisions. First, it defined "commerce" broadly to include not just the literal shipment of goods, but any "commercial intercourse" between states. The Court said that while Congress could not regulate business activity that solely took place within a state's boundaries, it could regulate commerce if part transcended state boundaries. Finally, the Court said that the federal law granting Gibbons a commercial license trumped New York's attempt to give Ogden exclusive right to carry goods and people between New York and New Jersey.

The Nullification Crises—The perilous and unsettled nature of federal and state relations during this era was exemplified by state attempts to nullify federal laws. States effectively said, "We do not recognize this federal law as operable on us." In 1798, Congress passed, and President John Adams signed the Alien and Sedition Acts. Kentucky and Virginia both passed resolutions nullifying the law in their states and asserted the right to disregard the federal laws with which they disagreed. The Kentucky resolution, secretly written by Thomas Jefferson, said that since the Constitution was created by the states, each state has "the unquestionable right to judge of its infraction," which is a way to say that Kentuckians get to determine whether a law is unconstitutional. (2) This nullification crisis didn't boil over because the Democratic-Republican/Jeffersonian victory in the 1800 election resulted in states repealing the offending federal legislation.

A more serious nullification crisis happened in the 1830s when southern states, which exported agricultural products like cotton, objected to a federal tariff law that they felt unduly punished the South and favored protecting northern manufacturers. The charge was led by John C. Calhoun, who resigned the Vice Presidency in 1832 so he could run for Senate from his native South Carolina and better lead the fight against the tariffs on the South's agricultural goods. South Carolina passed a resolution nullifying the federal tariff in the state and prepared to militarily resist the federal government should it insist on enforcing the tariff. Congress passed a Force Bill authorizing the president to use the military against South Carolina, so the United States was on the verge of

civil war. The situation was relieved when Congress passed a new tariff bill in 1833 that gave concessions to Southern interests, and South Carolina repealed its nullification resolution. (3)

The Civil War—As you learned in your history class, the North and the South became increasingly divided over the slavery issue and the political question of whether additional states would be admitted to the United States as slave or free—thereby determining the political balance in Congress. There is no space here to recount America's slide into the meat grinder that was the Civil War, but Republican Abraham Lincoln's presidential election was the final straw for white southerners who benefitted economically, culturally, and psychologically from slavery. Even though Lincoln asserted on many occasions that he did not believe in the inherent equality of blacks and whites, he did say things like, "There is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty, and the pursuit of happiness." (4) South Carolina repealed its ratification of the Constitution on December 20, 1860 and six states met in Montgomery, Alabama, on February 4, 1861 to form the Confederate States of America. Ultimately, eleven states joined the Confederacy, and the war between them and the Union killed at least 670,000 soldiers and civilians, freed 3.5 million people from slavery, and crushed the most serious challenge to federal authority in American history.

The Civil War was also a decisive victory for those who held that while the official name of this country is The United States of America, the states are merely administrative units of the people in whose name government operates. The Constitution begins with "We the People," not "We the states." Chief Justice Marshall, writing in *McCulloch v. Maryland* (1819), said the "government of the Union. . . is, emphatically and truly, a government of the people." During the Civil War, Abraham Lincoln gave the **Gettysburg Address** to dedicate a cemetery on the site of a great battle between North and South in Pennsylvania. Students in elementary schools across America learn it by heart, but often they recite the final line like this: "that government *of* the people, *by* the people, and *for* the people, shall not perish from the earth." In light of our conversation about federalism here, that passage is best articulated in a way that emphasizes that government is for people and not states: "that government of *the people*, by *the people*, and for *the people*, shall not perish from the earth."

Dual Federalism

Following the Civil War, the United States entered a period that political scientists call **Dual Federalism**, which is commonly called Layer Cake Federalism. Both names inadequately characterize what was happening. This period runs from 1865 to the election of Franklin Roosevelt in 1932. Despite the outcome of the Civil War, states continued to assert their prerogatives to govern exclusively in important public policy areas, and they were aided by Supreme Court rulings to that effect. The idea of dual federalism is that there are public policies over which the federal government predominates, such as foreign policy, tariffs, monetary policy, national defense, interstate commerce, and the mail. States took the lead in other areas of governmental responsibility like public safety, education, elections, business licensing, family and morals policy, inheritance and property laws, and commerce within state boundaries, including wages and working conditions. Note that state responsibilities more directly impinged on how people lived their day-to-day lives.

The legacy of the dual federalism era is not a pretty one for people who advocate for human dignity, and it is an embarrassing era even for those who argue today for states' rights. The notion that vast swaths of public policy directly affecting people's lives were off limits to federal intervention meant that during America's industrial explosion, state legislatures could empower corporations at the expense of people and could embolden white supremacists and nativists just when whole new former slave and immigrant populations were struggling to establish themselves as equals in America. This was the era of state Jim Crow legislation limiting political and economic freedom for African Americans, the era of unregulated child labor, the era of unchecked corporate malfeasance, and the era of morals legislation used to keep women in their place.



Two Girls Working in a Textile Factory in 1909.

Let's highlight one example—the issue of child labor. Congress passed the Keating-Owen Act in 1916, regulating commerce involving goods produced by children. It was mild legislation from our perspective. It banned interstate sale of goods made by children under the age of fourteen and by children under sixteen if they were working more than sixty hours a week. However, in the case of ***Hammer v. Dagenhart* (1918)**, the Supreme Court struck down the federal law as unconstitutional. Writing for the Court, Justice William Day said that manufacturing itself was not interstate commerce. Since the children were only involved in manufacturing—in this case, cotton—but not involved in transporting the goods once they were manufactured, the federal government had no power to legislate. The Tenth Amendment, said Day, reserved states' powers, and that among these was the power to regulate manufacturing, even if the goods were intended to be shipped across state lines. (5) Thus, the federal government was powerless to ban or regulate child labor. It was the same story with federal actions to break up monopolies—*U.S. v. E.C. Knight Co.* (1895); federal laws to protect Blacks against violence—*U.S. v. Cruikshank* (1876)*;* and federal laws to provide for full and equal access to public accommodations regardless of race—*The Civil Rights Cases* (1883). In all these cases, the Court said essentially that the Constitution was off the table as a possible help to make people's lives better. The Supreme Court's restriction on federal power also extended to states whenever they tried to limit business' power to operate freely. For instance, in *Lochner v. New York* (1905), the Court struck down a New York state law that limited baker's hours to sixty per week. The majority argued that state infringement on the right-of-contract between the bakers and their employer violated the individual's liberty to engage in commerce. Corporations, in other words, should be free to exploit workers because said workers were free to go find another job.

Cooperative Federalism

Dual federalism gave way in the 1930s to what is known as Cooperative Federalism, which lasted until the late 1960s. Again, this is not a particularly good name. The twin disruptions of the Great Depression and World War II—and the response led by Democratic presidents—created an era that was marked by increased federal power. The Democrats in Congress combined with the Roosevelt administration and passed economic regulations and instituted social welfare policies that had never been seen at the U.S. national level. Under the **New Deal**, the national government regulated the banking industry, supported agricultural prices, set the first federal minimum wage, created unemployment insurance, established social security for the elderly, supported the right of workers to unionize and collectively bargain, and put people to work building schools, hospitals, and roads.

This period of Cooperative Federalism was marked by two important developments. First, and this is really the origin of the name, the federal government and the states became partners as they solved problems associated with the Great Depression, World War II, and then the Cold War. Many programs were entirely or predominantly financed by the federal government and administered jointly by the federal and state governments or solely by the latter. For example, unemployment insurance, which is part of the Social Security Act of 1935, continues to be administered by states. The National Interstate and Defense Highways Act of 1956 provided federal funding predominantly for interstate highways, while states had significant roles in planning and construction. Some people call mixing federal and state powers "marble cake" federalism.

The second important development in this period is that the Supreme Court finally acceded to government regulating the economy and protecting civil rights and liberties. Initially, the Court struck down Roosevelt's initiatives such as the National Industrial Recovery Act and the Agricultural Adjustment Act. Roosevelt grew so frustrated that he proposed a **court packing plan** that would allow him to nominate new justices and expand the total number of justices on the Court. (6) Beginning in 1937, the Court abandoned its weird interstate commerce ruling found in *Hammer v Dagenhart* (1918) and began to treat America's economic system as a truly national one. No longer would the law differentiate commerce into manufacturing regulated by states because it takes place within a state's boundaries, or shipping regulated by the federal government because it was interstate commerce, or distribution regulated by states because it takes place within a state's boundaries. Now, it's *all* interstate commerce. A person digging coal in Kentucky is engaged in interstate commerce, even if they have never left the state, because the coal is likely headed to power plants in other states.

New Federalism

Beginning in the late 1960s, American federalism entered a **New Federalism** period, which is also sometimes called the Era of Devolution because of the ways that governmental power seems—in part—to have devolved back on to states. It's confusing, if only because these different periods are clouded by so many contradictory events. A defining factor in the modern period is that in the thirteen presidential elections held between 1968 and 2016, Republicans have "won" eight of them. Two of those victories—Bush in 2000 and Trump in 2016—were solely the result of the electoral college giving the

presidency to the popular vote *loser*. Nevertheless, the disproportionate number of Republican presidents in this period have been able to load up the Supreme Court and the federal courts with a disproportionate number of appointees who would be very comfortable if the United States were to go back to days of dual federalism and have the national government be powerless to act in many areas of public policy—particularly economic, worker safety, and environmental regulation. For example, four Supreme Court justices were ready to strike down the Affordable Care Act's individual mandate as an unconstitutional extension of Congressional power, and it was only Chief Justice John Roberts' decision–uncharacteristic for a conservative–not to join them that saved the law in 2012. (7) Earlier, in 1995, the Court ruled that the interstate commerce clause could not be stretched far enough by the elastic clause to constitutionally cover Congress' attempt to pass a Gun Free Schools Act and ban handguns near schools. (8)

Republican presidents like Nixon, Reagan, and the two Bushes joined Democratic presidents Clinton and Obama in devolving federal powers to states where they could. Under president Nixon, the federal government began offering block grants so that it could support housing and community development while allowing states to figure out how best to spend the money. President Reagan proposed to eliminate the Departments of Education and Energy and transfer most of their functions to the states. He was unsuccessful. He was more successful in shifting federal support from categorical to block grants in areas beyond housing, thereby giving states more freedom. In the 1996 welfare reform law, President Clinton presided over the federal government transferring welfare power to the states. It was the largest transfer since federal welfare began. The Obama administration allowed California to set its own air pollution regulations. There are, of course, exceptions to this pattern. For example, under President George W. Bush, the No Child Left Behind Act of 2001 consolidated federal power over education.

Conclusion

The United States has a conflicted history of political power in part because of the federal structure built into the Constitution. Struggles over the overall balance of power will continue, as will fights about specific legislation and whether it vests decision-making power with the federal government or the states. Keeping in mind the theme of this textbook, you should look at struggles over federalism as arenas for conflict between corporations and the rich and the broader population's desire to have effective government regardless of which level provides it. The corporate and financial elite may prefer some policies to be administered by the federal government and others by the states, depending on the benefits they can derive or the regulations they can avoid. The public's need for good governance, regardless of level, is ever-present.

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3. Interestingly, nullification was not an exclusively Southern phenomenon. In 1854, the state of Wisconsin nullified the Fugitive Slave Act that Congress passed in 1850, which required free states to return slaves who fled to free states back to their owners. The Supreme Court struck down Wisconsin's action as unconstitutional, an action which Wisconsin officially refused to recognize.
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5. Hugh D. Hindman, *Child Labor: An American History*. Armonk, NY: M. E. Sharpe, 2002. Pages 64-70.
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1.7: Chapter 17- A Secular Republic

> *"It does me no injury for my neighbor to say that there are 20 gods, or no god. It neither picks my pocket nor breaks my leg."*
>
> *–Thomas Jefferson (1)*

> *"Granting a citizen the right to think anything she wants is the preamble to other privacies."*
>
> *–Jacques Berlinerblau (2)*

What is a Secular Republic?

Many Americans are familiar with the federal system established by the Constitution. What is less familiar is the extent to which the founders went to create a secular republic as well as a federal one. Indeed, one could argue that the United States was the world's first secular republic. Secularism is a misunderstood word, especially by people with strong religious opinions who assume it means "opposition to religion." Part of this misunderstanding is reasonable, as some secularists have expressed their opposition to religion, but we ought not to let that distract us from the real issue here. Just because some Republicans advocate polygamy doesn't mean we should conclude that such advocacy is a key feature of the Republican party's belief system.

A secular republic is one that is characterized by a separation between government and religion. Above all, it means to avoid the trappings of theocracy in all its variations. (3) In a **secular republic**, people are free to practice religion or non-religion in peace; church and state are separated; people of differing faiths are treated equally before the law; and religious tests and oaths are not required to vote or hold office.

The European Roots of American Secularism

The Constitution was firmly rooted in the Enlightenment's secular philosophy. In his *Letter Concerning Toleration* (1689), English philosopher **John Locke** argued in favor of religious toleration and tried to "distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other." The American Revolution and the writing of the Constitution happened during the same period as a fight in England against what were called the **Test and Corporation Acts**, which prohibited Catholics from holding office there. The American founders were sympathetic with the arguments of **Joseph Priestly**, co-discoverer of oxygen and a founder of Unitarianism, and **James Burgh**, a Scottish minister and political writer, who both wanted the Test and Corporation Acts to be repealed. Burgh wrote, "Away with all foolish distinctions about religious opinions. Those with different religious views are both equally fit for being employed in the service of our country." (4)

The Constitution reflected the Enlightenment views of many of the leading lights of the founding generation. They were, as the author Susan Jacoby has described them, some of the first in a long line of freethinkers with respect to religion in public life. (5) This personal characteristic made them revolutionaries in more than one sense. Thomas Jefferson was most proud of three of his accomplishments: The Declaration of Independence, founding the University of Virginia, and writing and passing the Virginia Statute of Religious Liberty in 1786. Under his design, the University of Virginia did not have a church on school grounds, and he forbade teaching theology. When the Virginia Statute of Religious Liberty passed, Jefferson declared that there would be "freedom for the Jew and the Gentile, the Christian and the Mohammeden, the Hindu and infidel of every denomination." (6) James Madison thought that the presence of chaplains in Congress or the army was unconstitutional and warned against "the danger of a direct mixture of Religion and Civil Government." (7) John Adams had contempt for any priests commingling with governmental affairs. "Nothing is more dreaded," he wrote in 1812, "than the national government meddling with religion." (8) George Washington, too, was steeped in Enlightenment Deism, and declined to ask for an Episcopal clergyman at his deathbed. He wrote thousands of letters that rarely mention Jesus Christ or Christianity, instead, preferring Deist phrases such as Providence, the Supreme Being, and the Great Ruler of Events. He attended church about once a month and conspicuously left before communion. (9) Dr. Thomas Young, one of Boston's leading revolutionaries and the man who first publicly advocated throwing the British East India Company's tea into the harbor in 1773, was a life-long Deist. At the age of twenty-five, Young was tried and convicted for the charge that he "did. .

. speak and publish these Wicked false and Blasphemous Words concerning the said Christian religion (to wit) Jesus Christ was a knave and a fool." (10)

Secularism in the U.S. Constitution



Street Sign: Intersection of Church and State.

Secular features are manifest throughout the U.S. Constitution. The American Constitution's authors learned well from Britain's bitter experience with respect to religion and the state. Religious tests are explicitly banned in Article VI: "No religious test shall ever be required as a qualification to any office or public trust under the United States." Apparently, this provision passed through the Constitutional Convention with very little debate, which was remarkable given that eleven of the thirteen states had religious tests for public office. In Delaware, for example, office holders were required to affirm their "faith in God the Father, and in Jesus Christ His only son, and in the Holy Ghost, one God blessed forevermore." (11)

Aside from banning religious tests, the Constitution also distinctively failed to invoke God. This again departed from most state constitutions of the day. The Articles of Confederation referred to "the Great Governor of the World," and the Declaration of Independence made its Deist reference to "the Creator," by which it meant a God ensconced in Nature and subject to natural laws. But the Constitution explicitly and intentionally failed to mention God, the Creator, the Great Governor, the Supreme Being, or any other such reference. Before entering office, the president is required to make an oath or affirmation pledging to protect and defend the U.S. Constitution, but the oath does not have to be on a Bible, nor is "so help me God" a part of the affirmation.

When the Constitutional Convention's work became publicly known, the document's secular character elicited widespread criticism from those who felt it was a godless Constitution. At the Massachusetts ratifying convention, one critic said that without a religious test for the president, "a Turk, a Jew, a Roman Catholic, and what is worse than all, a Universalist, may be President of the United States." On March 7, 1788, a writer for the *Massachusetts Gazette* criticized the Constitution for failing to invoke God, by writing that "it is more difficult to build an elegant house without tools to work with, than it is to establish a durable government without the publick protection of religion." (12) In the North Carolina ratification debate, Reverend David Caldwell disapprovingly said that the secular nature of the Constitution was "an invitation for Jews and pagans of every kind to come among us. At some future period this might endanger the character of the United States." (13) This criticism contrasted markedly with the Federalists' defenses of the Constitution. When political philosopher Donald Lutz examined the sources the Federalists drew upon in their writings, he found that exactly zero percent of them came from the Bible. He concluded that "the Federalists' inclination to Enlightenment rationalism is most evident here in their failure to consider the Bible relevant" in defending the Constitution. (14)

During the ratification debates, critics made numerous attempts to amend the Constitution to add religious tests and/or to add references to God. One such attempt came in Connecticut's ratifying convention, where delegate William Williams proposed to replace the Constitution's preamble with his longer version below:

The Constitution's preamble
"We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Williams' suggested preamble:
"We the people of the United States in a firm belief of the being and perfection of the one living and true God, the creator and supreme Governor of the World, in His universal providence and the authority of His laws: that He will require of all moral agents an account of their conduct, that all rightful powers among men are ordained of, and mediately derived from God, therefore in a

dependence on His blessing and acknowledgment of His efficient protection in establishing our Independence, whereby it is become necessary to agree upon and settle a Constitution of federal government for ourselves, and in order to form a more perfect union, etc., as it is expressed in the present introduction, do ordain, etc."

The Connecticut delegates voted it down. In Virginia, an attempt was made to replace the "no religious test" language of Article VI with "no other religious test shall ever be required than a belief in the one and only true God, who is the rewarder of the good, and the punisher of evil." That wasn't accepted at the Virginia convention. In fact, all attempts to inject God and religious tests into the Constitution were defeated. (15)

During the Civil War, Protestant fundamentalists and other religiously-minded people created the National Reform Association, which pushed for a Constitutional Amendment to reword the preamble to the Constitution as follows:

"Recognizing Almighty God as the source of all authority and power in civil government, and acknowledging the Lord Jesus Christ as the Governor among the nations, His revealed will as the supreme law of the land, in order to constitute a Christian government. . ."

President Abraham Lincoln—who spoke frequently of "God's purpose" even though he was never a member of any church and was outspoken in his religious skepticism in his 20's—offered no support for the amendment. Similarly, Congress made no serious effort to pass the amendment. We should note, however, that in 1864 Congress added the motto "In God We Trust" to U.S. currency. The National Reform Association continued to advocate in vain for the Christian amendment until the organization dissolved in 1945. (16)

The Cold War saw additional attempts to undercut secularism in America. Despite the fact that President Truman was a lifelong Baptist, an additional attempt to pass a Christian amendment to the Constitution during his presidency was, according to scholar Dianne Kirby, "easily defeated." (17) With President Eisenhower's encouragement, in 1954 Congress added the phrase "under God" to the Pledge of Allegiance—clearly a product of the McCarthy-era's fear of godless communism. Note that the motto "In God We Trust" and the phrase "under God" were added to money and the Pledge of Allegiance, respectively, and are not part of America's secular Constitution. Note, also, that America's first unofficial motto—*E pluribus unum*, or "Out of many, one"—is still on the Great Seal of the United States and more properly reflects the religious and ethnic diversity of the American experiment even though it originally referred to the unity of the 13 diverse colonies.

The Advantages of Secularism

Why a secular republic? Several **advantages of secularism** come to mind. Secularism promotes order and peace between different religions, because of what Jacques Berlinerblau refers to as the **secular compact**, which is the understanding that the state guarantees people freedom to believe or not believe whatever they want in an orderly society, and in exchange, all citizens agree to limit their religious practices to those that do not violate the law or disrupt society. In essence, one can believe whatever one wants but can only act on those beliefs that don't hurt others or destabilize society.

Another advantage is that religion, atheism, and agnosticism all tend to thrive in secular republics, perhaps because secularism separates state authority from not only the dominant religion, but from all sects equally. As Berlinerblau put it, "Secularism is a fierce and principled defender of religious liberty—perhaps civilization's best defender of it." (18) Secularism defends freedom of conscience, which is a bedrock of democracy. A society in which individuals cannot articulate spiritual truths for themselves is not likely to allow people much freedom to publicize and advocate for any of their worldly beliefs either—especially if they differ from those who hold the reins of power.

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1.8: Chapter 18- Amending the Constitution

> *"If we take seriously the democratic principle of ratification that the phrase 'We the People' suggests, then nothing can make another generation's fundamental law count as ours except our consenting to it. In American constitutional law, silence—the fact that we have not amended the Constitution—counts as consent. But because amending the Constitution is nearly impossible, our silence is compelled, then laundered into consent."*
>
> *–Law Professor Jedediah Britton-Purdy (1)*

The Comparative Difficulty of Amending the Constitution

Article V provides several possibilities to amend the Constitution. The American founders were far-sighted in this regard, for it makes eminent sense that a foundational document might need to be updated as the decades—now centuries—pass and society changes. Since the American founding, it is commonplace that written constitutions around the world have provisions whereby they can be amended. However, the U.S. Constitution stands apart from other written constitutions in one important regard: **It is particularly difficult to amend**. Law professor Richard Albert has established that "The United States Constitution is extraordinarily difficult to formally amend, in contrast to most other less-rigid democratic constitutions." (2) Since 1789, America has amended the Constitution only twenty-seven times, even though there have been over eleven thousand amendments proposed in our history. By contrast, the Basic Law of the Federal Republic of Germany has been amended more than fifty-five times since it went into effect in 1949. Similarly, France has amended its constitution two dozen times since 1958. Between 1982 and 2015, Canada amended its constitution eleven times. Moreover, amending the U.S. Constitution appears to have become politically more difficult over time—so much so that Albert wrote that the Constitution almost seems to be "amendable in theory alone." (3) The last time the Constitution was amended was in 1992, when the 27th Amendment passed that affects compensation for Representatives and Senators. The last consequential amendment affecting the lives of ordinary Americans was in 1971 (!) when the 26th Amendment set the national voting age at 18 years.

There are several ways to think about the U.S. Constitution's resistance to alteration. It's entirely possible that the founders essentially "got it right" when they wrote the document, meaning that there hasn't really been much need for change. The eleven thousand plus amendment proposals suggest that this is not the case. Obviously, people from a wide variety of political perspectives have thought that the Constitution needed updating. Another way to think about it is that there may have been an extraordinary number of ill-advised proposals to amend the Constitution, and these proposals were justly defeated. That's a matter of political perspective. What isn't really debatable is that the difficulty in amending the Constitution puts the United States in the unenviable position of being stuck with a founding document that reflects pre-modern understandings of how to organize a society. Even if we ascribe genius to the founders, they were still people who did not have our modern understandings of democracy and equal rights. That's a problem. A final perspective to consider is that, by being so bloody difficult to amend, the Constitution stands as an obstacle to improving the lives of ordinary Americans.

Amending the Constitution

The process for amending the Constitution puts up many obstacles. Basically, there are four amendment possibilities situated in two pathways, all of which are spelled out in Article V of the Constitution. One pathway starts in the Congress and the other with the states. Both pathways need sufficient states to ratify the amendment for it to go into effect.

Congressional Initiation

1. The House and the Senate both must pass the amendment by a two-thirds majority vote. If that happens, then the amendment needs to pass by a simple majority of 50 percent, plus one vote, in three-quarters or thirty-eight of the state legislatures to go into effect.
2. The House and the Senate both must pass the amendment by a two-thirds majority vote. If that happens, then the amendment needs to be accepted at state-level conventions in three-quarters or thirty-eight state conventions to go into effect.

State Initiation

3. Two-thirds of the states (34 of the 50 states) petition Congress to call for a national convention, which passes the amendment. If that happens, then the amendment needs to pass by a simple majority of 50 percent, plus one vote, in three-quarters of the state legislatures (38 of the 50 state legislatures) for it to go into effect.
4. Two-thirds of the states (34 of the 50 states) petition Congress to call for a national convention, which passes the amendment. If that happens, then the amendment needs to be accepted at state-level conventions in three-quarters (38 of the 50 state conventions) to go into effect.

If we look at the history of amending the Constitution, we see that the first pathway is by far the most common. All but one amendment has traveled that path. One amendment—the Twenty-first Amendment, which repealed Prohibition—was accomplished with pathway #2 above. Pathways #3 and #4 have never been used to pass an amendment, and it's not for lack of trying. From 1789 to 1993 there were almost 400 proposals from some states for Congress to call a convention to amend the Constitution. (4) In 2018, conservative interests came within six states of successfully calling for a constitutional convention that they hoped would constitutionally enshrine their values. These efforts were funded and pushed by wealthy people such as the Mercer family and the Koch brothers. (5) Progressives have had less success pushing the same kind of agenda. Legal scholars and jurists from both the Left and the Right worry about a second constitutional convention running amok and radically altering America's constitutional order. As University of Maryland law professor Richard Boldt put it, "The lack of clear rules of the road, either in the text of the Constitution itself or in historical or legal precedent, makes the selection of the convention mechanism a choice whose risks dramatically outweigh any potential benefits." (6)

Looking at the four pathways above, it is now clear why the U.S. Constitution has not been amended much. It is very difficult to get an amendment to pass both the House and Senate with a two-thirds majority, and then there is the high hurdle of getting thirty-eight states to approve it. Consider the fate of the Equal Rights Amendment (ERA), which was initially proposed in 1923. It finally passed Congress in 1972, only to fall three states short of ratification. Then, many years later, Nevada ratified the ERA, followed by Illinois in 2018. After Democrats took over Virginia's state government in 2019, Virginia became the necessary thirty-eighth state to ratify the amendment. One might think that would be the end of the story. However, the text of the amendment passed by Congress in 1972 had language saying that it had to be ratified by March 22, 1979–a date that was later extended to June 30, 1982. The Democrats have passed bills in the House to remove the ratification deadline altogether, but Republicans in the Senate have let such bills die without debate. In 2020, the Justice Department's Office of Legal Counsel issued an opinion that, because Virginia's ratification came well after the deadline, the amendment could not be added to the Constitution. The United States Archivist is following that advice, so the Equal Rights Amendment has not been successful. (7) That's a heck of a long time and much effort in an ultimately futile attempt to codify the equal rights of women. This story illustrates the frustration people have that "the system" can serve ordinary people. Still, ordinary people's ability to organize and press for a Constitutional amendment is what has enabled women (19th Amendment) and people of color (15th Amendment) to vote, and holds the promise of steering the ship of state in more humane and democratic directions in the future.

Jedediah Britton-Purdy, law professor at Duke University, argued for changing Article V itself. "There is something to be said," he wrote, "for an open, fully democratic effort to put a change to Article V directly onto a national ballot, to stand or fall with the choice of the living majority." He suggested that Article V be amended to require a "constitutional convention every generation, staffed by a blend of specially elected delegates, senior public officials, and, perhaps, citizens selected jury-style to represent everyday experiences." After all, he wrote, "the Constitution doesn't have to be something we merely inherit; it could be something we can change ourselves—starting with rewriting the too-stringent rules for making such changes." (8)

What if . . . ?

What if you led an organization that was proposing a new amendment to the Constitution? What amendment would you propose? Why? What positive results would you hope to achieve with it? What if you were charged with making the Constitution easier to amend? What procedure would you put in place?

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1.9: Chapter 19- How Democratic is the U. S. Constitution?

> *"The Constitution was a compromise between slaveholding interests of the South and moneyed interests of the North."*
>
> *–Howard Zinn (1)*

> *"Wise as the Framers were, they were necessarily limited by their profound ignorance."*
>
> *–Robert Dahl (2)*

The question *How democratic is the Constitution?* is more complicated than it initially appears. Are we talking about the Constitution as it was written prior to any amendments? Or, are we talking about the Constitution we have now? Are we talking about the authors of the Constitution and what their understanding was of democracy? Are we talking about the Constitution as a document of its own time? Or, are we going to judge it by contemporary standards of democracy? What do we mean by the word *democratic* anyway? If we define **democracy** as rule by the people—either directly or via elected representatives—and if the definition of *the people* has expanded over time, how are we to fairly judge the Constitution on that ground? Not so easy, is it?



Democracy Road Sign

The Constitution in Broad Perspective

Let's start with the Constitution and the first ten amendments—treating them as one document even though we know that's not quite true—and judge them from the point of view of the late eighteenth century. Conduct a mental exercise and transport yourself back to the period between 1787 when the Constitutional Convention opened in Philadelphia and 1791 when the Bill of Rights was officially added to the Constitution. Float around the United States eastern seaboard and get a feel for the nature of the government that was being created there. Then, allow yourself to roam around the rest of the world, examining the governments of all the countries, kingdoms, principalities, empires, and tribal societies that existed at the time. From this perspective, author Catherine Drinker Bowen was on to something when she titled her book on the Constitutional Convention *Miracle at Philadelphia*. (3) As she pointed out, the founders themselves thought it was a miracle. We should not let go of that sense of the miraculous. The men who wrote the Constitution were remarkably steeped in cutting-edge political philosophy and displayed a thoughtful kind of genius with respect to laying out—for the first time, mind you—a written constitution for a large republic based on popular rule. One can hardly overstate how important a step forward the U.S. Constitution was for all of humankind. There was nothing like it anywhere. Given the social norms of the time, it is difficult to imagine how the founders could have produced a document that was *more* democratic than the Constitution and Bill of Rights.

Still, the founders were not angels. Nor were they divinely inspired. Nor could they divorce themselves from the time in which they lived. They were flesh and blood people with several obvious and relevant characteristics, and they represented interests not widely shared by the rest of the population. We can start with the fact that all the founders were men. Further, they shared a world view in which women's interests were only channeled into the public sphere through husbands, fathers, and brothers. The founders were also White and were not concerned about the interests of slaves, free Blacks, Native Americans, or other people not White. As propertied men, the founders did not represent the interests of even the majority of White men—those who did not have enough property to vote or hold office.

In 1913, the historian **Charles Beard** wrote one of the most famous and contentious books on the Constitution called *An Economic Interpretation of the Constitution of the United States*. He asserted that the founders consisted overwhelmingly of merchants, people who had money on loan to others, and people who owned public bonds, and that they pushed the Constitution at the expense of farmers and debtors. Subsequent research revealed some limitations of Beard's book, but his work forever changed the way we understand the American founding. (4) No longer would we ignore the obvious fact that the small group of men who wrote the Constitution had economic interests and that they preferred a central government strong enough to protect those interests, but not one empowered by popular majority to carry out radical economic policies that would damage their own elite interests.

The Founders' Understanding of Democracy

For most students coming to college straight out of high school, it is somewhat of a shock to realize that the American founders were not fond of democracy, a term they understood to mean direct democracy unmediated by representative bodies. Indeed, they equated the term *democracy* with mob rule. As the historian Richard Hofstadter wrote of the founders, "In their minds, liberty was linked not to democracy but to property." And when we talk of property, we are talking about people who owned a great deal of it. Further, Hofstadter argued that the founders were interested in negative liberties—the freedom of propertied interests from "fiscal uncertainty and irregularities in the currency, from trade wars among the states, from economic discrimination by more powerful foreign governments, from attacks on the creditor class or on property, from popular insurrection." (5) It's easy to see from the founder's own words that this was the case. James Madison argued that "Democracies have ever been spectacles of turbulence and contention," and that they are incompatible with "the rights of property." Indeed, he was concerned that those "without property" and "debtors," which constitute the majority of the population, would use their power to "kindle a flame" for "wicked projects" like "abolition of debts" and "an equal division of property." (6) Similarly, Alexander Hamilton looked down his nose at "the idea of an actual representation of all classes of people," and instead argued that the merchant class should be "more equal" than the others. (7)

Instead of a "democracy," most founders wanted to establish "popular government" or a "republican" form of government. (8) They wanted government to be founded on the will of the people but to be mediated by social customs and elite-dominated representative institutions that would ensure that their interests would not be jeopardized. Women's interests would be represented by their brothers, fathers, and husbands. Poor White men's interests would be represented by their betters in the merchant and creditor classes. Slaves' interests were not really considered separate from those of their owners. Madison wrote—again, in *Federalist #10*—that "The public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves." Moreover, the "wisdom" of these leaders would "best discern the true interest of their country, and [because of their] patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." This is nonsense, of course, for we know definitively from American history that representatives, senators, presidents, and Supreme Court justices have repeatedly demonstrated a self-interested understanding of justice and an unwillingness to act in the public interest unless faced with organized majorities of ordinary people demanding that they do the right thing.

What are we to conclude about the founders and democracy? They abhorred the idea of direct democracy. They wanted to establish a republic, which is what we would call a representative democracy—although their understanding of whose voices should count was necessarily much more limited than ours. Still, the founders supported the idea that the will of the majority should be regularly translated into public policy as long as the rights of the minority were not trampled in the process. James Wilson, a prominent member of the Constitutional Convention and later a Supreme Court justice, wrote that "the majority of the people wherever found ought in all questions to govern the minority." When James Madison referred in *Federalist #10* to "the republican principle," he was referring to the majority overruling the minority when the latter was attempting to go against the public good or violate the rights of the people. And in a letter to Madison, Thomas Jefferson wrote that "It is my principle that the will of the majority should

always prevail." (9) These sentiments are important to remember, for if the founders were alive today and had our broad understanding of who gets to count as members of the body politic, they would argue that our attenuated democracy needs to be strengthened. And yet we still live with the results of their privileged position in 1787 and their fears of direct democracy, both of which are used by contemporary interests who want to limit the voices of ordinary people. An interesting paradox, no?

Constitutional Features Limiting Popular Rule

The Constitution is full of features designed to limit direct popular rule. The House of Representatives was the only popularly elected body. The franchise (10) to elect representatives was left to the states and was very limited as we'll see later in this textbook. So, from our perspective in time, we can say that the House was a somewhat democratic feature of the Constitution. The rest of the document is a minefield of features designed to thwart majority will and to protect the interests of elites. Consider the following:

Separation of Powers—The separation of powers slows government down and makes it structurally unresponsive to large, sudden changes in popular will. Under the original, un-amended Constitution, such public mood swings need to be sustained over a long time to elect enough representatives to the House and to ensure that enough senators get selected by states to serve in Congress. There is the added burden of needing a president who would agree with the policy the people support. Finally, the whole project could be shot down by Supreme Court justices when the new policy is challenged in court. In addition to this separation-of-powers problem, it is undemocratic in the sense that it hinders the peoples' ability to hold leaders accountable—even after constitutional amendments designed to make the U.S. more of a democracy. Political scientist William Hudson has written that "The logic of separation of powers—shared responsibility for policy making, combined with accountability through separate elections—makes holding officials accountable for policy failure extremely difficult." (11)

The Senate—In the original Constitution, senators were not popularly elected. Instead, the founders wanted senators chosen by their respective state legislatures. Thus, the Senate was doubly insulated from the popular will. This defect was remedied in 1913 when the Seventeenth Amendment was ratified, which said that senators would henceforth be "elected by the people" of each state. Even now, however, the Senate is a profoundly undemocratic body. We'll talk more about this later, but keep in mind that each state is allotted two senators, regardless of the state's population. This empowers voters in smaller, rural states, which happen to be whiter than the overall U.S. population and hobbles the influence of people living in larger, more populous, more diverse states. Even worse, as noted by Noah Feldman, "The Constitution was designed precisely so that no one would be able to do anything about the undemocratic Senate." (12)

The President—The American president is not elected by the people. Instead, presidents are elected by the Electoral College. Again, we'll talk more about this later in the text. Even though we have tied the electors' choice to popular vote in each state—or in particular districts in the case of Nebraska and Maine—the basic fact is that popular vote does not determine who sits in the White House. The Electoral College vote is determinative, not that of the people. This is why George W. Bush became president in 2001 even though Al Gore received about 544,000 more votes nationwide, and this is why Donald Trump became president in 2017 even though Hillary Clinton received about 2,900,000 more votes nationwide. It is difficult to call a country's political system fully "democratic" when majority vote does not select the president.

The Supreme Court—Justices who sit on the Supreme Court and make enormously significant decisions about the constitutionality of state and federal laws and regulations are insulated from the popular will. They are nominated by the president—who may or may not be in office due to the will of the people—and are approved by the undemocratic Senate. Further, they hold their seats for life, meaning that they can influence the character of the country long after they have fallen out of touch with the lives of ordinary Americans. They also usually come from upper-class backgrounds and attend elite colleges. The common Supreme Court defense of the lack of democratic accountability is that justices should be impartial. However, as we'll see later in the text, Supreme Court justices are anything but impartial. For most—but not all—of American history, a majority of conservative justices has implemented conservative ideology through their rulings, empowering corporations and putting their finger on the scales of justice in favor of a particular set of interests.

No Positive Right to Vote—The original Constitution never articulated an affirmative right to vote to anyone, and instead left the vote-granting privileges to states. Initially, of course, states granted voting privileges to the minority of property-owning White men. Through amendments to the Constitution, we have extended the "right to vote" to people of color, to women, and to people who are eighteen years and older. However, as Garrett Epps has written, our courts still see voting as a privilege: "The 'privilege'

over the years has been made dependent on literacy, or long residency in a community, or ability to prove identity, or lack of a criminal past. None of these conditions would be allowed to restrict free speech, or freedom from 'unreasonable' searches, or the right to counsel," but they have been used to keep people from voting. (13) A truly democratic constitution would positively assert the right of all adult citizens to vote and place the burden of registering people to vote on the government rather than the individual.

The Amendment Process—We've just talked about this, so we don't need to belabor the point here. Suffice it to say that the Constitution is remarkably difficult to amend. Thomas Jefferson once wrote to James Madison that "The earth belongs…to the living…the dead have neither powers nor rights over it." (14) And yet, because the Constitution is so difficult to amend, we are governed by a slightly modified document written by a small number of slave-owning, wealthy White men who did not have the benefit of all we know about the world nor the appreciation we have for the dignity of all people.

The political scientist Robert Dahl, whose quote leads off this chapter, looked carefully at this question of how democratic the Constitution was and is. Two things stand out in his review of the subject. First, the Constitution we have is a creature of its time—and its time was not a particularly democratic one from our perspective over two centuries later. Had the Constitution been written in the 1830s or the 1960s or yesterday, it would undoubtedly be far more democratic in nature. It would have had, in other words, an expanded understanding of "the people" on whose authority government rests, and it would have placed fewer barriers to translating majority opinion into public policy. The second takeaway from Dahl's work is that the Constitution *should* be more democratic. He wrote, "For my part, I believe that the legitimacy of the constitution ought to derive solely from its utility as an instrument of democratic government—nothing more, nothing less." (15)

What if . . . ?

What if you were invited to a constitutional convention today to write a new Constitution? How would you convince your colleagues that the new U.S. Constitution needs to be more structurally democratic? What features would you insist be a part of the new Constitution?

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CHAPTER OVERVIEW

2: The Presidency

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2.1: Chapter 25- The President as Person and Institution

> *"[Woodrow] Wilson's administration was not overwhelmingly popular among intellectuals in its first few years—especially among those who thought that the Progressive movement should go beyond the effort to realize the old competitive ideals of small businessmen and do something about child labor, the position of Negroes, the condition of workingmen, and the demand for women's suffrage."*
>
> *—Richard Hofstadter (1)*

> *"Unelected bureaucrats and cabinet appointees were never going to steer Donald Trump in the right direction in the long run, or refine his malignant management style. He is who he is."*
>
> *—Anonymous (2)*

The presidency is two things: a person—the president—who has prevailed in an electoral struggle to attain the White House, and the presidency is an institution—an infrastructure—that has developed over time to support and enable each president's policies. That infrastructure—the institutional presidency—has largely been built up since the Great Depression and World War II. It is staffed by presidential appointees, some of whom require the Senate's "advice and consent" and some of whom do not.

The President as Person



President Joe Biden

Fewer people have served as President of the United States as have served in any given year in the United States Senate. Presidents serve a four-year term and can be re-elected for one more term before they must leave office. The original Constitution placed no limits on the number of consecutive terms a president could serve. Franklin Roosevelt was elected in 1932, 1936, 1940, and 1944. In 1951, the **Twenty-second Amendment** came into effect. It states that "No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once." Thomas Jefferson would have liked the Twenty-second Amendment, for he wrote to James Madison from Paris after reading a copy of the Constitution and complained that it lacked what he called "rotation in office, and most particularly in the case of the President." He worried that if we didn't have term limits for the president, other nations would interfere in our political processes to keep someone in the presidency who served their interests rather than those of the American people. (3)

As of this writing, all American presidents have been men. Hillary Clinton came close to becoming the first female president in 2016, when she won the popular vote but lost the electoral college tally. All American presidents except Barack Obama have been White. Common occupations before becoming president include lawyer, U.S. senator, vice president, and state governor. About half of U.S. presidents have served in the military at some point in their life. Donald Trump was the only modern president never to

have either served in the military or held any elected or appointed office before becoming president. Woodrow Wilson was the only political scientist professor ever to have been elected president.

When referring to the president, the Constitution uses “he” throughout and places few requirements on who can serve. At the time the Constitution was adopted, it said the president must be “a natural born citizen, or a citizen of the United States”; the president must have been a resident of the United States for at least fourteen years before assuming office; and the president must be at least thirty-five-years-old. When William McKinley was assassinated, Theodore Roosevelt became the youngest president at only forty-two-years-old, and John F. Kennedy was the youngest elected president at forty-three-years-old.

The Institutional Presidency

The president is a person, but the presidency is an institution—one of three co-equal branches of government. Think of the institution as all the bureaucracy surrounding the president to help them do their job. The presidency’s physical institution is the White House and the Eisenhower Executive Office Building, located just west of the White House. The people, entities, and agencies who help the president—who make up that bureaucracy—are called the president’s cabinet and the Executive Office of the President.

The Cabinet

At the 1787 Constitutional Convention and during the ratification debates, George Mason advocated that the president be ensconced in what he called “a constitutional council” composed of the president, two members from New England, two from the mid-Atlantic states, and two from the Southern states. (4) Mason’s proposal did not make it into the document. Instead, the Constitution says that the president “may require the opinion, in writing, of the principal officer in each of the executive departments.” From that prerogative, the **cabinet** evolved, the main role of which is to advise the president. Originally, the cabinet was composed of the Secretary of War, the Secretary of State, the Secretary of the Treasury, and the Attorney General. Think of the cabinet as the major executive agencies’ leaders and anyone else designated by the president to sit with that group. With the exception of the Vice President, cabinet members are approved by the Senate. In modern times, presidents typically do not gather all of their cabinet members at once and have real deliberations over policy—photo ops, maybe, but not true deliberations. Instead, presidents will gather some cabinet members as needed to discuss particular policy issues. As of this writing, the cabinet consists of the following offices:

Secretary of Agriculture	Secretary of Health & Human Services	Secretary of State
Attorney General	Secretary of Homeland Security	Secretary of Transportation
Director of the Central Intelligence Agency	Secretary of Housing and Urban Development	Secretary of the Treasury
Secretary of Commerce	Secretary of the Interior	U. S. Trade Representative
Secretary of Defense	Secretary of Labor	Secretary of Veterans Affairs
Secretary of Education	Director of the Office of Management & Budget	Vice President
Secretary of Energy	Director of National Intelligence	White House Chief of Staff
Administrator of the Environmental Protection Agency	Administrator of the Small Business Administration	

The Executive Office of the President

The **Executive Office of the President** was created by Congress during the Franklin Roosevelt administration when the demands of modern government made it clear that the presidency needed a more extensive organization. The Executive Office of the President employs several thousand people. It comprises staff and agencies that directly support the president. As of this writing, the following are key components of the Executive Office of the President:

The White House Staff—The **Chief of Staff** manages the White House staff operations and often controls access to the president. The White House staff comprises key aides and support personnel who do not require Senate approval. Among these are the president's secretarial staff, who are responsible for correspondence and calendaring; the White House Legal Counsel, who advises the president on what he can and cannot do with respect to constitutional and statutory powers; the White House Press Secretary, who is responsible for all communications with the news media; the National Security Advisor, who coordinates security policy and the various agencies involved with those matters; the Office of Legislative Affairs, which is concerned with getting the president's agenda through Congress; plus a variety of other offices dedicated to presidential trips, intergovernmental affairs, communication, economic policy, domestic policy, and so forth. Presidents typically have not had family members play roles on the White House staff, but there have been exceptions. President Clinton had his wife, Hillary Rodham Clinton, chair the National Commission on Health Care Reform. President Trump added his daughter, Ivanka Trump, to his staff as an Advisor to the President and his son-in-law, Jared Kushner, as an Assistant to the President and Senior Advisor. Neither were paid a salary for their services. The couple were reportedly "exasperated" with John Kelly, President Trump's second Chief of Staff, and they both may have played a role in his leaving the administration. (5)

Important Support Agencies—The Executive Office of the President also contains a number of important support agencies. We won't mention them all, but the following are most likely to be in the news:

- **Office of Management and Budget**. Originally created in 1921 as the Bureau of the Budget in the Treasury Department, President Franklin Roosevelt moved it into the White House in 1939, and President Richard Nixon reorganized it and renamed it the Office of Management and Budget (OMB) in 1970. The OMB is a powerful agency within the executive branch. According to the White House, the OMB assists the president with the following:
  - Developing and executing the budget.
  - Managing agency performance and oversight, human capital, federal procurement, financial management, and information technology.
  - Coordinating and reviewing all significant executive agencies' federal regulations policy.
  - Coordinating the Legislative branch and providing them clearance.
  - Coordinating Executive Orders and Presidential Memoranda. (6)
- **National Security Council**. The National Security Council (NSC) was established in 1947 by the National Security Act. Its responsibility is to advise the president and coordinate American security and foreign policy. Its disposition reflects the highly militarized way in which the United States views its foreign policy. In addition to the President, Vice President, and the National Security Advisor, the NSC's principle members are the Secretary of Defense, the Chairman of the Joint Chiefs of Staff of the military, the Secretary of State, the Director of National Intelligence, the Secretary of Energy, and the Secretary of the Treasury.
- **Council of Economic Advisors**. Established by Congress in the Employment Act of 1946, the Council of Economic Advisors is charged with providing the president helpful domestic and international economic policy analysis and guidance. The Council is composed of three prominent presidential appointed economists, one of whom is designated as the chairman, and a variety of other consulting economists who specialize in fields like international economics, housing economics, or healthcare economics. The people appointed to the Council of Economic Advisors share the president's approach to economics and are often used by presidents to justify their actions regarding domestic and international economic policy.
- **Office of the United States Trade Representative**. Established by Congress with the Trade Expansion Act of 1962, the Office of the United States Trade Representative is responsible for coordinating U.S. trade policy and negotiating international trade agreements. In its role, the U.S. Trade Representative has pursued a heavily pro-corporate agenda, opening up foreign markets to American capital, negotiating agreements that open up American markets to imports, promoting offshoring American jobs, and putting American workers in direct competition with lower-paid international workers who have fewer rights to organize and who typically don't have as robust safety and environmental protections as U.S. workers. (7)

What if . . . ?

The Constitution doesn't allow immigrants to become president. What if we changed that? Would you support or oppose such a change? If you support it, what limitations would you put on the practice?

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2.2: Chapter 26- The Vice President and Presidential Succession

> *"Hence also sprung that unnecessary & dangerous Officer the Vice President; who for want of other Employment, is made President of the Senate; thereby dangerously blending the executive & legislative Powers; besides always giving to some one of the States an unnecessary & unjust Pre-eminence over the others."*
>
> *–George Mason (1)*

The Vice President



Vice President Kamala Harris

Today, presidents and vice presidents run on a ticket together. The **Twelfth Amendment** altered the way electors cast ballots for the two offices. In the original Constitution, electors cast two ballots, and the person who got the most votes became president while the person with the next most votes became the vice president. That procedure resulted in two potential issues, both of which manifested themselves early on. In the 1796 election, the electors chose Federalist John Adams for president and Democratic-Republican Thomas Jefferson for vice president, which created all sorts of problems. In the 1800 election, the electoral college votes tied for Jefferson and Aaron Burr, both of whom were from the same party. That election was thrown into the House of Representatives, which took thirty-six ballots to finally elect Jefferson as president. Now, with the Twelfth Amendment, the electors cast separate ballots for president and vice president and we avoid both of those problems.

George Mason's concerns about the dangers of the vice president have not come to pass. With the exception of Dick Cheney in the George W. Bush administration, most vice presidents have not been especially powerful—although some, such as Lyndon Johnson in the John F. Kennedy administration, were fairly useful to the president's agenda. Vice presidents don't have many formal powers. One, as Mason mentioned above, is **President of the Senate**, but that is mostly a formality, and the vice president isn't even allowed to participate in Senate debates. As President of the Senate, vice presidents only have two formal Senate roles that are meaningful. Vice presidents preside over the electoral college vote-counting, which takes place in a joint session of Congress. The vice president also has the ability to cast a tie-breaking vote if one is needed in the Senate. During the Obama administration, Vice President Joe Biden cast zero tie-breaking votes. During the first year of the Clinton administration, Vice President Al Gore cast the tie-breaking vote on a budget that set the U.S. back on the course of balanced budgets after the deficit-ridden Reagan and George W. Bush years. Early in the Trump administration, Vice President Mike Pence cast a tie-breaking vote to ensure that nominee Betsy DeVos became Secretary of Education—a controversial choice, as DeVos never attended a public school, never worked at one, did not send her children to public schools, and never served on a public board of education. With an evenly divided Senate in the first half of the Biden presidency, Vice President Kamala Harris was called upon to cast a number of tie-breaking votes, including voting to pass the Inflation Reduction Act of 2022, COVID economic relief in 2021, and numerous votes to confirm President Biden's appointments.

Beyond their few formal powers, vice presidents are nevertheless important in American politics. They are often chosen by presidential candidates to **"balance the ticket"** either geographically or politically. In 1960, Massachusetts liberal John F. Kennedy needed someone like Texan Lyndon Johnson to help him win the presidency. In 2012, Mitt Romney—who had expressed pro-

choice values and had pushed RomneyCare through in Massachusetts—needed someone with strong conservative credentials like Paul Ryan from Wisconsin. In 2016, the irreligious and by all accounts debauched New Yorker Donald Trump needed someone pious and influential with white Christians like Mike Pence from Indiana. Once in office, vice presidents are used by presidents in many ways. They might be relied upon for political advice. They might be put in charge of special initiatives. They often represent the president at ceremonies and functions domestically and around the world.

Presidential Succession

If the president resigns or dies in office, they are succeeded by the vice president. In 1841 William Henry Harrison died thirty-one days into his first term, and John Tyler became the first vice president to succeed to the presidency. Tyler asserted himself as president—not acting president—and established the precedent that when a Vice President becomes President, he does so fully and without qualification. Lyndon Johnson became president in 1963 when John F. Kennedy was assassinated in Dallas, Texas. In 1974 Gerald Ford became president when Richard Nixon resigned due to his role in the Watergate scandal. When a sitting vice president becomes president, they nominate someone to be vice president, and according to the **Twenty-fifth Amendment**, that nominee needs majority approval from both the House and the Senate.

The Twenty-fifth Amendment also has two provisions that deal with presidential incapacity. First, the president can inform the President Pro Tempore of the Senate and the Speaker of the House that they are unable to fulfill the powers and duties of the office. When this occurs, the vice president becomes Acting President until the president informs Congress that they are ready to resume the office. In 1985, this provision was used when Ronald Reagan had a colonoscopy, and George H. W. Bush became Acting President. Twice for the same reason, President George W. Bush temporarily transferred authority to Vice President Dick Cheney in 2002 and in 2007. In an additional section of the Twenty-fifth Amendment, the vice president and a cabinet majority can inform the President Pro Tempore of the Senate and the Speaker of the House that the president is unable to fulfill the powers and duties of the office, and then the vice president would become the Acting President. This has never been done, but there were persistent rumors of it being contemplated during the Trump administration. (2)

Presidential succession issues beyond Twenty-fifth Amendment provisions are covered by the **Presidential Succession Act of 1947**, which has been amended several times since then. This law spells out the succession order if the president and vice president are both killed or otherwise incapacitated. Any person occupying one of these positions who does not meet the eligibility requirements to become president would be skipped. Here is the succession order after the vice president:

1. Speaker of the House	10. Secretary of Labor
2. President pro Tempore of the Senate	11. Secretary of Health and Human Services
3. Secretary of State	12. Secretary of Housing and Urban Dev
4. Secretary of the Treasury	13. Secretary of Transportation
5. Secretary of Defense	14. Secretary of Energy
6. Attorney General	15. Secretary of Education
7. Secretary of the Interior	16. Secretary of Veterans Affairs
8. Secretary of Agriculture	17. Secretary of Homeland Security
9. Secretary of Commerce	

There has been a long cautionary practice that ensures that someone on the succession list is safe in case some catastrophe takes out most or all of the top executive branch officials. The person identified as the designated survivor does not attend major events like the President's State of the Union Address at which many or all of the others on the list attend.

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2.3: Chapter 27- The President's Domestic Powers

> *"It is important. . . that the habits of thinking in a free country should inspire caution in those entrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another."*
>
> *–George Washington (1)*

American presidents have a wide range of formal powers, but the founders were, as Garrett Epps has written, "artfully vague about the extent and limits" of those powers. (2) Put another way, "the Constitution permits either an active or a passive executive." (3) Several factors determine the extent to which a president can successfully exercise domestic political power. These include their margin of victory, Congress' partisan power balance, and the president's own understanding of how to act while in office. One important situation to consider is whether we are in a **divided government**, which is when the president and at least one congressional chamber are from different parties. Such a situation does not necessarily have to lead to gridlock, but it does make it difficult for a president to accomplish their policy goals.

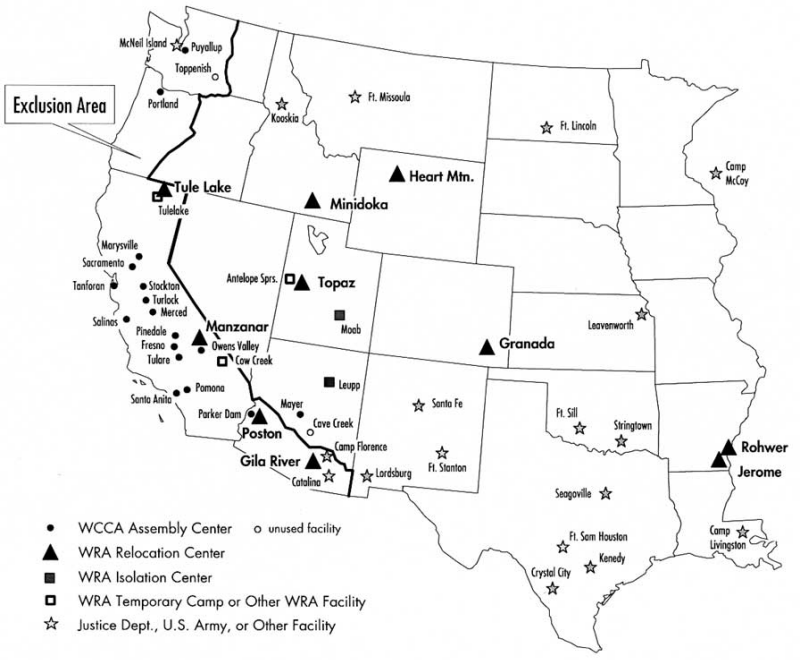
If a president is politically well-positioned to act and is personally predisposed to act, they can draw upon the following key powers.

Veto Power

High on the list is the president's ability to veto bills passed by Congress. The word "**veto**" is Latin for "I refuse." The president has two kinds of veto, both of which you should know: a **regular veto** and a **pocket veto**. When Congress sends a bill to the president, they can handle it in several different ways. If they sign the bill, usually in a ceremony, the bill becomes law. If they do not sign the bill, it will become law anyway after ten working days. The president's third option is to veto the bill by sending it back to Congress with a veto message about why they feel the bill should not become law. This is called a **regular veto**. Congress can override a regular veto with a two-thirds vote in both chambers, but the chances of a successful override are not good. Of the 1,517 regular vetoes issued from 1789 through the end of the Trump administration in 2021, only 111 were successfully overridden. (4) That pattern continued during the Trump administration. Of Trump's nine vetoes, Congress only successfully overrode one. If Congress happens to adjourn in the ten-day period, the president must consider the bill. If the president does not sign the bill, this is called a **pocket veto**. One important difference between a regular veto and a pocket veto is that Congress cannot override a pocket veto.

Executive Orders

Another presidential power is issuing **executive orders** to executive branch members. By issuing an executive order, the president can direct executive branch members to do many things, so long as those actions lie within the law and so long as they do not entail appropriating new federal money. Congress can overturn an executive order if there are enough votes to do so—which would require a simple majority in both chambers, or a simple majority in the House and 60 votes to end a filibuster in the Senate if the president's party wished to defend their use of power. An incoming president can issue an executive order countermanding an executive order issued by a previous president. Rarely do executive orders get more than a passing reference in newspapers. Presidential critics from both parties often claim that executive orders constitute a "power grab" by the president who is issuing them. However, William Howell, a political science professor at the University of Chicago, argues that "it just doesn't match up with the facts on the ground. It's not all power grabs. A lot of it is clearly trivial stuff." (5) Still, it's always a good idea to be vigilant about presidents acting on their own without legislative mandate.



Map of Internment Camps for Japanese-Americans During World War II

Occasionally, executive orders have broader consequences or make big news. You should be familiar with some prominent executive orders.

- **Executive Order #9066**, issued February 1942—President Franklin Roosevelt authorized the Secretary of War "to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion…" (6) The U.S. military then detained and removed against their will over 100,000 Japanese Americans living in California, Oregon, Washington, and Arizona. These people, most of whom were U.S. citizens, were placed in prison camps for the war's duration because they constituted a security risk, even though no evidence was ever presented to that effect. In 1988 Congress issued a public apology and gave $20,000 in restitution to each of the 60,000 surviving internees.
- **Executive Order #9981**, issued July 1948—President Harry Truman directed "that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin." (7) This order effectively desegregated the U.S. military and officially ended a long-standing practice of assigning less desirable duties to racial minorities.
- **Executive Order #13228**, issued October 8, 2001—President George W. Bush **created the Office of Homeland Security.** This executive order directed that the new Office of Homeland Security "identify priorities and coordinate efforts for collection and analysis of information within the United States regarding threats of terrorism against the United States and activities of terrorists or terrorist groups within the United States." (8) Rather quickly, this order transformed into legislation creating the Department of Homeland Security, charged with preventing terrorist attacks and minimizing damage from potential terrorist attacks and natural disasters.
- **Executive Order #13769,** issued January 2017—President Donald Trump issued an executive order very early in his first month in office called **Protecting the Nation from Foreign Terrorist Entry into the United States**. For 120 days it barred entry to any refugee waiting to resettle in the United States; it prohibited all Syrian refugees from entering the U.S.; and it banned "the citizens of seven Muslim-majority countries—Iraq, Iran, Syria, Somalia, Sudan, Libya, and Yemen—from entering the U.S. on any visa category." (9) After some early defeats in court, the Trump administration altered the language of the ban and took the case to the Supreme Court. In a five to four decision, the Court majority ruled that the president was within his powers under the Immigration and Nationality Act, which allows the executive to suspend an entire "class" of people from entering the United States. The dissenters argued that the Immigration and Nationality Act also forbids the executive from discriminating based on nationality. (10)

Executive Branch Appointments

Another useful tool is the president's ability to appoint officeholders throughout the executive branch, as they can appoint those who are politically loyal as well as capable of carrying out the president's domestic policy agenda. (11) In fact, a president will typically appoint thousands of people to various posts in the executive branch. Presidential appointments such as cabinet-level secretaries, other executive agencies' high officials, and ambassadors are all subject to the "advice and consent of the Senate," which means that the **Senate must approve each appointment with a simple majority vote**. The Supreme court case ***Meyers v. United States* (1926)** established that presidential appointees to executive agencies can be removed by the president without Senate approval. However, the Court did rule in ***Humphrey's Executor v. United States* (1935)** that presidential appointees to independent regulatory commissions or agencies that have "quasi-judicial" or "quasi-legislative" functions can only be removed according to the legislative stipulations that created the agency or commission. This is important, because the federal government has many of these kinds of commissions or agencies, and conservative members of the Supreme Court would like the president to have unlimited authority over their members.

At the president's direction, executive branch appointees use their congressionally granted statutory authority to put the president's program into effect. Much of the statute's language is either open to interpretation or allows executives discretion in how exactly to enforce the law. Law professor Kim Wehle points out that Article II's provision that the president "shall take care that the laws be faithfully executed, and shall commission all the officers of the United States" still allows the president and their appointees a fair amount of discretion in applying the law. The Obama administration, for example, was within its powers to defer action on children who were brought to the United States by their undocumented parents, as was the Trump administration to end that program. (12)

The State of the Union Address and the Bully Pulpit

The constitutional provision that the president "shall from time to time give to Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient," has given rise to the annual **State of the Union Address**. Before a national television audience, the president addresses a joint session of Congress in January or February, accentuates his administration's accomplishments, and argues for measures he would like Congress to pass. Thomas Jefferson preferred to send Congress a letter, and the traditional annual personal visit to Congress to give an address did not develop until Woodrow Wilson started the trend in 1913. The State of the Union's effectiveness depends heavily on the level of public support the president enjoys at the time. More broadly, presidents are able to use their rhetorical abilities and media attention to force the country to at least consider specific policy proposals. President **Theodore Roosevelt** recognized and used these abilities, coining the term **bully pulpit** to refer to his ability to push an agenda. Today, we generally refer to a bully pulpit to mean any position which gives the holder the positional and rhetorical context with which to strongly advocate a position. Note that the word "bully" in this context doesn't mean to bully people. Instead, President Roosevelt simply meant that his office was a "wonderful" or "awesome" pulpit from which to preach his views.

Pardons and Reprieves

The Constitution gives presidents the power to "grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." Note the **two limitations on the pardon power**: presidents can only pardon people who have been charged with federal (not state) crimes, and presidents cannot pardon someone in the executive or judicial branches who Congress has impeached. The president can issue a **full pardon**, which restores the recipient's full rights so they can run for office, serve on juries and purchase firearms, or a **conditional pardon**, which restores partial rights. Pardons do not imply that the person is innocent, nor do they expunge the original conviction. The president can also **commute a sentence** which typically allows a person to leave federal prison before completing their full sentence, but they maintain the other impacts of their federal conviction. Most presidential pardons and commutations are not controversial. The Department of Justice's Office of Pardon Attorney has a process to handle petitions from people convicted of federal crimes, and it periodically presents presidents with lists of people who could be pardoned if the president so chooses. Most of the time, exercising presidential pardon power is not a particularly newsworthy event.

However, you should be familiar with the **controversial presidential pardons that have occurred in modern history**. Note that the presidential pardon power is absolute in the sense that neither Congress nor the Supreme Court can countermand a presidential pardon. If, however, a president was to use their pardon power in a way that abused their office, they could be subject to impeachment and removed.

- In 1974, President Gerald Ford pardoned Richard Nixon for any crimes committed while in office. Nixon therefore avoided prison, even though people who carried out his orders ended up in jail. This action may have caused Ford to lose the 1976 election.
- In 1979, President Jimmy Carter granted a blanket amnesty to all Vietnam-era draft evaders. Carter intended to help the nation heal its Vietnam wounds, but the result was to momentarily re-animate the acrimonious debate about that war.
- In 1992, President George H. W. Bush issued controversial pardons to several high Reagan administration officials who had been involved in the Iran-Contra Scandal where they circumvented Congress and sold arms to Iran, using the proceeds to illegally fund the Contra rebels in Nicaragua. Bush pardoned Secretary of Defense Casper Weinberger, who allegedly lied to the independent counsel investigating the scandal, and six others who were involved in the scheme. Perhaps most significantly, Bush pardoned Weinberger before his trial, at which President Bush was expected to be called as a witness.
- In 2001, President Bill Clinton pardoned billionaire financier Marc Rich, who fled the country in 1983 before he was indicted for allegedly evading taxes, committing fraud, and illegally participating in oil deals with Iran. While he was out of the country, Marc Rich's ex-wife, Denise, donated roughly $1 million to the Democratic Party and gave money to Hillary Clinton's successful Senate campaign. (13)
- In 2017, President Barack Obama created controversy when he used the pardon power to commute Chelsea Manning's remaining sentence. Manning, an American activist, whistle blower, and former U.S. Army soldier, had served seven of 35 years for stealing and releasing to the media diplomatic and military cables that proved embarrassing to the United States.
- President Donald Trump issued more controversial pardons than any president. In his first use of this power, Trump pardoned Sheriff Joe Arpaio, who had been found guilty of defying a judge's order to stop detaining and harassing Latinx residents of Maricopa County, Arizona. (14) In 2019, Trump pardoned an Army officer and a Navy SEAL who had been convicted of committing war crimes—one for murder and obstruction of justice and the other for posing with the corpse of an enemy combatant. He also pardoned another Army officer who was awaiting trial for murdering a detainee in Afghanistan. Trump's pardons disregarded the recommendations of the Pentagon leaders, who felt that they would undermine military leadership's ability to maintain proper order. (15) At the end of his administration Trump pardoned Roger Stone and Paul Manafort, two people who were intimately involved in campaign's outreach to Russia for help in the 2016 election and convicted by federal juries for crimes ranging from lying to the FBI, obstructing Congress, and threatening a witness. Trump pardoned Charles Kushner, father of his son in law Jared Kushner, who had been convicted of tax evasion, witness tampering, and illegal campaign contributions. In one of his final acts in office, Trump pardoned his former chief strategist Steve Bannon, who had been charged with defrauding donors to a We Build the Wall non-profit. (16)

Emergency Powers

President Trump declared a national emergency at the U.S. border with Mexico as a way to divert funds to support building a wall between the two countries, which Congress did not approve. Congress passed a joint resolution denouncing the move, but Trump vetoed it. Several lawsuits followed, but ultimately a 5-4 Supreme Court majority refused to stop the president. (17) This case highlights the importance of the president's emergency powers.

When a president declares an emergency, the **National Emergencies Act of 1976** and other statutory provisions open up all sorts of new presidential powers. The Brennan Center for Justice catalogued 136 emergency powers available to a president, fully ninety-six of which "require nothing more than [the president's] signature on the emergency declaration" to go into effect. (18) And the powers available to a president in an emergency are breathtaking. For instance, the president can "shut down many kinds of electronic communications inside the United States or freeze American's bank accounts." Emergency declarations under the statute are supposed to last less than one year, but emergency declarations are often renewed "for years on end." Even beyond the National Emergencies Act, "other laws permit the executive branch to take extraordinary action under specified conditions, such as war and domestic upheaval, regardless of whether a national emergency has been declared." (19) Presidents declare national emergencies with a disturbing frequency—dozens of times since the National Emergencies Act was passed.

Many Americans incorrectly think that the Posse Comitatus Act of 1878 means that the U.S. military cannot undertake domestic policing functions. In fact, the law merely requires that Congress authorize such military use, which it did in the **1807 Insurrection Act**. The Insurrection Act was used by President Eisenhower in 1957 to send federal troops to desegregate Little Rock High School and by President George H. W. Bush in 1992 to send the military in to quell the Los Angeles riots that erupted after Los

Angeles police officers were acquitted for beating Rodney King. The Insurrection Act is impressive in its scope. Elizabeth Goitein describes it this way:

"As amended over the years, [the 1807 Insurrection Act] allows the president to deploy troops upon the request of a state's governor or legislature to help put down an insurrection within that state. It also allows the president to deploy troops unilaterally, either because he determines that rebellious activity has made it 'impracticable' to enforce federal law through regular means, or because he deems it necessary to suppress 'insurrection, domestic violence, unlawful combination, or conspiracy' (terms not defined in the statute) that hinders the rights of a class of people or 'impedes the course of justice.'" (20)

Congress could limit or better define presidential emergency powers, but it has not done so. The Supreme Court has traditionally deferred to presidential action in emergencies. In one famous case—***Youngstown Sheet and Tube Company v. Sawyer* (1952)**—the Court struck down President Truman's efforts to seize steel plants during a strike to keep them running because he feared production delays would harm the Korean War effort. Interestingly, however, Truman did not invoke statutory emergency powers in that situation and instead argued that the Constitution gave him inherent power to seize the steel plants. It's an open question how the Court might have ruled had Truman invoked emergency powers.

What if . . . ?

What if a president declared a national emergency and used law enforcement and the military to target people of a particular religion or lawful visa status to apprehend, detain, and/or deport them? What if you knew someone well who was a member of the targeted population? What would you do?

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2.4: Chapter 28- The President's Foreign Policy Powers

> *"My fellow Americans: As President and Commander in Chief, it is my duty to the American people to report that renewed hostile actions against United States ships on the high seas in the Gulf of Tonkin have today required me to order the military forces of the United States to take action in reply."*
>
> *–President Lyndon Johnson, escalating U.S. involvement in Vietnam in 1964 (1)*

Commander in Chief

The president is **commander in chief** of U.S. military forces. This means that the president is a civilian in charge of the U.S. military. Generals and admirals must take orders from the president. Indeed, recent presidents have become quite involved in managing the armed forces. **You should know these examples**:

- President Harry Truman, without a congressional declaration of war, ordered American troops into battle on June 30, 1950 to defend South Korea. When General Douglas MacArthur, commander of U.S. troops in Korea, made reckless statements about bombing China and spoke to congressmen about Truman's poor strategy, Truman relieved the general of his command. This was a gutsy move, as MacArthur was very popular in the United States—he came home to a ticker-tape parade, but most people recognized the president's constitutional right to make that decision.
- During the Vietnam War, an undeclared war from 1964 to 1973, both Presidents Lyndon Johnson and Richard Nixon involved themselves heavily in the day-to-day tactics of our fighting forces. In fact, both men spent considerable time discussing troop levels and bombing targets with generals.
- With congressional authorization—although not a formal declaration of war—President George H. W. Bush launched an invasion of Iraq in response to Iraq invading Kuwait. Bush also then unilaterally made the decision to halt the war's ground phase before Iraqi President Saddam Hussein was ousted.
- Following the 9/11 attacks, President George W. Bush's administration decided to invade Iraq even though that country had nothing to do with the attacks. The Bush administration had previously invaded Afghanistan, whose Taliban regime had sheltered Osama bin Laden and the al-Qaeda network. Without a declaration of war, although with congressional support, President George W. Bush initiated a pre-emptive war on Iraq in 2003 that removed Saddam Hussein from power.

Congress has tried to restrain presidential commander in chief powers, but these efforts have not been successful. For instance, Congress passed the **War Powers Resolution** in 1973 over President Nixon's veto. The Resolution stipulates that 1) presidents consult with Congress when possible before committing U.S. military forces to action, 2) forces be withdrawn after sixty days unless Congress either declares war or grants a use-of-force extension, and 3) Congress can pass a concurrent resolution ending American use-of-force at any time. All presidents of both parties have considered the resolution to be unconstitutional, but it has never come before the Supreme Court. Presidents have largely ignored the Resolution's provisions, or at best given them lip service and went ahead and used the military however they wanted. Sometimes, these presidential dodges require ridiculously interpreting the Resolution's language. In 2011, President Obama said his use of U.S. forces in Libya to bomb Libyan targets as part of a NATO intervention did not constitute "hostilities" and therefore the Resolution did not apply. (2) By and large, Congress has not been able to muster the political will to challenge presidents on war issues. When it does, it runs into constitutional limitations. For example, in 2019 Congress passed a bipartisan resolution to end America's support for Saudi Arabia's war in Yemen. President Donald Trump vetoed the resolution, and America continued to assist Saudi Arabia. (3)



President Donald Trump and Chairman Kim Jong Un

In foreign affairs, the president has **treaty power**, or the ability to negotiate and sign formal agreements with other countries. President-signed treaties require ratification by a two-thirds Senate vote. Although most treaties that the president submits are ratified, there have been notable instances in which the president has failed to convince enough senators. The Treaty of Versailles, negotiated and signed by President Woodrow Wilson in 1919, officially ended World War I and created the League of Nations. The Senate refused to ratify the treaty, and Wilson suffered a stroke while trying to rally public support for it. The United States never did join the League of Nations. In 1999, President Bill Clinton could not round up enough Senate votes to ratify the Comprehensive Test Ban Treaty, which would have banned all nuclear weapons testing. The year before, Clinton also signed the Kyoto Protocol on climate change, but did not even submit it to the Senate because he knew it would not be ratified.

Because the formal treaty process is so onerous, presidents have more frequently turned to creating **executive agreements**, which are agreements with at least one other country's head of state. While they are in effect, executive agreements have the same force as treaties. They do not require Senate approval, but an incoming president can stop honoring or can renegotiate executive agreements entered into by previous presidents. For example, in 2019 President Donald Trump formally announced that the U.S. was withdrawing from the Paris Climate Agreement, whose goal was to limit global temperature increases to below 2 degrees Celsius from the preindustrial average. Overall, both congressional houses are actually more involved in executive agreements, although with simple majority approval. As political science professors Glen Krutz and Jeffrey Peake put it, "In most cases, an executive agreement is pursuant to a statutory grant of power to the president or requires ex post congressional approval (through joint resolution) before the agreement enters into force." (4) The North American Free Trade Agreement between Canada, the United States, and Mexico is another famous example of an executive agreement. As commander in chief, the president often negotiates **status of force agreements**—a type of executive agreement—with other heads of state in countries where the U.S. has stationed military personnel.

Another foreign policy power is the president's ability, spelled out in the Constitution, to "receive ambassadors and other public ministers." This means that the president, acting without Congress' approval, has **diplomatic-recognition** power. When the United States "receives" the ambassador from Germany, and our ambassador presents themself to Germany's president, then in international-law parlance, Germany and the United States have diplomatically recognized each other. The United States diplomatically recognizes most countries of the world. President Clinton re-established diplomatic relations with the People's Democratic Republic of Vietnam in 1995 and sent Pete Peterson, a former North Vietnam POW, as our first ambassador. After Fidel Castro's revolution in Cuba, the United States withheld diplomatic recognition from 1961 to 2015. The United States does not diplomatically recognize North Korea, although the two countries have been negotiating for years over Korean peninsula security matters. The United States does not diplomatically recognize Bhutan, which has a long-running border dispute with the People's Republic of China.

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2.5: Chapter 29- Contemporary Issues of Presidential Power

> *"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."*
>
> *–James Madison in Federalist #47*

The Problem of Executive Power

The Constitution performs a delicate balancing act between empowering and constraining the presidency. It is no surprise, then, that American political history has witnessed numerous controversies about presidents exercising power. Some presidents have pushed the envelope, while others have not. However, the long-term trend is clear: over time, presidential power has increased considerably.

Executive power is always a tricky political problem. The founders were especially cognizant of what history had to teach about checking executive power. Democratic republics are fragile, as the demise of Athenian democracy and the Roman republic demonstrate. It was a long time before anything resembling popular democracy returned to the West. In 1215, King John of England—after disastrous foreign policy mistakes and domestic power abuses—was forced to accept the **Magna Carta**, or Great Charter. The Magna Carta limited the king's power vis a vis the nobility and the clergy. Later, in 1649, Parliament executed **Charles I**. During his rule, he levied taxes without Parliament's approval, disbanded Parliament for eleven years, forced people to loan money to the government, and sent an armed force into Parliament to arrest members. After a Commonwealth period in which Oliver Cromwell ruled a fractious England as "Lord Protector," the monarchy was restored in 1660 when Charles II, son of Charles I, was invited to be king. A later king, James II, was forced from power in the **Glorious Revolution** when Anglicans feared that his son's birth would establish a Catholic dynasty in England. Instead, they asked his Protestant daughter, Mary, and her husband, William of Orange, to rule. **William and Mary** were forced to accept the **1689 Bill of Rights**, which guaranteed, among other things, the right not to be taxed without Parliament's approval, the right to petition the King, the right for Protestants to bear arms for self-defense, freedom from cruel and unusual punishments, freedom from excessive bail, freedom of speech in Parliament, and guarantees of a trial before having to pay fines. This background and the American colonists' belief that both Parliament and King George III denied to them the "rights of Englishmen" underscores our own struggles with executive power.

Informed citizens should be familiar with four key issues regarding executive power in the United States. Keep in mind that the issues are all interrelated, even though they are treated separately here.

Executive Privilege

Since the American republic's beginning, presidents have exerted a right to executive privilege, even though this right is nowhere mentioned explicitly in the Constitution. Aside from not being in the Constitution, the problem with executive privilege is that its definition rests almost entirely on the collective judgments of courts over the years. As constitutional law professor Jonathan Shaub puts it, "the term *executive privilege* has no legal content. There is no law governing executive privilege." (1) Basically, **executive privilege** asserts that the separation of powers built into the Constitution gives presidents a certain amount of discretion when responding to the legislative and judicial branches' orders and information requests. (2) Specifically, presidents have argued that they are entitled to withhold from Congress, the courts, and the public certain executive branch documents and the transcripts of deliberations within executive agencies. Executive privilege is not absolute. This is contested ground, of course, because unitary executive theory advocates would say that there should be no limits (described below). However, mainstream opinion among scholars and lawyers is that this particular presidential prerogative is limited. The consensus is that **executive privilege cannot do the following**:

- Protect the president when he is acting in his personal capacity.
- Shield information related to presidential decisions once they have been made.
- Hide communications related to committing a crime.
- Block information Congress requires in an impeachment proceeding.
- Protect communications that the president or his office never received.

- Provide absolute immunity to congressional subpoenas.
- Be exerted by a former president over the objections of the sitting president. (3)

George Washington was the first president to assert executive privilege, but the stakes have become more significant in recent cases. Presidents of both parties have tried to push the envelope and get around the limitations that courts have placed on executive privilege. During the Watergate scandal, President Nixon invoked executive privilege and refused to turn over White House tape recordings and written documents to special prosecutor Leon Jaworski. The Supreme Court ruled against Nixon—a decision that sealed his presidency's fate because the tapes were damning—but it also appeared to give some credence to the executive-privilege idea. In its opinion in ***United States v. Nixon* (1974)**, the Court recognized "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties," and that "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process."

President Bill Clinton's administration invoked executive privilege on thirteen occasions, a record up to that time. Clinton's special counsel Lloyd Cutler wrote a memo indicating that "Executive privilege will be asserted only after careful review demonstrates that assertion of the privilege is necessary to protect Executive Branch prerogatives," and that "Executive privilege belongs to the President, not individual departments or agencies." (4) Clinton asserted executive privilege on its least defensible issue—the Monica Lewinsky scandal. He used it to conceal information about their affair and how his White House personnel handled it. As with the Watergate scandal, the dispute between the White House and Congress eventually went to the courts. In this case—and relying on the precedent in *United States v. Nixon (1974)*—Federal Judge Norma Holloway Johnson again seemed to embrace executive privilege but ruled against the president on the merits of that particular case. (5)

President George W. Bush invoked executive privilege six times. His administration asserted executive privilege on various issues such as energy policy, Pat Tillman's death, firing federal prosecutors, and allegedly misusing organized crime informants. Barack Obama invoked executive privilege one time to prevent Congress from having access to certain documents related to Operation Fast and Furious, which was a weapons-trafficking sting that was poorly conceived and poorly executed. Federal agents lost track of many weapons that they sold to suspected Mexican gun traffickers. (6) Republicans in Congress held Obama's Attorney General, Eric Holder, in contempt for refusing to turn over documents, but the Obama administration successfully ran out the clock and withheld the documents throughout Obama's term.

President Donald Trump exerted executive privilege over releasing the full *Mueller Report* regarding Russian ties to Trump's 2016 campaign and to Trump's attempts to obstruct investigating those ties. Trump then attempted to completely deny Congress' ability to investigate anything having to do with his administration. He would not allow the IRS to turn over his tax returns to a congressional committee even though a federal law explicitly says the IRS "shall" do so upon request, and then he would not let the IRS director or the Treasury Secretary testify to Congress about the issue. When the issue of Trump's taxes was litigated in New York state, his lawyers asserted what the prosecutor in the case described as "blanket immunity" from "any routine, lawful grand jury request for information." (7) Note that President Trump's tax returns were not made public until two years after he left office. Trump also exerted executive privilege over documents related to his administration's attempt to add a citizenship question to the full census. When the House began impeachment proceedings against Trump for bribery, abuse of office, and obstruction of justice, Trump refused to allow key figures like Chief of Staff Mulvaney, Attorney General Barr, and Vice President Pence to testify. After encouraging his supporters to march on the Capitol and "fight like hell" to keep him in office after he lost the 2020 election, Trump attempted unsuccessfully to use executive privilege to keep records of his attempt to overturn the election from Congressional investigators. In *Trump v. Thompson* (2022), the Supreme Court ruled 8-1 that Trump could not exert executive privilege to shield the relevant documents.

Unitary Executive Theory

Republican administration members and their supporters have been the strongest proponents of what is known as the **unitary executive theory**. This theory has been circulating among conservative legal scholars for years, but it finally reached the public consciousness when it became known that George W. Bush had relied on this theory to authorize the National Security Agency to wiretap phone calls in the United States without a warrant as required by the Foreign Intelligence Surveillance Act. Even before that, however, the Bush administration relied on the unitary executive theory in its War on Terror. Bush and his defenders asserted that the unitary executive idea allowed the executive branch to hold what it called "enemy combatants" in a state of legal limbo

where they were not criminal defendants, nor prisoners of war, nor covered by the Geneva Convention, nor able to talk with lawyers, nor able to see any of the evidence against them. (8)

The **unitary executive theory** argues that the White House's occupant has broad inherent powers that are implied by the Constitution's executive authority vestment with the presidency. The president, these theorists argue, can act without legislative authorization and is virtually without check in the realm of national security. The theory also holds that the president can go beyond merely executing the law, and execute it as they interpret it. Here, the issue concerns **presidential signing statements**, written statements that presidents have issued when they sign a bill into law. They aren't new, but President George W. Bush used them extensively and wrote them in ways that suggest great latitude in enforcing the law. In the country's history up through the Clinton administration, all presidents combined issued a total of 322 signing statements. President Bush issued 435 of them in his first term alone. (9) For example Congress, spurred on by Republican Senator John McCain, passed the McCain Anti-Torture Law to push back against the executive branch's excesses during the War on Terror. President Bush signed the bill, but issued the following signing statement:

"*The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President…of protecting the American people from further terrorist attacks.*" (10)

It is not yet clear what kind of credence the Supreme Court will give to signing statements when it comes time to interpret the laws. If the Constitution requires that the president "shall take care that the laws be faithfully executed," and if the Supreme Court allows the president to "construe" the very laws he is supposed to be enforcing, it brings into question whether the president would become more like a monarch than the leader of a democratic republic. In any case, it would further shift the balance of power away from Congress and toward the president. A 2006 report by the American Bar Association condemned Bush for abusing signing statements, saying that it was "contrary to the rule of law and our constitutional system of separation of powers." (11)

Candidate Obama roundly criticized President Bush for abusing signing statements. President Obama did not issue nearly as many signing statements as his predecessor, but even those remained controversial. The American Bar Association was sufficiently concerned with Obama's signing statements that it issued a public letter "restating its objection to the practice and urging him to instead veto bills if he thinks sections are unconstitutional." (12) President Donald Trump continued with the practice of issuing signing statements—most famously indicating that he considered numerous provisions of the National Defense Authorization Act unconstitutional infringements on his executive authority. (13)

The unitary executive theory has important implications for the rule of law in the United States. **The rule of law** refers to the related ideas that no one is above the law, that all of us are equally subject to the laws that we collectively make together, and that decisions are reached by following pre-established procedures. During Donald Trump's presidency, the president and his Attorney General William Barr, acted together to ensure that the law fell lightly on the president's friends and heavily on the president's detractors. (14)

The National Security State



F-18 on the USS John C. Stennis

Much of the growth in the president's power can be attributed to what scholars and critics refer to as the **rise of the national security state**. This concept suggests that the exigencies of protecting the United States from real or imagined external enemies inflates the power of the military, the intelligence agencies, and the internal security agencies—all of which are directed by the president. The founders feared this sort of development because it inevitably eroded democracy and the civil liberties they cherished, and they continually warned against a large standing army in peacetime. James Madison wrote to Thomas Jefferson in

1798 that “perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretend, from abroad.” (15)

World War II was clearly a watershed event in expanding the United States’ national security apparatus. Before that conflict, the country’s peacetime armed forces were relatively small—in 1896, there were only 41,680 active-duty military personnel. Indeed, on the eve of World War I, Belgium’s tiny army was larger than the United States Army. Since 1945, however, the United States armed forces have never comprised fewer than 1.3 million people and have often included more than twice that figure, which doesn’t count reservists and guardsmen. During World War II, the Pentagon—still the largest office building in the world—was created to coordinate military efforts against the axis powers. It has become the national security state’s focal point. (16) The United States spending priorities shifted to favor military spending after World War II when the Cold War standoff between the U.S. and the Soviet Union consumed our foreign policy. During the Cold War (1948-1991), the United States spent tens of trillions of inflation-adjusted dollars on its military. If we had spent only half that much on the military, we could have funded numerous domestic policy priorities. (17) Military spending goes through cycles of ups and downs, but always at a very high level. The United States spends about the same on its military as the other top twenty countries combined, many of which are U.S. allies. The United States and its allies spend approximately six times more on their armed forces than Russia, China, Sudan, Cuba, Libya, North Korea, Iraq, Syria, and Iran all together. (18)

In 1947 the **National Security Act** passed, which consolidated the Department of War and the Navy Department into the Department of Defense—notice the rhetorical shift from War to Defense—it’s easier to support large expenditures year after year for “defense” rather than “war.” The Act created the National Security Council to advise the president on foreign affairs and security. The Act also created the Central Intelligence Agency (CIA), which was designed to gather intelligence and engage in covert operations around the world. Over the years, the CIA has led or participated in overthrowing foreign leaders and unsuccessfully attempting to overthrow others; the CIA has experimented with mind-altering drugs on Americans and illegally spied on Americans. Later, the United States established the National Security Agency (NSA), which is charged with gathering information from electronic intercepts and satellite imagery.

In his famous 1961 **farewell address**, **President Dwight Eisenhower**—who spent his career in the military before becoming president—warned against the power of what he called the **military-industrial complex**. It is worth quoting him at length:

This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence – economic, political, even spiritual – is felt in every city, every Statehouse, every office of the Federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. (19)

This is no less true today, say critics of the national security state, because of the **War on Terror** declared by President George W. Bush following the events of September 11, 2001. Spending on the military and other security operations increased, intelligence and law enforcement operations of the CIA, the NSA, and the FBI became more aggressive, and President Bush asserted broad executive authority in the name of national security.

President Obama continued to do so by expanding the U.S. presence in Afghanistan and ramping up drone attacks and raids in neighboring Pakistan. Eric Holder, Obama’s Attorney General, said in 2013 that in some “extraordinary circumstances” his opinion was that the president would be legally allowed to direct a drone strike on American citizens on U.S. soil. Presumably, the permitted circumstances would be if said Americans were about to carry out a terrorist attack. (20) President Trump and a compliant Congress increased military spending by hundreds of billions of dollars per year. (21)

Imperial Presidency

In his classic book, *The Imperial Presidency*, **Arthur Schlesinger, Jr.,** warned that the growth of presidential power—particularly in response to national security concerns—threatened to warp the country’s constitutional fabric. The book was especially timely given the Nixon administration’s abuses, but its theme has continued to resonate to the present. Gene Healy of the Cato Institute condemned William Clinton’s presidency saying that he “has adopted a view of his executive power that is positively Nixonian in its breadth and audacity,” and that “the imperial presidency is as unconstrained and as menacing as it has been at any time since the

Vietnam War." (22) The presidencies of George Bush and Barack Obama have also been condemned from the left and the right for their imperial character, and the president appears in case after case to act outside of—or at the margins of—the rule of law. When such actions are revealed in the media, the administration goes on a public relations blitz justifying its actions as necessary and thereby undercutting the political will of Congress to stand up. Writing in *Newsweek*, Jonathan Alter feared that because of the Bush years manifesting the imperial presidency, "we are in danger of scrapping our checks and balances—not just for a few years as was done during the Civil War, but for good." (23) During the Trump administration—with its seizure of money and diverting it to build a wall against Congress' wishes and his use of his office to attack his political rivals, Attorney General William Barr was such an advocate for the unified executive theory and the imperial presidency that even conservative commentators recoiled at the notion of an unfettered chief executive. (24)

What if . . . ?

Can you articulate a one-paragraph vision for the president's proper role in the American republic? In other words, if you could define for the country, what would be the presidential role when it comes to enforcing laws passed by Congress and signed by the president? What should and should not the president be doing? What amount of discretion and leeway should she have?

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2.6: Chapter 30- Impeachment and Removal of the President

> *"No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? . . . Shall the man who has practiced corruption & by that means procured his appointment [election] in the first instance, be suffered to escape punishment, by repeating his guilt?"*
>
> *–George Mason (1)*

Before we begin talking about the process of impeaching and removing a sitting president, please keep in mind that other executive and judicial branch officials can be impeached and removed in a similar fashion. Executive branch officials who get into trouble tend to resign, or the president removes them from office, which has led to very few of them being impeached. (2) In 1804, the House impeached sitting Supreme Court Justice Samuel Chase, but he survived the trial in the Senate. In 1969, Supreme Court Justice Abe Fortas resigned under threat of impeachment for financial improprieties. Eight federal judges have been impeached and removed from office. An additional three federal judges have been impeached and resigned before they completed their Senate trials. The charges against these judges ranged from sexual assault to bribery and perjury. (3) But it is the prospect of a president being **impeached and removed** that is the most interesting and historically significant possibility that we will examine here. The founders were aware that neither ancient Grecian or Roman societies had figured out how to peacefully remove a chief executive who was abusing their office—often assassination or uprisings were the only remedy. Thus far, no American president has been impeached by the House *and* removed by the Senate.

Impeachment Power

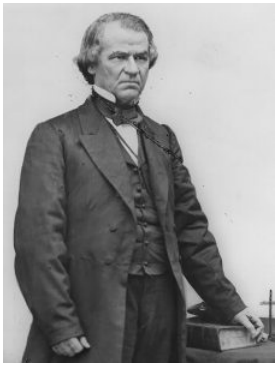
The founders were very familiar with impeachment in British and Colonial American history. Beginning in 1376, the House of Commons "prosecuted powerful offenders before the House of Lords." (4) Frequently, this process—called impeachment, a term with which American colonists were very familiar—involved executive ministers and was a way for Parliament members to exert influence over the Crown by proxy. Even though the British monarch could not be impeached, the House of Commons proclaimed that impeachment was a principal instrument to hold royal power accountable. In the American colonies—particularly after 1755 and then intensifying in the 1770s—colonial assemblies "came to see impeachment as the mechanism by which the people could begin the process of ousting official wrongdoers, understood as those who betrayed republican principles, above all by abusing their authority through corruption or misusing power." (5) After independence, several states put impeachment provisions in their state constitutions.

The founders created an impeachment provision in the U.S. Constitution and were anxious that it be applied to any future president who had, in the words of Benjamin Franklin, "rendered himself obnoxious" to the Constitutional order and the rule of law. The president, vice president, and other civil U.S. officers can be removed from office by Congress if they are found guilty of "treason, bribery, or other high crimes and misdemeanors." While the definitions of treason and bribery are clear, the phrase "other high crimes and misdemeanors" sometimes confuses people. However, the founders were quite clear about what they meant. George Mason originally proposed that the House be able to impeach in cases of treason, bribery, or "maladministration," but that was deemed to be too broad a term. Instead, they chose the phrase "or other high crimes and misdemeanors," which had precedent in English law going back to 1642. What did they mean by that odd phrase? They were particularly concerned about presidents who fraudulently achieved office, who might be under the influence of—or conspire with—foreign powers, who improperly enriched themselves, who undermined the rule of law, or who became incapacitated. (6) As put by constitutional scholars Lawrence Tribe and Joshua Matz, "In creating the impeachment power, the Framers worried most of all about election fraud, bribery, traitorous acts, and foreign intrusion. Willful conspiracy with a hostile foreign power to influence the outcome of a presidential election directly evokes all of these concerns." (7) It is clear that the president's offenses need not be law violations and could instead be technically legal assaults against the common good or the public trust. For example, Alan Hirsch argues that it is perfectly legal for a president to pardon all members of his own party for any federal offenses, but such action would be reasonable grounds to impeach and remove that president. (8)

The impeachment process is a fairly straightforward one, albeit one full of political dangers for everyone involved. At its most basic, constitutionally removing a president is a two-step process: The House impeaches and the Senate holds a trial to either remove the president or allow them to stay in office. Let's suppose the president is accused of committing a criminal act, abusing their office, or undermining the rule of law. The impeachment process begins in the House of Representatives, where one or more members introduces a bill to impeach. This bill will be referred to the House Judiciary Committee, which will hold hearings and vote whether to report out **articles of impeachment** to the full House. Other relevant House committees may hold hearings as well. Articles of impeachment are essentially the specific charges against the president. The full House debates the articles of impeachment and votes; **a successful majority vote on one of the charges means that the president has been impeached**. Then the process moves to the Senate, where the president is put on **trial** and the senators determine whether the president is "guilty" of the offenses spelled out in the articles of impeachment. Members of the House Judiciary Committee come over to the Senate to present the case against the president, while the president's lawyers mount a defense. The **Chief Justice** of the Supreme Court comes into the Senate to preside over the trial. **The Constitution requires a two-thirds vote in the Senate to convict and remove the president.**

Congress has never gone through the whole process and successfully removed a sitting president. However, there have been four notable cases in American history that you should know:

Andrew Johnson



President Andrew Johnson

In the 1864 presidential election, Republican Abraham Lincoln chose Tennessean and Democrat Andrew Johnson as his running mate in an effort to reach out to Democrats who supported the Union's war effort. The Lincoln-Johnson ticket won. John Wilkes Booth shot President Lincoln on April 14, 1865, and Lincoln died the next morning. Andrew Johnson became president at a time when members of the Republican Party's radical wing were adamant that the defeated Southern states be "reconstructed" into loyal Union members and that African Americans be guaranteed political rights and full participation. Johnson was more inclined to be lenient with the former Confederate states, which included his home state of Tennessee. Indeed, he did not believe that Blacks were capable of democratic governance and said in 1865 that "White men alone must manage the South." (9) He vetoed the 1866 Civil Rights Act and the Freedmen's Bureau bill, which was designed to enlarge and solidify the powers of the already existing Freedmen's Bureau to protect the civil rights and liberties of newly freed slaves and refugees. This angered the Radical Republicans, and Congress overrode his vetoes. Johnson also opposed passing the Fourteenth Amendment, which granted former slaves citizenship. It passed anyway.

To limit Johnson's power, Congress passed the ***Tenure of Office Act in 1867***, which said that the president could not remove the holders of any appointed positions unless the Senate concurred. When Johnson removed Secretary of War Edwin Stanton without the Senate's approval and replaced him with Lorenzo Thomas, the House voted to impeach him for the clear violation of the Tenure of Office Act. They also impeached him for very derogatory statements he made about Congress, specifically that he "did attempt to bring into disgrace, ridicule, hatred, contempt and reproach to the Congress of the United States." That's not a crime, although they impeached him for it anyway. After a three-month trial in 1868, President Johnson's opponents came one vote short of a two-thirds majority to remove him from office. He served out the remainder of his term. Interestingly, the Tenure of Office Act was repealed in 1887, and then the Supreme Court definitively ruled in *Meyers v. United States* (1926) that the president does not need Senate approval to fire executive branch officials.

Richard Nixon



President Richard Nixon and Advisors

On June 17, 1972, agents of President Richard Nixon's Committee for the Re-Election of the President (CREEP) were caught breaking into the Democratic Headquarters in the **Watergate** office and residential complex. Nixon immediately tried to cover up the incident by ordering hush money payments and telling the Federal Bureau of Investigation to not look into it. The cover-up ultimately did not work, and the revelations that followed constituted a shock to the American public that reverberated for decades. Nixon did everything he could to forestall the inevitable. In the famous **Saturday Night Massacre**, Nixon ordered Attorney General Elliot Richardson to fire Archibald Cox, who was serving as the independent special prosecutor in the case. Richardson resigned rather than carry out the order. Nixon then ordered Deputy Attorney General William Ruckelshaus to fire Cox. Ruckelshaus also refused to do it and resigned instead. Then Nixon asked Solicitor General Robert Bork to fire Cox, and Bork complied.

The scandal that started with the Watergate break-in expanded to reveal shocking corruption in the Nixon administration. Nixon and his subordinates were responsible for, among other things, extorting money from rich individuals and corporations; spying on American citizens because they disagreed with the president's policies; trying to use the Internal Revenue Service to destroy "enemies" of the president; selling government favors in exchange for campaign contributions; seriously contemplating the murder of a journalist; and breaking into psychiatrists' offices looking for dirt on opponents. (10)

Nixon had a taping system in the White House that recorded his conversations with everyone who came into his office. Nixon refused to turn over the tapes in the face of a congressional subpoena until forced by a unanimous Supreme Court decision. *The case,* ***The United States v. Nixon (1974),*** established that while the president had the right to confidentially record conversations with his advisors, executive privilege did not extend to refusing to turn over records pertinent to a criminal proceeding. Apparently, Nixon contemplated refusing to turn over the tapes and pardoning the burglers and those in his administration who had already been convicted and indicted, but in the end decided to comply with the Supreme Court's order. (11) The tapes revealed the cover-up's "smoking gun": Nixon suggested to his chief of staff that the FBI be told by the CIA to stay out of the Watergate investigation because it dealt with national security issues—an assertion that was not true and that clearly indicated obstruction of justice. Nixon resigned the presidency on August 9, 1974, just before the full House had a chance to vote on accepting three articles of impeachment. By resigning before he was actually impeached by the House, Nixon was then eligible to be pardoned by Gerald Ford, who assumed the presidency after Nixon's resignation.

Bill Clinton



President Bill Clinton and Monica Lewinsky

The House of Representatives voted along party lines in 1998 to impeach President Bill Clinton in what is surely the most sensational sexual, political scandal ever to hit the American presidency. The complicated story can be distilled as follows: While he was still governor of Arkansas, Clinton allegedly dropped his pants and propositioned an Arkansas state employee named Paula Jones in a Little Rock hotel. With support from conservatives, including lawyer Kenneth Starr, Jones pursued a sexual harassment lawsuit against now President Clinton. Kenneth Starr later became the independent counsel charged with investigating a variety of

non-sexual allegations against Clinton and his wife. Starr eventually failed to find enough evidence that the Clinton's ever did anything impeachable in their finances or in running the White House.

However, during depositions in the Paula Jones case designed to demonstrate Clinton's pattern of sexual harassment, the president was asked whether he had had "sexual relations" with Monica Lewinsky, a former White House intern. She was asked a similar question. Clinton and Miss Lewinsky both said in their depositions that they had not had sexual relations, when in fact they had. Independent Counsel Starr heard about this from Paula Jones' lawyers and went to Attorney General Janet Reno to get his investigative mandate extended to cover this salacious affair. The Attorney General agreed to grant Starr's request, although Starr allegedly hid from Reno the fact that he had an obvious conflict of interest in this case. (12) Both Clinton and Lewinsky were brought before Starr's grand jury to testify, and they again stated that they did not have sexual relations. In the meantime, the president's secretary recovered gifts Clinton had given Lewinsky, and the president repeated his lies to his associates, knowing that they would restate them in *their* testimony before the grand jury. The Independent Counsel's report indicated that Clinton and Lewinsky had ten "sexual encounters" short of actual intercourse. (13)

The House passed two articles of impeachment against Clinton that centered on his perjury under oath and his obstruction of justice by encouraging others to perjure and conceal evidence. The case's facts were not really in dispute: Clinton did what the House alleged. When the impeachment case reached the Senate, Clinton survived by a comfortable margin, with only fifty of the required sixty-seven senators voting to convict. Very few people outside of the president's staunchest political allies argued that Clinton's testimony did not constitute perjury—he clearly gave false statements under oath in a federal case. **The debate in the Clinton impeachment revolved around two issues**: 1) Did lying under oath in court about an embarrassing extramarital affair constitute a serious enough offense to remove the president? and 2) How much damage did the Clinton scandal—with its salacious details—do to the presidency's moral authority? In the end, the broad national consensus was that Republican efforts to impeach and remove Clinton amounted to an overly moralistic and politically opportunistic overreaction to a scandal that in no way threatened the Constitutional order.

Donald Trump



President Donald Trump with Ukrainian President Volodymyr Zalensky

In hindsight, it should not have surprised anyone that Donald Trump became the third president to be impeached by the House of Representatives. As a businessman who inherited wealth from a father who flouted the law, Trump's conduct before taking up his position in the White House allegedly included tax fraud, running a fraudulent foundation, running a fraudulent university, bilking subcontractors, posing as a publicist and praising himself to a reporter, and engaging in sexual harassment and assault. (14) During the 2016 campaign, Trump flouted post-Nixon custom and refused to release his tax returns. He also paid off at least two women to keep their adulterous sex stories out of the news during the campaign.

Once in office, President Trump engaged in numerous potentially impeachable offenses that included violating the Constitution's emoluments clause by accepting money from foreign governments; obstructing justice by firing FBI Director James Comey when he opened up an investigation into Russian ties to the Trump campaign; obstructing justice with respect to Special Counsel Robert Mueller's Russian ties to the Trump campaign investigation; violating his duty to see that laws are executed by advocating violence perpetrated by various supporters and law enforcement personnel; abusing his pardon power in the cases of Joe Arpaio and the pardons for war crimes, thereby undermining the rule of law; committing crimes against humanity for separating children from their parents at the U.S. border, placing them in inhumane conditions and having no plan to reunite them when their cases were adjudicated; and violating campaign finance laws while he was president by reimbursing his personal lawyer Michael Cohen and by discussing sexual-affair hush money payments in the Oval Office. (15) Trump was not impeached for any of those possible offenses.

In late 2019, the House of Representatives impeached President Trump on a party-line vote because a whistle-blower came forward with a claim: Trump's months-long conspiracy to use his office and taxpayer resources for his personal political benefit to get Ukraine to announce that it sought to investigate Democratic presidential candidate Joe Biden. Trump compounded his troubles by refusing to release any relevant documents—except a summary of two calls between Trump and the Ukrainian president—or to allow any administration personnel to testify to the House Intelligence Committee about the matter. Several people involved in or knowledgeable of the conspiracy came forward and testified anyway, but principals including the president's personal lawyer Rudy Giuliani, Secretary of State Mike Pompeo, Acting Director of the Office of Management and Budget Mick Mulvaney, former National Security Advisor John Bolton, Vice President Michael Pence, Attorney General William Barr, and several other staff followed Trump's direction and refused to come forward during the House investigation.

Ultimately, the House passed two articles of impeachment:

- Abuse of power by soliciting foreign interference in the 2020 election and compromising the national security of the United States, and
- Obstruction of Congress by the categorical and indiscriminate defiance of lawful Congressional subpoenas for information and testimony in an impeachment investigation.

Donald Trump's Senate trial was a true low point in American political history. Republican senators blocked all attempts to request relevant documents and interview eyewitnesses to Trump's alleged abuse of power. It was the first impeachment trial that heard from no witnesses and introduced no documents into the record. As far as the Republican senators were concerned, "facts and evidence—reality—were viewed as grave threats, which is why they had to be buried." (16) Many aspects of the trial lent a kangaroo court character to the proceedings. Trump's defense team didn't attempt to present counter evidence—instead, they sought to rationalize the president's actions—and Republican senators acknowledged that the president did what was alleged in the articles of impeachment. (17) One Republican senator attempted to get Chief Justice John Roberts to reveal the name of the whistleblower, but Roberts refused. While the trial was going on, new information came out in the media from one participant in the scheme—Lev Parnas—and one opponent of it—National Security Advisor John Bolton—who tried to shut it down because he knew it was illegal, but such evidence was not allowed to be heard in the trial. The Government Accountability Office confirmed during the trial that the president's actions violated the Impoundment Control Act. (18) During the trial, Bolton's upcoming book manuscript alleged that Pat Cipollone, the White House Counsel and part of Trump's legal team, participated in the criminal conspiracy. (19) In the end, all Republicans except for Senator Mitt Romney (R-UT) voted "not guilty" on both articles of impeachment, and all Democrats voted "guilty" on both articles of impeachment—a result that fell far short of the two-thirds vote needed to remove Trump from office. Senator Romney voted "yes" on the abuse of power charge and "no" on the obstruction of Congress charge.

Two legacies of Trump's first impeachment are likely to have long-term consequences. The first centers on the Trump administration getting away with blanket obstruction of a congressional inquiry. Republican senators seemed not to care about Congress' institutional need to have Trump or any future president honor its subpoenas for documents and testimony. An executive whose actions cannot be investigated by Congress and who has a compliant Justice Department is more like an all-powerful monarch than an American president. That's a frightening precedent for the Senate to set. The second concerns an especially pernicious legal argument put forward by Trump's defense. Alan Dershowitz, one of Trump's lawyers, said on the floor of the Senate that "Every public official that I know believes that his election is in the public interest. If a president does something which he believes will help him get elected in the public interest, that cannot be the kind of *quid pro quo* that results in impeachment." This was an astounding argument that lacked any support in the scholarly or judicial record. (20) According to this line of thinking, a president could exercise his legal authority to declassify national security secrets for another country in exchange for that country's help with his re-election. It is a way of thinking that subsumes the national interest of the United States underneath the personal political interest of the president.

Donald Trump's Second Impeachment

At the close of President Trump's first impeachment trial, Representative Adam Schiff made the following prophetic warning to the Senate: "He has not changed. He will not change. A man without character or ethical compass will never find his way. He has done it before and he will do it again. What are the odds if he is left in office that he will continue to try to cheat? I will tell you: 100%. He will continue to try to cheat in the election until he succeeds. Then what shall you say?" (21) Less than one year later, the U.S.

House of Representatives was forced to impeach Trump for "incitement of insurrection," which "followed his prior efforts to subvert and obstruct the certification of the results of the 2020 Presidential election." (22)

The precipitating event for this second impeachment of Trump was the January 6, 2021 insurrection in which Trump supporters and allied domestic terrorists invaded the U.S. Capitol while Congress and the Vice President were gathered to carry out their Constitutional duty to certify the official Electoral College vote for Joe Biden and Kamala Harris—the Democratic ticket that won the popular vote by 7 million votes and the Electoral College vote by 306 to 232. The insurrectionists overwhelmed the outnumbered police forces that were protecting the Capitol and beat one of those police officers to death and injured at least 70 others. (23) They also appeared to be intent on capturing and possibly assassinating members of Congress and the Vice President. The rioters damaged parts of the building, defecated in its public spaces, and stole laptops and other material from Congressional offices. The January 6 insurrection marked the first violent presidential transition of power since the American Civil War that resulted from the secession of Southern states following the election of Abraham Lincoln.

Normally, politicians are not held accountable for the rash acts of their supporters. Trump, however, was not a normal politician and bore direct responsibility for this outrage. Consider the following sequence:

- Trump endorsed violence throughout his political life and often excused or ignored violence committed by his supporters. (24) He stirred up people in Michigan to "liberate" their state from duly elected officials, and then watched passively as armed citizens disrupted the state legislature. Nor did he issue a condemnation when a group of Michiganders were caught plotting to kidnap the state's governor. In fact, he tweeted that the governor had done a "terrible job" and that she insufficiently thanked him for his non-existent role in catching the domestic terrorists. (25) When he discovered that some of his followers harassed a Biden campaign bus while it was traveling on an interstate highway in Texas, Trump tweeted "I love Texas!" (26) During a debate, when pressed about his support from domestic terrorist groups like the Proud Boys, Trump told groups like them to "stand back and stand by." Members of those groups later participated in the January 6 insurrection.
- Trump was the first American president to declare before an election (twice, in fact, for 2016 and 2020) that he would not accept the results unless he won. If he didn't win, that would be evidence in his mind—and in the minds of many of his supporters—that the process was rigged. (27)
- Months before the 2020 election, Trump claimed without evidence that it was going to be fraudulent and that mail-in ballots in particular were problematic. In fact, the 2020 election was the cleanest and most secure in modern American history. This fact was upheld by cyber-security analysts as well as (predominantly Republican) state and local officials and (predominantly Republican appointed) state and federal judges. (28)
- After the election, Trump and his associates pressured state and local officials in Arizona, Michigan, Pennsylvania, and Georgia to find ways to either decertify the election results or change those results. In the case of Georgia, Trump told the Georgia Secretary of State, "Look, all I want to do is this: I just want to find 11,780 votes." Trump had lost the popular vote in that state by 11,779 votes, so if the Secretary of State could actually "find" 11,779 + 1 extra Trump votes in that state, all of Georgia's electors would have gone to Trump. (29)
- Long after the election had been called for Biden and Harris by all major news outlets including Fox News, Trump and his associates promulgated The Big Lie that he had won a "landslide" victory that the Democrats "stole" from him. He repeated The Big Lie and told his followers to come to Washington on January 6 to "fight like hell" and "fight to the death" or "you're not going to have a country anymore." He promised it would be "wild." During the January 6 rally–when Trump already knew that attendees were armed and could not make it through the metal detectors surrounding his podium–he directed the crowd toward the Capitol building, saying they needed to "fight much harder," "stop the steal," and "take back our country." (30) He also said that he would join the marchers, attempted to do so, but was not allowed to by his Secret Service detail.
- After the melee began on the Capitol steps, after the battering of the Capitol police, after the forced suspension of Congressional work, and after knowing that the chants of "hang Mike Pence" by the insurrectionists forced the Vice President's security detail to rush him from the building, President Trump did not tweet to his followers to stop the violence. Instead, he tweeted "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!" Nor did he proactively call out the D.C. National Guard, which reports to the president. (31)

During the Senate trial, Trump's lawyers largely did not dispute the facts of the case but made two substantial arguments and several minor ones. We'll focus on the substantial ones. (32) Their first argument was that it was unconstitutional for the Senate to try Trump now that he was out of office, since the point of impeachment and trial is to remove the offender from office. In fact, the Constitution provides for an additional penalty upon conviction after an impeachment: "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." The argument that an impeachment trial cannot proceed once the alleged offender has left office would, if accepted, give presidents a free pass to violate the public trust in their final months in office. In fact, constitutional scholars overwhelmingly rejected Trump's lawyers' argument and argued that the Founders wanted the Senate to hold a trial in exactly these circumstances. (33)

The second argument put forward by Trump's lawyers was that the president's words and actions were protected by the First Amendment's freedom of speech. They relied on *Brandenburg v. Ohio* (1969), in which the Supreme Court said Clarence Brandenburg could not be prosecuted for incitement to riot for his inflammatory speech given at a Ku Klux Klan rally. Again, constitutional scholars roundly rejected this defense for a sitting president stoking up his followers with lies, telling them they must act outside the law, and aiming them at the Congress and his own vice president. On the face of it, Trump's lawyers made an important point: a president can tell Blacks to "go back to Africa" (akin to one of Brandenburg's statements), or burn a flag at a rally, or deny the Holocaust while marching past a synagogue. Despicable as they are, all of these are technically protected forms of political speech, but that does not prevent Congress from impeaching and removing from office such a president for gross dereliction of duty, abuse of his office, and failure to preserve, protect, and defend the Constitution. The First Amendment, in other words, might protect Trump in any criminal or civil cases he faced as a result of his actions, but they do not restrain Congress when it comes to impeachment. (34) Remember, an impeachment article need not strictly be a violation of federal law.

Despite Trump's weak defense in the Senate trial, he was quickly acquitted. It was the most bipartisan vote in presidential impeachment history, with seven Republican senators voting to convict. Still, the 57-43 majority vote was insufficient to meet the 2/3 threshold for conviction. In a head-scratching coda to the trial, Senate Minority Leader Mitch McConnell (R-KY), who voted to acquit the president, also made this clear statement: "Fellow Americans beat and bloodied our own police. They stormed the Senate floor. They tried to hunt down the Speaker of the House. They built a gallows and chanted about murdering the Vice President. They did this because they had been fed wild falsehoods by the most powerful man on Earth — because he was angry he'd lost an election. Former President Trump's actions preceding the riot were a disgraceful dereliction of duty." (35)

In terms of its overall impact for an attenuated democracy like ours, Trump's acquittal on his second impeachment confirmed the lessons of his first acquittal and served as yet another warning that politicians and institutions lose all credibility when they don't stand up to tyranny. It's interesting to step outside the realm of partisan politics and listen to the voices of principled conservatives on this one. Charles Sykes, a commentator with impeccable conservative credentials, argued that under Trump's leadership the Republican party had shown a "willingness to accept—or at least ignore—lies, racism, and xenophobia. But now [following the impeachment vote] it is a party that is also willing to acquiesce to sedition, extremism, and anti-democratic authoritarianism." (36) Focusing his attention on the institutional failure of the Senate, conservative writer Jim Swift said the majority of its Republicans let the country down through sheer "partisan cowardice": "Donald Trump incited an insurrection; the case against him was not refuted; and history will look back upon his acquittal with confusion and shame." (37)

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CHAPTER OVERVIEW

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3.1: Chapter 20- Who are Our Members of Congress and Whom Do They Represent?

> *"Poverty is the feeling that your government is against you, not for you; that your country was designed to serve other people and that you are fated to be managed and processed, roughed up and handcuffed."*
>
> *— Matthew Desmond (1)*

> *"Plutocracy—rule for the rich by the rich—prevails in Congress for the most part."*
>
> *–Michael Parenti (2)*

Who Are Our Members of Congress?



A Committee Meeting in the U.S. House of Representatives.

The United States Congress is composed of 435 representatives and 100 senators. The representatives are elected to two-year terms, and the entire body is up for re-election every two years. Senators have six-year terms, with one-third of them up for re-election every two years. Under the original Constitution, senators were chosen by state legislatures rather than by popular vote, but they have been popularly elected since the Seventeenth Amendment passed in 1913. There are no term limits for either representatives or senators. It almost goes without saying that House districts are more uniformly populated than are the states—except in cases like Wyoming where the House district is also the state boundary. The average House district has between 700,000 and 800,000 residents, but states range in population, for example, about 40 million for California to less than 600,000 for Wyoming. Note that the least populous states, like Wyoming, are guaranteed one representative and two senators regardless of their population.

We have, then, 535 people whose job ostensibly is to represent the people of the United States —or do they just represent the voters? In 1776, when states were writing new constitutions to replace state charters, John Adams wrote a treatise that he hoped would guide their efforts. In it, he wrote that a legislature "should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them." (3) How does our Congress measure up to this standard? It is clear that congressional members, in several respects, do not represent average Americans. Note the following discrepancies between congressional members and the American population:

Occupation—Lawyers constitute .6 percent of the American workforce—and even less of the overall population—yet over 40 percent of congressmen were lawyers before entering Congress. Around another 22 percent of congressmen list business/banking as their occupation prior to Congress.

Sex—Approximately 51 percent of the U.S. population is female, while women constitute only 27 percent of the representatives and senators. Note that this is the largest percentage of women *ever* in Congress. As recently as the 1970s, less than 4 percent of congressional seats were held by women. From the beginning of the republic to 2020, only 2.9 percent of all members of Congress were women.

Race—Whites comprise 63 percent of the U.S. population, but 76 percent of Congress and 94 percent of the Republicans in Congress are White. Note that the current Congress is the most diverse it has ever been. For example, in 1945 people of color accounted for 1 percent of Congress while they account for 24 percent now.

Age—The median age of Americans is slightly over thirty-eight years. The median age of House members is fifty-eight years and for senators it is sixty-one years.

Education—Around 96 percent of congressmen have at least a four-year college degree, while only 34 percent of American adults possess a bachelor's degree.

Income—The median family income in 2018 was about $62,000, while the base pay for representatives and senators was $174,000.

Wealth—This is more difficult to know because members of Congress don't have to disclose their wealth in exact terms. We do know that twelve members have a net worth of over $50 million; 34 have a net worth of $10-50 million; 157 have a net worth of $1-10 million; and 155 have a net worth of $100,000-1 million. The median net worth of Americans aged 55-64 is about $164,000. Thus, we can confidently say that the majority of the 535 congressional members possess considerably more wealth than the average American.

Religiosity—In the general public, 23 percent of people identify as atheist, agnostic, or "nothing in particular." In fact, *nonreligious* is the fastest growing group of people in the United States. In Congress, however, virtually all representatives and senators claim to belong to a church, and 88 percent belong to a Christian denomination. (4)

Now that we know these disparities between Congress and the American people, we are better prepared to ask some probing questions about how our representatives and senators should be representing us. Our questions can be grouped under two conceptually distinct ways to understand how we are represented, which are called descriptive representation and substantive representation.

Whom Do Members of Congress Represent?

Descriptive representation—The statistics above directly address what political scientists call **descriptive representation**, which concerns "the extent to which a representative resembles those being represented." (5) Collectively, we would ask: to what extent do our representatives resemble the population being represented, and does it matter if they don't? Historically speaking, Congress has been very good at descriptively representing wealthy, educated, White males. It is, however, slowly becoming more diverse with respect to race and gender, but not with respect to wealth and education. Is a legislature populated disproportionately by men qualified to legislate on women's access to abortion and reproductive health services? What are we to think about a legislature deliberating health insurance policy when the overwhelming majority of its members have never gone a day without health insurance? Ditto for a legislature full of wealthy individuals debating whether or not to increase the minimum wage. What are people of color to think about a predominantly White legislature's ability to fully address civil rights?

These are important questions. Surely, men can understand and empathize with women's perspectives. One does not have to be African American, Asian American, or Latinx to argue against criminal justice discrimination or against voting discrimination. One does not have to be of a particular religious denomination to uphold freedom of conscience for believers and non-believers alike. Still, there's something disconcerting about a legislature whose members do not descriptively represent the population's diversity, because representative democracy is about the whole population turning over decision-making power to a smaller group. It is inherently uncomfortable to turn over important decisions to a group that doesn't look like you or doesn't share your circumstances. Discuss with your friends, family, and classmates the issue of descriptive representation.

Substantive Representation—We can also ask questions about what political scientists call **substantive representation**, which concerns whether representatives "advance the policy preferences that serve the interests of the represented." (6) Again, representation turns the collective's decision-making powers over to a subset of people who are supposed to make wise, far-seeing decisions in the interests of those they represent. In this textbook, we are particularly concerned that the interests of ordinary Americans are served by Congress, the presidency, the executive branch agencies, and the Supreme Court. In many ways, Congress is the beginning point, for it can fulfill its function to represent ordinary Americans only if it passes legislation that the public wants and that serves the public's broad interest in promoting the general welfare, facilitating justice, and securing the blessings of liberty. As political scientists Benjamin Page and Martin Gilens wrote, "It seems obvious to us that in a democracy, the government should pay attention to what policies its citizens want." (7)

Congress' substantive representation track record is not very good. Looking back on the chapter about how democratic the U.S. Constitution is, we note that this may very well be a design flaw built into the system. Consider the following policy options, public

support for each, and the legislative outcome. (8)

Policy Option	Public Support	Outcome So Far
Background checks for guns	89%	No law passed
Paid maternity leave	84%	No law passed
Overturn *Citizens United* decision	75%	No law passed
Government support for childcare	75%	No law passed
Medicare option for health insurance	70%	No law passed
Federally regulated drug prices	67%	Limited law passed
For the People Act (National voter access standards)	67%	No law passed
Pathway to citizenship for illegal immigrants	64%	No law passed
Green jobs and infrastructure	63%	Limited law passed
Increase taxes on incomes over $1 million	62%	No law passed
Increase minimum wage	60%	No law passed
Medicare for all	54%	No law passed
2017 tax cut mostly for businesses and the rich	33%	Law passed
2008 Wall Street bailout	20%	Law passed

The table above seems to indicate that the majority of Americans would like Congress to pass laws that address specific issues affecting broad swaths of the populace. They would like, in other words, to have Congress use our collective resources to make the lives of ordinary Americans better. Congress seems unable to substantively represent the interests of ordinary Americans, but does appear able to deliver on the wishes of corporations and the rich. For example, in the 2008 Great Recession, Congress bailed out banks and other financial institutions without providing corresponding help for the millions of people who lost their homes. In another example, Congress passed a tax reform act in 2017. Analyses of the change indicate that by 2027, 83 percent of the tax reduction benefits will go to the top 1 percent of wage earners. (9) Even worse, the tax cut ballooned the federal deficit and did not stimulate the economy as promised. This begs the question: What is the purpose of Congress if it typically does not act in accord with public opinion? And another: Could the lack of substantive representation be a key reason why Congress' public-approval rate typically hovers between only 20 and 25 percent? Discuss among your classmates, friends, and family.

Congress *has* acted in the interests of ordinary Americans and *will* do so in the future only if enough representatives and senators are sufficiently afraid of the one real source of power that people have—their votes. For example, outside of the South, solid majority support for civil rights legislation combined with various legal, public relations, and civil disobedience strategies by civil rights groups put enough pressure on Congress to pass the Civil Rights Act of 1964—even though a majority of Whites was still uncomfortable with integration then. (10) Similarly, growing environmentalism among the public and the first Earth Day celebration were instrumental in convincing President Nixon and enough representatives and senators to establish the Environmental Protection Agency, to pass the Clean Water Act, and to enhance the Clean Air Act.

What if . . . ?

What if we did away with elections for Congressional members? What if we chose representatives and senators by lottery—representatives for one six-year, non-renewable term and senators for one nine-year, non-renewable term? What would be the advantages and disadvantages of selecting our legislators this way? Would you put qualifications in place regarding who is eligible

for the congressional lottery? What if we did a lottery for nominations, and picked two people for each congressional election, who would then debate each other, put out platforms, and face the voters? Would that better preserve popular choice?

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3.2: Chapter 21- Congressional Roles

> *"This country has come to feel the same when Congress is in session as when the baby gets hold of a hammer."*
>
> *–Will Rogers (1)*

Legislation

Being a senator or representative is a complicated job; they fulfill several roles at the same time. One obvious role is **legislative**, *or law writing.* Congress is typically fairly active in this regard, notwithstanding protestations of a "do-nothing Congress." People who track Congress' productivity make a distinction between substantive laws and ceremonial laws. **Substantive laws** are those that make a change in federal law or that authorize spending taxpayer dollars. **Ceremonial laws** are those that do relatively trivial things like rename federal buildings, award medals, or designate special days. In the past twenty years, Congress has passed between 200-450 substantive laws per session and between 50 and 250 ceremonial laws per session. (2) Sitting congressmen run for reelection based on their legislative records: What "good" bills did they push, and what "bad" bills did they oppose? They campaign on their legislative abilities, and local media report on the status of a candidate's important legislation. The theory of representative democracy rests on the rather large assumption that voters assess legislation and reward those politicians who have voted "correctly" on the issues that matter to voters.

Representation

Representation is closely related to the legislative role. Congressmen are elected to represent their constituents' interests. This is not as straightforward as it sounds. Elections often do not convey the voters' wishes clearly to the politician. If a politician wins with 53 percent of the vote, they cannot be certain from those results what the voters want them to do. That is why politicians are fond of polls and focus groups conducted by survey-research organizations. In addition, congressmen can access other information sources by reading local newspapers, conversing with lobbyists, talking to elites in the district, and soliciting constituent views during town meetings. Also, the representative's role is to decide what kind of representation is best. Should the politician be a **delegate**, who is bound to vote the way constituents want? We saw before in our substantive representation discussion that ordinary people want Congress to act in their interest. But what if constituents advocate a policy that their representative or their senator considers unwise? The other possibility is to be a **trustee**, a representative who is directed by their own judgment rather than their constituents' views. This can be politically risky if the politician votes in direct opposition to what the majority of his or her constituents want. But this is what James Madison was counting on when, in *Federalist #10*, he endorsed representation in a large republic. He wrote that such representatives "may best discern the true interest of their country," and that their "patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." What do you think? Should a member of Congress be a delegate or a trustee? Who is more likely to assume the delegate roll—representatives or senators?

Constituent Service

Another important congressional role is to perform **constituent service**, which is often referred to as casework. Are your veteran's benefits caught up in red tape? Did you fail to receive the cost-of-living adjustment in your social security check? Did your community theater federal grant application get lost? Call your senator or representative's office—staff people are there to help you if they can. Constituent service is a way for a congressman to garner good favor and positive news coverage in their district. Also, casework can serve to educate congressmen, particularly with respect to legislation and oversight. As one member of Congress put it: "You learn more about the job by doing constituent service work than anything else. . .It tells you whether or not the legislation is doing what it is supposed to do." (3) Constituent service can also become controversial, however, especially when politicians are seen to be doing the bidding of well-heeled citizens or corporations, both of whom donate money to congressional campaigns and seem to have better access to congressmen than do ordinary citizens.

Oversight

A final important congressional role is performing executive-agency **oversight**. Congress is interested to see how programs and regulations are actually working and what impacts federal laws have once they go into effect. So, standing committees and their subcommittees hold hearings to inquire into the operations of those executive agencies. Congressmen sometimes have an interest in serving the American public by exposing waste, fraud, and abuse in the executive branch. Often, those agencies' heads are called to testify before a committee or subcommittee, and experts from the General Accounting Office—which is the investigative arm of Congress—testify about their investigations into a particular agency.

It is important to understand the perilous state of congressional oversight. Presidents from both parties as well as the intelligence agencies have resisted Congress' efforts to get the information it needs. With respect to presidents and other executive officials, there is a clear tension between congressional oversight and what is known as executive privilege. Although **executive privilege** is never explicitly mentioned in the constitution, presidents have long held that they are entitled to withhold from Congress certain executive branch documents and the transcripts of deliberations within executive agencies. They also say that executive privilege allows them to defy congressional subpoenas to testify before oversight committees. We'll talk more about executive privilege when we get to the presidency section of the text.

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3.3: Chapter 22- How Congress Passes Legislation

> *"[T]he theoretical process of how an idea becomes law is drastically more complicated when one attempts to put the theory into practice."*
>
> *–Trevor Corning, et al (1)*

> *"Legislation intended to assist the needy moves along the slow lane."*
>
> *–Michael Parenti (2)*



U.S. Capitol Building

What follows is the textbook version of how a bill becomes a law. Please keep in mind that not only is this a simplified view of the process, but there are many occasions when important decisions affecting your life are made in a fashion that does not resemble the idealized version below. Indeed, the process is often so convoluted that political scientist Michael Parenti referred to it as "the legislative labyrinth."

Party Leadership

Before we get to the actual bill-passing process, we should note that in each chamber, party leadership shapes the whole legislative labyrinth. The party with the most seats in each chamber gains considerable power—not just from their numerical majority—but also from their ability to select the **leadership positions** in each chamber. In the House of Representatives, the **Speaker of the House** is the preeminent leadership position. The Speaker of the House is elected by the majority party and serves as both the House's partisan and administrative leader. Even though the Speaker typically does not vote, engage in debate, or sit on standing committees, it is the House's most powerful position. The Speaker articulates and pushes the majority party's political agenda. They manage the House's floor business and makes parliamentary decisions—typically to the majority party's advantage. They are also the House's business manager, handling everything from procurement to calendaring. The **Senate Majority Leader** is elected by the majority party and schedules and manages all the Senate's business. These leadership positions are very powerful, which is why parties are so keen to gain the most votes in each chamber. In addition to having majority votes to pass legislation, if all the members hang together, they get to elect the Speaker and the Senate Majority Leader who can use their powers to their party's advantage.

The leadership positions described above represent the top of party leadership in the House and Senate, but there are other important positions as well. In the House of Representatives, the majority party selects a Majority Leader and a Majority Whip, and the minority party selects a Minority Leader and a Minority Whip. These positions serve as floor leadership and try to ensure party unity on important upcoming votes. Parties in the Senate also have Whip positions—both majority and minority whips—that serve similar roles as their House counterparts, and the minority party is led by a Minority Leader.

Standing Committees

House and Senate members propose bills in their respective chambers. A clerk assigns the bills a number, for example, HR 1205 or S 683. Only the House can initiate bills that increase federal government revenue, but other bills may originate in either chamber, or they may simultaneously work their way through both chambers. The **Speaker of the House** refers the bills to **standing committees** in that chamber. In the Senate the majority and minority leaders negotiate between themselves to decide who refers the bill to a standing committee.

Standing committees—so called because they persist over time—do much work in Congress. The House of Representatives has twenty standing committees, and the Senate has sixteen. In addition, there are about a dozen joint committees in both chambers, such as the Joint Taxation Committee, or there are select committees, such as the Select Intelligence Committee. Most standing committees are organized around topics such as agriculture, defense, foreign relations, taxation, and so on. Committees, in turn, are divided into subcommittees. A bill having to do with gas pricing might be referred to the committee on energy, or to the committee on transportation, or to the committee on foreign relations, or to all three. In the House, the Ways and Means Committee deals with taxing, and the Appropriations Committee handles discretionary spending. In the Senate, the corresponding committees are the Finance Committee and the Appropriations Committee.

Generally speaking, when writing legislation, standing committees go through three stages:

1. **Hearings**— The committee or subcommittee chairman invites interested individuals to testify. People who commonly testify are executive department heads, technical experts and scholars, and interest-group representatives.
2. **Mark-up Sessions**—During several meetings, committee members edit the bill's language. In pre-computer days, congressmen literally marked-up paper bills with pens. Mark-ups often attract lobbyists whose clients pay them to favorably influence the legislation's wording.
3. **Reporting Out**—If the committee votes to approve the bill, it is reported out to the main chamber along with a report describing the bill and its rationale. The bill's supporters and opponents can include their views in the report.

Before getting too far along in describing the legislation process, we should stop here and talk a little bit about getting seats on these standing committees. Congressional members have two main priorities with respect to committee assignments: Generally speaking, they want to be on the more powerful and visible committees, but they also have an interest in being on committees that are most relevant to their states or districts. If a military base is in their district, it would be in a congressman's interest to be on the House Armed Services Committee or the Defense Subcommittee of the Appropriations Committee. The taxation, appropriations, and budget committees are all-purpose powerful committees. But it costs to get a plumb committee assignment. Joseph Califano, former Defense Department lawyer, as well as Secretary of Health, Education, and Welfare, notes that both the Democratic and the Republican congressional leadership essentially charge "dues" to their congressional members to get committee assignments—the better the assignment, the more money the congressman needs to raise for their respective party re-election committee—the Democratic Congressional Campaign Committee or the National Republican Congressional Committee. Members are advised to spend four hours per day on the phone to raise money to pay these committee-assignment party dues, as well as for their own re-election efforts. (3)

Most bills introduced in Congress die somewhere in the committee process. If a bill does make it through the standing committees, each chamber will debate it on the floor. The overall **Rules of the House** is a document passed in a new congressional term's first week that expresses how the majority party wants to conduct business. Often, the incoming majority either adopts or makes slight changes to the existing Rules of the House. For instance, during the Trump impeachment imbroglio, House Republicans complained bitterly about the Oversight, Intelligence, and Judiciary Committee's closed-door hearings, but Republicans are the ones who originally passed the rules allowing such meetings in 2015 when they had the majority. Indeed, they used the same kind of closed-door meetings to investigate events surrounding the attack in Benghazi, Libya.

House Rules Committee

When a bill comes out of the House committee, the bill must first make a stop at the **House Rules Committee**, which has been called "the majority leadership's traffic manager" for floor debate. (4) Like other committees, the majority party has the most seats on the Rules Committee, and these members are very likely to have the trust of party leadership. The Rules Committee attaches a special rule to each bill that specifies the debate's nature: The rule indicates how much debate-time is allowed and how many amendments can be introduced, and the rule might indicate that only certain portions of the bill can be amended. The Rules Committee can also waive points-of-order against a bill, meaning that procedural challenges against the bill cannot halt its progress. There are four types of special rules:

- *Open*—allows any congressional member to offer an amendment to the bill on the floor so long as the amendment is germane to the bill's topic. Appropriations bills are usually considered under open rules, but the amendments offered are restricted to changing funding levels.

- *Modified Open*—allows any congressional member to offer an amendment to the bill on the floor so long as the amendment is preprinted in the Congressional Record ahead of time. This gives the majority party time to strategize over how best to handle minority-party amendments.
- *Structured*—allows only certain amendments of which must be approved by the Rules Committee and written into the rule itself. The amendments approved for floor debate are given a certain time-limit during which they can be debated.
- *Closed*—allows no amendments to the bill on the floor.

You can imagine that the majority party tends to use structured and closed rules on legislation in which it is heavily invested and wants to see pass. This is a tremendous advantage for the majority party. When the bill reaches the House floor, each party is given time to debate it, and each party's leadership divides up their time-block among the representatives who are best positioned to speak on the bill.

The Senate Floor

While the Senate does have a Rules Committee, it is not really comparable to the House Rules Committee, so both parties' Senate leadership may try to achieve a result similar to a rule by drafting a **unanimous consent agreement** for the bill. This agreement would set a debate time, a debate time-limit, and may limit the amendments allowed. To be accepted, however, a unanimous consent agreement requires all 100 senators to agree to those debate rules—and that might not happen.

If the Senate does not pass a unanimous consent agreement to limit the debate, some senators might **filibuster** a bill to kill it or to gain concessions. A filibuster prevents a bill from passing by dragging out the debate—if the debate does not end, there can be no vote, and without a vote, the bill cannot pass. The filibuster can be when a senator continuously speaks, although this is rare now. The record for a single filibuster is held by South Carolina's Strom Thurmond, who filibustered the 1957 Civil Rights Act for twenty-four hours and eighteen minutes. A filibuster can also be stopped by a **motion of cloture,** which is a motion to place a time limit on the filibuster. At least sixty senators must agree to the cloture, and then debate ends and a vote happens on the bill.

Due to filibuster reforms in the 1970s as well as later changes in Senate processes, cloture motions–and thus, filibusters–became routine in the Senate. (5) In the 1940s and 50s, each Congress experienced about five filibusters in a two-year term. But a 2002 study indicated that by that time "roughly half of all major bills encounter[ed] filibuster difficulties, often resulting in either defeat or substantial concessions." (6) As political scientist Sara Binder stated before the Senate, "From roughly 1920 to 1970, filibusters averaged *one* a year. In stark contrast, in 2005-2006, there were an average of thirty-four cloture motions filed to end filibusters, and in the 2007-08 Congress there were 139 cloture motions filed, roughly *seventy* a year." (7) Now, the mere threat of a filibuster can derail a bill or stymie a presidential nomination. Indeed, legal scholar Josh Chafetz, who argues that the filibuster is unconstitutional, points out how undemocratic the situation has become by writing that "a measure that cannot command the support of sixty Senators is unlikely even to be introduced onto the Senate floor." (8)

Early in the 113th Congress (2013-14), Democratic senators Tom Harkin, Jeff Merkley, and Tom Udall attempted—but failed—to push through significant filibuster reforms that would have limited the minorities' ability to stop the will of the Senate majority. (9) In 2013, after Republicans refused to allow President Obama to fill empty seats on the D.C. Circuit Court, Democrats pushed through an end to the filibuster for lower federal court nominations. Then, in 2017, after Democrats filibustered President Trump's nomination of Neil Gorsuch to fill a Supreme Court seat that Republicans had earlier refused to allow President Obama to fill, Republicans killed the filibuster for Supreme Court nominations as well. As of this writing, the filibuster continues to be a tool of the minority party in the Senate to impede the will of the majority.

Conference Committees

After debate has ended, each chamber takes a floor vote. At this point, an interesting problem can develop. If the House's version of the bill differs from the Senate's version, the bill cannot be sent to the president. One of three things can happen: 1) One chamber can just agree to adopt the version of the bill that passed in the other chamber. 2) The two chambers can send the different versions to each other to attempt to get to a compromise. *3)* The two bill versions can be melded into one in a **conference committee** called specifically for that purpose. Conference committees—so important that they are sometimes called the third house of Congress—are composed of both representatives and senators who are chosen by the bill mark-up committee(s) chair and senior leader of the minority party. Conference committees have ranged in size from seven to over 250 members, and there does not have to be an equal number of representatives and senators. If the conference-committee members cannot compromise with each other, the bill is

stuck. If a majority can agree, then the conference report, as it is known, is voted on directly in the House and the Senate, with no floor amendments allowed from either chamber. If the conference report fails to pass both chambers, the conference committee can be reconvened. Once both chambers accept the conference report, it can be sent on to the president.

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3.4: Chapter 23- Pathologies of Congressional Behavior

> *"Toward the end of an age, more and more people lose faith in their institutions and finally they abandon their belief that these institutions might still be reformed from within."*
>
> *–Historian John Lukacs (1)*

The legislative process is much more detailed than described in the previous chapter. The process is susceptible to several pathologies, meaning that it can be manipulated in ways that grossly distort the textbook version of how a bill becomes a law.

Log Rolling

Nineteenth century German Chancellor Otto von Bismarck once remarked that laws had something in common with sausages: "It's better for your stomach not to watch either one of them being made." The legislative process, unfortunately, more resembles interested minorities clashing than rationally deliberating the public good. One legislative practice that Bismarck may have had in mind is **logrolling**, or trading votes for something desired: A congressman votes on something they don't really care about, in exchange for something in return. For example, although a congressman would never admit it, they might vote for a bill to build a defense project in another state, knowing it's a waste federal money. In exchange, the congressman who wanted the defense project votes to support a road project in another district.

Pork Barrel Spending



Cartoon of a Pork Barrel in 1849

Those same congressmen will pat themselves on the back for "bringing home the bacon" on the road project, while decrying wasteful government spending. That phrase, "bringing home the bacon," is related to **pork barrel spending**. There are multiple stories about the phrase's origin. One has it that the name comes from the pre-Civil War practice of distributing salted pork to slaves from large barrels. Another story says that pork barrels were a common staple in nineteenth century rural kitchens. The barrel's pork level was a sign of the family's prosperity. In any case, the practice of congressmen dipping into the national treasury to fund local projects came to be known as them dipping into the **pork barrel**—and the name and the practice have continued ever since.

According to the watchdog group Citizens Against Government Waste (CAGW), in 2022 Congress spent $18.9 billion on what it defines as pork barrel projects. The organization's *Pork Hall of Shame* documents the worst abuses, including funding for local museums and recreation facilities, upgrades to military equipment that the Pentagon didn't request, and targeted research funds that go to particular universities. (2) Critics say that these projects do not serve the national interest and therefore should not be funded by national taxpayer dollars.

Pork barrel spending is largely accomplished through inserting earmarks into congressional bills. An **earmark** is typically a small paragraph of very specific language inserted into a budget appropriation bill directing an agency to fund a project. CAGW typically identifies hundreds of earmarks every year. These earmarks are often the result of congressmen bowing to lobbying pressures and

campaign contributions from organized interests. Not all earmarks are pork, but if an earmark meets one of the following criteria, CAGW defines it as pork: Only one congressional chamber requested it; not specifically authorized; not competitively awarded; not requested by the president; greatly exceeds the president's budget; not the subject of congressional hearings; serves only a local or special interest. Many projects meet more than one of those criteria.

Corruption

The legislative process is also occasionally subject to outright **corruption** and illegal behavior. This sometimes takes the form of bribery, in which special interests provide tangible benefits for congressmen in exchange for congressmen providing favors. Other forms of corruption are more mundane. In 1994, Representative Dan Rostenkowski (D-IL) lost his seat and later served fifteen months in federal prison for misusing payroll and office expense money. In 2002, Representative James Traficant (D-OH) was convicted of racketeering, tax evasion, and bribery. He was one of the House's few members to be formally expelled by his colleagues. In 2005, Representative Randall "Duke" Cunningham (R-CA) pled guilty to a variety of offenses including bribery and mail fraud involving his relationship with defense contractors Mitchell Wade and Brent Wilkes and co-conspirators. In exchange for earmarks, government contracts, and other favors, the contractors provided Cunningham with a yacht on which to live and bought a California house from him for $700,000 above market value, among other favors. In 2009, Representative William Jefferson (D-LA) was convicted of bribery and money laundering. The FBI raided Jefferson's home and discovered $90,000 in cash stashed in the freezer. The money was part of a bribe Jefferson received in exchange for help with a Nigerian business deal. A number of congressmen—Representative Tom DeLay (R-TX), Senator Conrad Burns (R-MT), Representative Roy Blunt (R-MO), Representative Bob Ney (R-OH), and others—were implicated in the corrupt web surrounding the disgraced and convicted lobbyist Jack Abramoff. Representative Ney pled guilty to taking money and gifts in exchange for doing work on behalf of Abramoff, and then Ney resigned from Congress in October 2006. The scandal resulted in two Bush administration White House officials and congressional staff members going to jail. In 2019 Representative Duncan Hunter (R-CA) pleaded guilty to misusing hundreds of thousands of dollars of campaign donations. He was sentenced to prison and served a few months when President Donald Trump pardoned him.

Another form of corruption that sometimes ensnares congressional members is **insider trading**. It is against federal law to use information not available to the public when executing securities trades. This used to be more common among congressional members before the STOCK Act passed in 2012, which explicitly said that representatives, senators, and their staff, "are not exempt from the insider trading prohibitions arising under the securities laws." But cases still do arise. In 2019, Representative Chris Collins (R-NY), one of Congress' wealthiest members at the time, pleaded guilty to insider trading and conspiracy—part of which involved a phone call to his son Cameron Collins made from the White House lawn to give him inside information on a biotech company's failed drug trial. (3) President Donald Trump pardoned Collins. In 2020, several members of Congress were accused of dumping stocks after they found out via classified briefings that the coronavirus pandemic was going to be severe. (4)

Gridlock

Perhaps the legislative processes' biggest pathology—gridlock—is the ability to stop something that the American people desire. There are a thousand and one ways for this to happen in Congress. Most bills get bottled up in committee and never come to a floor vote. This happens frequently when the bill is attempting something that organized interests' lobbyists don't want to see happen. Some bills get poison pill amendments attached to them to render the bill useless or to damage its chances of passing. The Senate filibuster kills some bills. When one chamber is controlled by one party and the other chamber is controlled by the other, frequently bills will pass one of the chambers only to be defeated—or not even considered—in the other. This is a function of the bicameral legislature plus the chamber's divided political control.

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3.5: Chapter 24- The Undemocratic Senate

> *"We should keep in mind that the original one-state, two-senators rule was written and ratified by property-owning white men, almost half of whom owned slaves…"*
>
> *–Eric Orts (1)*

The Senate as an Affront to Democratic Principles

Any proper understanding of the United States legislative branch must deal with an issue that doesn't get as much attention as it should: The United States Senate is not an especially democratic representative body. Indeed, journalist and former congressional candidate Norman Solomon wrote that "today, the U.S. Senate is the most undemocratic elected body in the nation." (2) Of course, the Senate was never designed to be a democratic body—remember that the Senate was initially chosen by state legislators rather than the people. Journalist and author George Packer puts it this way:

The Senate was designed, as part of the separation of powers, to check the impulses of the House and the popular will. For some Federalists, it also had an aristocratic purpose: to collect knowledge and experience, and to guard against a leveling spirit that might overtake the majority. (3)

In 1913, the **Seventeenth Amendment** changed the Senate selection process by having the people directly elect senators. That change certainly made senators more responsive to the democratic will within their respective states, but the basic problem is structural and has to do with how senators are apportioned. Senate seats are **apportioned** equally between the states, with each state getting two senators regardless of population. This enormously distorts the democratic principle of one-man, one-vote. Consider that the 7 million residents of Alaska, Delaware, Montana, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming elect sixteen senators; meanwhile, the 147 million Americans living in California, Florida, Illinois, New York, Ohio, Pennsylvania, and Texas elect only fourteen senators.



Senate of the 111th Congress

In the 1964 case ***Wesberry v. Sanders***, the Supreme Court ruled that unequal House election districts were an unconstitutional violation of the "one-man, one-vote" standard for legislative districts. House districts are sized accordingly and are roughly equal in population, with the important caveat that each state gets at least one representative. (4) Unfortunately, this logic cannot penetrate the U.S. Senate because the Constitution's language enshrines that body's undemocratic structure. From the strictly mathematical view, any constitutional amendment to remedy the situation would have to garner a two-thirds vote in the House of Representatives and also in the Senate itself. Besides, when talking about amendments, Article V of the Constitution stipulates that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Thus, fixing the senators' apportionment would require that most senators agree to the change, but would also require the small states to agree to give up the disproportionate power they now have.

The Senate's unrepresentative structure—being based on states rather than on population—has real-world political consequences. For one thing, the senators from the twenty-six smallest states hold the most Senate seats even though they represent only 17 percent of the U.S. population. They can refuse to pass legislation desired by the majority of the population, the House, and the president. Small states and rural interests gain disproportionate power in this scheme. So do Whites: the list of states with the least population correlates fairly well with the list of states with greatest percentage of White people.

The founders saw the Senate as a bulwark against unruly democratic majorities. Criminology and criminal justice professor Richard Rosenfeld summed up the situation, "The United States Senate stands today as a grotesque monument to that antidemocratic legacy; it remains largely a preserve of wealthy white male aristocrats drawn from an entirely different economic

class than the people they purport to represent." (5) Today, however, the situation is even worse. For example, in 1787 the most populous state, Virginia, had ten times more people than Delaware, the least populous state. Now, California is the most populous state and Wyoming is the least populous. California has sixty-nine times more people than Wyoming—and yet Wyoming has the same number of U.S. Senate seats as does California. The 117th Congress perfectly illustrated the partisan fallout of this undemocratic apportionment. Following the 2020 election, the Senate was split evenly, with 50 seats held by Republicans and 50 seats held by 48 Democrats and 2 Independents who caucused with the Democrats. Collectively, the 50 Republican senators represented nearly 42 million fewer people than did the 50 Democratic/Independent senators. (6)

The Senate apportionment problem is compounded by the **filibuster**, for it only takes forty-one senators to defeat a cloture motion and prevent a bill from being voted on. If the forty-one senators sustaining a filibuster happened to come from the least populous states, it would mean that the senators representing less than 12 percent of the population are inhibiting legislation that the vast majority of the population wants. The situation is so obviously undemocratic, that many people have argued that the filibuster is unconstitutional. The group Common Cause even tried to sue to get a federal court to declare the filibuster unconstitutional, but the suit was thrown out because the judge said the group didn't have standing to sue. Adam Winkler, responding to Senator Rand Paul's thirteen-hour filibuster to protest the Obama administration's unconstitutional drone attacks, notes that the filibuster is not mentioned in the Constitution and that the first filibuster didn't take place until 1841. The Constitution requires only a simple majority vote to pass legislation, and it carefully spells out the few situations that require a different rule—for example, a two-thirds Senate vote to remove someone who has been impeached by the House or a two-thirds Senate vote to support a treaty. (7)

While both parties routinely use the filibuster, it is clear that it has more often been used to frustrate progressive changes endorsed by the majority of Americans. Southern Democrats used the filibuster for decades to block civil rights legislation. More recently, Republicans and conservative Democrats have used the filibuster to block a paycheck protection bill to equalize pay between men and women, the DREAM Act for the children of undocumented immigrants, campaign finance bills that would force the disclosure of dark money, a bill that would close corporate tax loopholes that incentivize sending jobs overseas, an expansion of Social Security benefits, and the For the People Act, which would have set national standards for voting, taken steps to reduce partisan gerrymandering, and better ensured the security of elections. Additionally, victims of the filibuster also include a public option in the Affordable Care Act and a cap-and-trade bill intended to fight climate change. (8) All were blocked by filibuster or the threat of filibuster.

What Could be Done About the Undemocratic Senate?

The U.S. Senate's undemocratic nature has become so odious that people often entertain possible ways to fix the problem. One way would be to leave the apportionment system alone but break up large states so that each new state would have its own two senators. California, for instance, could be broken up into six or eight states. (9) This is actually a modest proposal, given that the city of Los Angeles has nearly seven times the population of the entire state of Wyoming. John Dingell, one of the longest serving Representatives in U.S. history, argued that the Senate's apportionment imbalance "has become the primary cause of our national legislative paralysis." His solution is that we should simply abolish the Senate by constitutional amendment. (10) Wharton legal studies professor Eric Orts has argued that we should expand the Senate to 110 seats, give one seat to each state, and then give additional seats to states according to population. Wyoming would end up with one senator while California would have twelve. Moreover, he argued that such a move would only require legislation rather than a Constitutional amendment. Why? Because in cases like *Reynolds v Sims* (1964) and even *Bush v. Gore* (2000), the Supreme Court has already firmly established the constitutional principle of one-man one-vote, and the Congress is already empowered through amendments like the Fourteenth, Fifteenth, and the Nineteenth to uphold American citizens' privileges and immunities—of which voting is one. (11)

What if . . . ?

What would you do about this undemocratic institution sitting firmly in the middle of our republic? Would you vote to support splitting up large states? What if you were a resident of one of the less populous states? Would you vote to abolish the Senate altogether? What does it say about our democracy when we seem so unable to address such an obviously undemocratic anachronism?

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CHAPTER OVERVIEW

4: Courts

Learning Objectives

- This section examines the structure and function of the criminal courts in America. It examines the concept of jurisdiction and describes the dual court system (the federal court system and the various state court systems). This section also examines the role and function of the various courtroom participants–the people who work in the courts. After reading this section, students will be able to:
- Differentiate between what happens at trial and what happens on appeal and identify the procedural history of a criminal case by reading appellate opinions written in the case.
- Describe how a crime/criminal case proceeds from the lowest level trial court up through the U.S. Supreme Court. (i.e., students should understand the hierarchy of the federal and state courts).
- Discuss the function and selection of state and federal trial and appellate judges in the American criminal justice system.
- Discuss the function and selection of state and federal prosecutors in the American criminal justice system.
- Discuss the importance of the criminal defense attorney in the American criminal justice system.
- Identify at what stages of the criminal justice process a defendant is entitled to the assistance of a court-appointed attorney.

Critical Thinking Questions

1. Knowing what happens at trial and what happens on appeal, would you be more interested in being a trial judge or an appellate judge? Why?
2. Why is there a different standard of review for questions of fact and questions of law?
3. Do you agree that cases should be overturned only when there was a fundamental or prejudicial error that occurred during the trial?
4. Do you think it is easier to be a defense attorney than a prosecutor believing the defendant is guilty but knowing that the justice system has violated the defendant's rights?
5. Should the defendant ever waive the assistance of counsel?
6. Is there any position as a court staff that particularly interests you? Why?

4.1: Introduction to the U.S. Court System
4.2: Jurisdiction
4.3: Structure of the Courts- The Dual Court and Federal Court System
4.4: Structure of the Courts- State Courts
4.5: American Trial Courts and the Principle of Orality
4.6: The Appeals Process, Standard of Review, and Appellate Decisions
4.7: Federal Appellate Review of State Cases
4.8: Courtroom Players- Judges and Court Staff
4.9: Courtroom Players- Prosecutors
4.10: Courtroom Workgroup- Defense Attorneys

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4.1: Introduction to the U.S. Court System

What follows is an examination of the structure and role of the courts in the American criminal justice system and the requirement of **jurisdiction**. As you read this chapter, pay attention to the context when you see the word “court” because it is used in a variety of ways. “Court” can mean a building—it is short for “courthouse” (for example, “he went to the court”); one judge (for example, “the trial court decided in his favor”); a group of judges (for example, “the Supreme Court unanimously upheld the conviction”), or an institution/process generally (for example, “courts hopefully resolve disputes in an even-handed manner”). Courts (the institution and processes) determine both the facts of a crime (did the defendant do the crime?) and also the legal sufficiency of the criminal charge (can the government prove it?). Courts ensure that criminal defendants are provided **due process of law**, or the procedures used to convict the defendant are fair. Courts are possibly more important in criminal cases than in civil cases because, in civil matters, the parties have the option of settling their disputes outside of the court system, but all criminal prosecutions must be funneled through the criminal courts.

After reading this chapter, you will be able to project the trajectory of a criminal case from the filing of criminal charges in a local courthouse through all final appeals processes. This requires an understanding of the **dual court system,** the structure of typical state court systems and the federal court system. This chapter explores the differences between a trial court and an appellate court, and you will learn how trial judges and juries decide (determine the outcome of) a case by applying the legal standards to the facts presented during trial and how appellate judges decide if the case was rightly decided after examining the trial record for legal error. Appellate courts make known their decisions known through their written opinions, and this chapter introduces the types of opinions and rulings of appellate courts.

This chapter also examines the selection, roles, and responsibilities of the participants in the criminal courts frequently referred to as the **courtroom workgroup.** You will become familiar with who the players are during each of these steps of the process.

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4.2: Jurisdiction

In order to understand the courts, it is essential to understand the many facets of the word **jurisdiction**. Jurisdiction refers to the legal authority to hear and decide a **case** (legal suit).

Jurisdiction Based on the Function of the Court

Trial Courts versus Appellate Courts

Jurisdiction may be based on the function of the court, such as the difference between trial and appellate functions. The federal and state court systems each have court hierarchies that divide trial courts and appellate courts. Trial courts have jurisdiction over pretrial matters, trials, sentencing, probation, and parole violations. Trial courts deal with facts. Did the defendant stab the victim? Was the eyewitness able to clearly see the stabbing? Did the probationer willfully violate terms of probation? As a result, trial courts determine guilt and impose punishments.

Appellate courts, on the other hand, review the decisions of the trial courts. They are primarily concerned with matters of law. Did the trial judge properly instruct the jury about the controlling law? Did the trial court properly suppress evidence in a pretrial hearing? Does the applicable statute allow the defendant to raise a particular affirmative defense? Appellate courts correct legal errors made by trial courts and develop law when new legal questions arise. Appellate courts do not hold hearings in which evidence is developed, but rather they only review the record, or "transcript", of the trial court. In some instances, appellate courts determine if it is legally sufficient, or enough, evidence to uphold a conviction.

Jurisdiction Based on Subject Matter

Jurisdiction can also be based on the subject matter of the case. For example, criminal courts handle criminal matters, tax courts handle tax matters, and customs and patent courts handle patent matters. Regarding "subject matter jurisdiction" Kerper (1979, 34) noted,

"The [subject matter] jurisdictional distinction . . . tends to be utilized primarily in distinguishing between different trial courts. Appellate courts ordinarily can hear all types of cases, although there are several states that have separate appellate courts for criminal and civil appeals. At the trial level, most states have established one or more specialized courts to deal with particular legal fields. The most common areas delegated to specialized courts are wills and estates (assigned to courts commonly known as probate . . . courts), divorce, adoption or other aspects of family law (family or domestic relations courts), and actions based on the English law of equity (chancery courts). The federal system also includes specialized courts for such areas as customs and patents. While significant, the specialized courts represent only a small portion of all trial courts. Most trial courts are not limited to a particular subject but may deal with all fields. Such trial courts are commonly described as having general jurisdiction since they cover the general (i.e., non-specialized) areas of law. Criminal cases traditionally are assigned to courts with general jurisdiction." [1]

Jurisdiction Based on the Seriousness of the Case

The jurisdiction of trial courts may also be based on the seriousness of the case. For example, some courts, called **courts of limited jurisdiction** only have authority to try infractions, violations, and petty crimes (misdemeanors) whereas other trial courts, called **courts of general jurisdiction**, have authority to try serious crimes (felonies) as well as minor crimes and offenses.

Jurisdiction Based on the Court's Authority over the Parties to the Case

Jurisdiction also refers to the court's authority over the parties in the case. For example, juvenile courts have jurisdiction over dependency and delinquency cases involving youth. Other courts have jurisdiction that is based on the special nature of the parties are the military tribunals, including courts-martial, Courts of Criminal Appeals, and the United States Court of Appeals for the Armed Services.

Jurisdiction based on State and Federal Autonomy (Geography)

Finally, jurisdiction is also tied to our system of federalism, the autonomy of both national and state governments. State courts have jurisdiction over state matters, and federal courts have jurisdiction over federal matters. Jurisdiction is most commonly known to represent geographic locations of the court's oversight. For example, Oregon courts do not have jurisdiction over crimes in California.

1. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed.). West Publishing Company. ↵

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4.3: Structure of the Courts- The Dual Court and Federal Court System

Each state has two complete parallel court systems: the federal system, and the state's own system. Thus, there are at least 51 legal systems: the fifty created under state laws and the federal system created under federal law. Additionally, there are court systems in the U.S. Territories, and the military has a separate court system as well.

The state/federal court structure is sometimes referred to as the **dual court system**. State crimes, created by state legislatures, are prosecuted in state courts which are concerned primarily with the applying state law. Federal crimes, created by Congress, are prosecuted in the federal courts which are concerned primarily with applying federal law. As discussed below, it is possible for a case to move from the state system to the federal system when a defendant challenges the conviction on direct appeal through a **writ of certiorari,** or when the defendant challenges the conditions of confinement through a **writ of habeas corpus**.

Dual Court System Structure

Highest Appellate Court	**U.S. Supreme Court** (Justices) (NoteCourt also has original/trial court jurisdiction in rare cases) (Note: Court will also review petitions for writ of certiorari from State Supreme Court cases).	**State Supreme Court** (Justices)
Intermediate Appellate Court	**U.S. Circuit Court of Appeals** (Judges)	**State Appellate Cour**t (e.g., Oregon Court of Appeals) (Judges)
Trial Court of General Jurisdiction	**U.S. District Court** (Judges) (Note: this court will review petitions for writs of habeas corpus from federal and state court prisoners)	**Circuit Court, Commonwealth Court, District Court, Superior Court** (Judges)
Trial Court of Limited Jurisdiction	**U.S. Magistrate Courts** (Magistrate Judges)	**District Court, Justice of the Peace, Municipal Courts** (Judges, Magistrates, Justices of the Peace)

The Federal Court System

Article III of the U.S. Constitution established a Supreme Court of the United States and granted Congress discretion as to whether to adopt a lower court system. It states the "judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Fearing that the state courts might be hostile to congressional legislation, Congress immediately created a lower federal court system in 1789. [1] The lower federal court system has been expanded over the years, such as when Congress created the separate appellate courts in 1891.

View the authorized federal judgeships at http://www.uscourts.gov/sites/default/files/allauth.pdf

Trace the history of the federal courts at https://www.fjc.gov/history/timeline/8276

Trace the history of the subject matter jurisdiction of the federal courts here https://www.fjc.gov/history/timeline/8271

View cases that shaped the roles of the federal courts at https://www.fjc.gov/history/timeline/8271

Trace the administration of the federal courts at https://www.fjc.gov/history/timeline/8286

United States Supreme Court

The United States Supreme Court (Court), located in Washington, D.C., is the highest appellate court in the federal judicial system. Nine justices sitting ***en banc,*** as one panel, together with their clerks and administrative staff, make up the Supreme Court. [View the biographies of the current U.S. Supreme Court Justices here: https://www.supremecourt.gov/about/biographies.aspx]. The Court's decisions have the broadest impact because they govern both the state and federal judicial system. Additionally, this Court influences federal criminal law because it supervises the activities of the lower federal courts. The nine justices have the final word in determining what the U.S. Constitution permits and prohibits, and it is most influential when interpreting the U.S. Constitution.

Associate Justice of the Supreme Court, Robert H. Jackson stated in *Brown v. Allen*, 344 U.S. 433, 450 (1953), "We are not final because we are infallible, but we are infallible only because we are final." Although it is commonly thought that the U.S. Supreme Court has the final say, this is not one hundred percent accurate. After the Court has read written appellate briefs and listened to oral arguments, it will "decide" the case. However, it frequently refers or sends, the case back to the state's supreme court for them to determine what their own state constitution holds. Similarly, as long as the Court has interpreted a statute and not the constitution, Congress can always enact a new statute which modifies or nullifies the Court's holding.

Writs of Certiorari and the Rule of Four

The Court has a discretionary review over most cases brought from the state supreme courts and federal appeals courts in a process called a **petition for the writ of certiorari**. Four justices must agree to accept and review a case, and this only happens in roughly 10% of the cases filed. (This is known as the **rule of four**.) Once accepted, the Court schedules and hears oral arguments on the case, then delivers written opinions. Over the past ten years, approximately 8,000 petitions for writ of certiorari are filed annually. It is difficult to guess which cases the court will accept for review. However, a common reason the court accepts to review a case is that the federal circuits courts have reached conflicting results on important issues presented in the case.

Take a virtual tour of the U.S. Supreme Court building: https://www.oyez.org/tour

The United States Supreme Court Building

"The United States Supreme Court occupies a majestic building in Washington, D.C., with spacious office suites and impressive corridors and library facilities. With enhancements and attributes similar to those of appellate courts, the elegance and dignity of the facilities comport with the significant role of the Court as the final arbiter in the nation's judicial system. There is a sparse crowd at most state and intermediate federal appellate courts; at the Supreme Court, by contrast, parties interested in the decisions that will result from arguments, a coterie of media persons, and many spectators fill the courtroom to hear arguments in cases that often significantly affect the economic, social, and political life of the nation. Photography is not allowed, and the arguments and dialogue between counsel and the justices are observed silently and respectfully by those who attend." [2]

Take a tour of the U.S. Supreme Court with CNN: https://www.youtube.com/watch?v=Unyswl36q8w

Original (Trial Court) Jurisdiction of the Supreme Court: A Rarity

When the Court acts as a trial court it is said to have **original jurisdiction**, and it does so in a few important situations, such as when one state sues another state. The U.S. Constitution, Art. III, §2, sets forth the jurisdiction of the Court. It states,

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make."

Original jurisdiction cases are rare for several reasons. First, the Constitution prohibits Congress from increasing the types of cases over which the Supreme Court has original jurisdiction. Second, parties in an original jurisdiction suit must get permission by petitioning the court to file a complaint in the Supreme Court. In fact, there is no right to have a case heard by the Supreme Court, even though it may be the only venue in which the case may be brought. The Supreme Court may deny petitions for it to exercise original jurisdiction because it finds that the dispute between the states is too trivial, or conversely, too broad, and complex. The Court does not need to explain why it refuses to take up an original jurisdiction case. Original

jurisdiction cases are also rare because, except in suits or controversies between two states, the Court has increasingly permitted the lower federal courts to share its original jurisdiction.

United States Courts of Appeal

Ninety-four judicial districts comprise the 13 intermediate appellate courts in the federal system known as the U.S. Courts of Appeals, sometimes referred to as the federal circuit courts. These courts hear challenges to lower court decisions from the U.S. District Courts located within the circuit, as well as appeals from decisions of federal administrative agencies, such as the social security courts or bankruptcy courts. There are twelve circuits based on geographic locations and one federal circuit which has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws, and cases decided by the U.S. Court of International Trade and the U.S. Court of Federal Claims. The smallest circuit is the First Circuit with six judgeships, and the largest court is the Ninth Circuit, with 29 judgeships. Appeals court panels consist of three judges. The court will occasionally convene *en banc* and only after a party who has lost in front of the three-judge panel requests review. Because the Circuit Courts are appellate courts which review trial court records, they do not conduct trials and, thus, they do not use a jury.

The U.S. Courts of Appeal, like the U.S. Supreme Court, trace their existence to Article III of the U.S. Constitution. These courts are busy, and there have been efforts to both fill vacancies and increase the number of judgeships to help deal with the caseloads. For example, the Federal Judgeship Act of 2013 would have created five permanent and one temporary circuit court judgeships, in an attempt to keep up with increased case filings. However, the bill died in Congress. Fortunately, in recent years, fewer cases have been filed.

Click on this link to see the geographical jurisdiction of the U.S. Courts of Appeals: http://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf

United States District Courts

The U.S. District Courts, also known as "**Article III Courts"**, are the main trial courts in the federal court system. Congress first created these U.S. District Courts in the Judiciary Act of 1789. Now, ninety-four U.S. District Courts, located in the states and four territories, handle prosecutions for violations of federal statutes. Each state has at least one district, and larger states have up to four districts. Each district court is described by reference to the state or geographical segment of the state in which it is located (for example, the U.S. District Court for the Northern District of California). The district courts have jurisdiction over all prosecutions brought under federal criminal law and all civil suits brought under federal statutes. A criminal trial in the district court is presided over by a judge who is appointed for life by the president with the consent of the Senate. Trials in these courts may be jury trials.

Link to a number of cases filed in U.S. District Courts http://www.uscourts.gov/federal-judicial-caseload-statistics-2018-tables

Although the U.S. District Courts are primarily trial courts, district court judges also exercise an appellate-type function in their review of **petitions for writs of habeas corpus** brought by state prisoners. Writs of habeas corpus are claims by state and federal prisoners who allege that the government is illegally confining them in violation of the federal constitution. The party who loses at the U.S. District Court can appeal the case in the court of appeals for the circuit in which the district court is located. These first appeals must be reviewed, and thus are referred to as **appeals of right**.

United States Magistrate Courts

U.S. Magistrate Courts are **courts of limited jurisdiction** in the federal court system, meaning that these legislatively-created courts do not have full judicial power. Congress first created the U.S. Magistrate Courts with the Federal Magistrate Act of 1968. Under the Act, federal magistrate judges assist district court judges by conducting pretrial proceedings, such as setting bail, issuing warrants, and conducting trials of federal misdemeanor crimes. There are more than five hundred Magistrate Judges who disposed of over one million matters.

In the News: https://www.uscourts.gov/sites/default/files/data_tables/jb_s17_0930.2017.pdf)

U.S. Magistrate Courts are "**Article I Courts"** as they owe their existence to an act of Congress, not the Constitution. Unlike Article III judges who hold lifetime appointments, Magistrate Judges, formerly referred to as "Magistrates" before the Judicial Improvement Act which took effect December 1, 1990, are appointed for eight-year terms.

For a comprehensive review of the U.S. Magistrate Courts and U.S. Magistrate Judges see: http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System

? Course Assignment

Watch season two of the popular Netflix series, Making a Murder which covers the appeals of the murder convictions of Steven Avery and his nephew Brendan Dassey. Pay attention to the discussions among Brendan Dassey's appellate team from Northwestern School of Law concerning the appeals process from the state courts through the federal Seventh Circuit Court of Appeals, which convened *en banc* after a 2-1 panel decision finding Brendan Dassey's confession was inadmissible.

See also, http://involuntary.http://www.abajournal.com/news/article/en_banc_7th_circuit_reinstates_brendan_dasseys_conviction_in_making_a_murde?icn=most_read

- Write a 500-word response about what you saw during the appeals process and how it made you feel. Did you agree with it or disagree with it? Is this justice?

  Click on this link to see the number of filings: http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018

1. (The Judiciary Act of 1789 (Ch. 20, 1 Stat 73) ↵
2. Scheb II, J.M. (2013). *Criminal Law and Procedure* (8th ed., pp. 45). Belmont, CA: Cengage. ↵

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4.4: Structure of the Courts- State Courts

State Court Systems

Each state has its own independent judicial system. State courts handle more than 90 percent of criminal prosecutions in the United States. Although state court systems vary, there are some common features. Every state has one or more level of trial courts and at least one appellate court. Although there is no federal constitutional requirement that defendants be given the right to appeal their convictions, such a right is arguably implicit in the due process clause of the Fourteenth Amendment. Moreover, every state has some provision, usually within its own constitution or statutes, that provides defendants at least one appeal. Most state courts have both courts of general jurisdiction, which conduct felony and major misdemeanor trials, and courts of limited jurisdiction, which conduct violations, infractions, and minor misdemeanor trials. Similar to the U.S. Magistrate Courts, states' courts of limited jurisdiction will also handle pre-trial matters for felonies until they are moved into the general jurisdiction court. Most states have intermediate courts of appeals and some have more than one level of these courts. All states have a **court of last resort,** generally referred to as the Supreme Court. Some states court systems are streamlined, and some are complex, with most states fall between the two extremes.

Hierarchy of State Courts

State trial courts tend to be busy, bustling places with lots of activity. Appellate courts, on the other hand, tend to be solemn and serene, formal places. Scheb noted,

"Appellate courts are different than trial courts, both in function and 'feel.' Unlike a trial court, which is normally surrounded by a busy atmosphere, an appellate court often sits in the state capitol building or its own facility, usually with a complete law library. The décor in the building that house appellate courts is usually quite formal, and often features portraits of former judges regarded as oracles of the law. When a panel of judges sits to hear oral arguments, they normally emerge from behind a velvet curtain on a precise schedule and to the cry of the court's marshal. When not hearing oral arguments, appellate judges usually occupy a suite of offices with their secretaries and law clerks. It is in these individual chambers that appellate judges study and write their opinions on cases assigned to them." [1]

Kerper describes the flow of a case through the hierarchical structure of the courts as follows:

"When the specialized courts are put to one side, we find that a judicial system typically has three or possibly four levels of courts. This will be the hierarchy commonly applicable to criminal cases.

At the bottom level in the typical hierarchy will be the magistrate court. Judges on that level will try minor civil and criminal cases. They will also have some preliminary functions in the more serious felony cases that will eventually be tried in the general trial court. Thus a person arrested on a felony charge initially will be brought before a magistrate who will inform the arrestee of the charge against him, set bail, and screen the prosecution's case to ensure that it is sufficient to send on to the general trial court.

At the next court level is the general trial court, which will try all major civil and criminal cases. While this court is predominantly a trial court, it also serves as an appellate court for the minor cases tired in the magistrate court. Thus, if a defendant is convicted on a misdemeanor charge in a magistrate court, his natural route of appeal is to the general trial court as the next highest court. The appellate review in the general trial court will take a special form where the magistrate court is one described as a court "not of record." In most instances, however, the general trial court will review the record in the magistrate court for possible error in the same way that the appellate court at the next tier will review the trial decisions of the general trial court in major cases.

The court at the next level may be either the first of two or the only general appellate court in the judicial hierarchy. In almost half of the states and the federal system, there are two appellate tiers. The first appellate court, which would be at the third level in the hierarchy, is commonly described as the intermediate appellate court. The next level of appellate court is the appellate court of last resort; it is the highest court to which a case can ordinarily be taken. These highest appellate courts frequently are titled, "supreme courts." . . . Where a judicial system has two tiers of appellate courts, the supreme court will be at the fourth level of the hierarchy. In those states that have only one tier, there is no intermediate appellate court. The supreme court is the court at the third level of the hierarchy.

In most jurisdictions, the losing party at trial is given an absolute right to one level of appellate review, but any subsequent reviews by a higher appellate court are at the discretion of that higher court. Thus, in a system that has no intermediate appellate court, a

defendant convicted of a felony in a general trial court has an absolute right to have his conviction reviewed by the next highest court, the supreme court. In a system that has an intermediate appellate court, the felony defendant's absolute right to review extends only to that intermediate court. If that court should decide the case against him, the defendant can ask the supreme court to review his case, but it need do so only at its discretion. The application requesting such discretionary review is called a petition for certiorari. If the court decides to review the case, it issues a writ of certiorari directing that the record in the case be sent to it by the intermediate appellate court. Those supreme courts having discretionary appellate jurisdiction commonly refuse to grant most petitions for certiorari, limiting their review to the most important cases. Consequently, even where a state judicial hierarchy has four rather than three levels, most civil or criminal cases will not get beyond the third level.

Our description of the hierarchy of the courts has assumed so far that all trial courts are "courts of record," and appellate review accordingly will be on the record. There is one major exception to that assumption which we should note—the court "not of record." The division between courts of record and courts not of the record originally was drawn when many trial courts lacked the mechanical capacity to maintain a complete record of their proceedings. If a court could provide such a record, the losing party could readily gain an appellate review of the trial decision before the next highest court. If the record was not available, however, the higher court had no way of examining the proceedings below to determine if an error was committed. Without a court of record, a second look at the case could only be provided by the higher court giving the case de novo consideration (i.e., fresh consideration). This was done by conducting a new trial called a trial de novo. The trial de novo was not in fact appellate review, since it did not review the decision below, but proceeded as if the case had begun in the higher court. The trial de novo simply was a substitute for appellate review, necessitated by the absence of a record." [2]

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1. Scheb II, J.M. (2013). *Criminal Law and Procedure* (8th ed., pp. 43). Belmont, CA: Cengage. ↵
2. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 38-39). West Publishing Company. ↵

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4.5: American Trial Courts and the Principle of Orality

At trial, the state will present evidence showing facts demonstrating that the defendant committed the crime. The defendant may also present facts that show he or she did not commit the crime. The **principle of orality** requires that the **trier of fact** (generally the jury, but the judge when the defendant waives a jury trial) considers only the evidence that was developed, presented, and received into the record during the trial. As such, jurors should only make their decision based upon the testimony they heard at trial in addition to the documents and physical evidence introduced and admitted by the court. The principle of orality would be violated if, for example, during deliberations, the jury searched the Internet to find information on the defendant or witnesses. Similarly, if the police question the defendant and write a report, the jury cannot consider the contents of the report unless it has been offered in a way that complies with the rules of evidence and the court has received it during the trial. The principle of orality distinguishes the functions of a trial court, developing the evidence, and the function of the appellate courts, reviewing the record for legal error.

The principle of orality is one major difference between the **adversarial system** generally followed by the United States and the **inquisitorial system** generally followed in most other countries. Frequently in **civil law countries** (for example, most European nations), the police, prosecutors, or investigating magistrates question witnesses prior to trial and write summaries of their statements called a **dossier**. In determining guilt, the trier of fact is presented with just the summaries of the witness statements. The trial in civil law countries is less about the presentation of evidence establishing the defendant's guilt and more about the defendant's presentation of mitigation evidence which assists the court in giving an appropriate **sentence**, or sanction.

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4.6: The Appeals Process, Standard of Review, and Appellate Decisions

The Appeals Process

The government cannot appeal a jury's decision by **acquitting** the defendant, or finding the defendant not guilty. Thus, most criminal appeals involve defendants who have been found guilty at trial. The government may appeal a court's pretrial ruling in a criminal matter before the case is tried, for example a decision to suppress evidence obtained in a police search. This is called an **interlocutory appeal**. Although the defendant is permitted to appeal after entering a guilty plea, the only basis for his or her appeal is to challenge the sentence given. When the defendant appeals, he or she is now referred to as the **appellant**, and the State is the **appellee**. (Note that often the court will use the words **petitioner** and **respondent**. The petitioner is the party who lost in the last court who is petitioning the next level court for review; the respondent is the party who won in the last court). In routine appeals, the primary function of appellate courts is to review the record to discern if errors were made by the trial court before, during, or after the trial. No trial is perfect, so the goal is to ensure there was a fair, albeit imperfect, trial. Accordingly, the appellate courts review for **fundamental, prejudicial or plain error**. Appellate courts will reverse the conviction and possibly send the case back for a new trial when they find that trial errors affected the outcome of the case. A lower court's judgment will not be reversed unless the appellant can show that some prejudice resulted from the error and that the outcome of the trial or sentence would have been different if there had been no error. By reviewing for error and then writing opinions that become case law, appellate courts perform dual functions in the criminal process: error correction and lawmaking.

Appellate judges generally sit in panels of three judges. They read the **appellant's brief** (a written document filed by the appellant), the **reply brief** (a written document filed by the the appellee), and any other written work submitted by the parties or **friend of the court amicus curiae briefs.** Amicus curiae are individuals or groups who have an interest in the case or some sort of expertise but are not parties to the case. The appellate panel will generally listen to very short oral arguments, generally twenty minutes or less, by the parties' attorneys. During these oral arguments, it is common for the appellate judges to interrupt and ask the attorneys questions about their positions. The judges will then consider the briefs and arguments and the panel will then meet and deliberate and decide based on majority rule. If the appellate court finds that no error was committed at trial, it will **affirm** the decision, but if it finds there was an error that deprived the losing party of a fair trial, it may issue an **order of reversal**. When the case is reversed, in most instances, the court simply will require a new trial during which the error will not be repeated. This is called a **remand**. In some cases, however, the order of reversal might include a direction to dismiss the case completely, for example when the appellate court concludes that the defendant's behavior does not constitute a crime under the law in that state. When reading an opinion, also known as decisions, from an appellate court, you can tell the **procedural history** of a case (i.e., a roadmap of where the case has been: what happened at trial, what happened as the case was appealed up from the various appellate courts).

Standards of Review

You have just learned that one function of the appellate courts is to review the trial record and see if there is a prejudicial or fundamental error. Appellate courts do not consider each error in isolation, but instead, they look at the cumulative effect of all the errors during the whole trial. Appellate court judges must sometimes let a decision of a lower court stand, even if they personally don't agree with it. Sports enthusiasts are familiar with the use of instant/video replay, and it provides us a good analogy. Officials in football, for example, will make a call, a ruling on the field, immediately after a play is made. This decision, when challenged, will be reviewed, and the decision will be upheld unless there is "incontrovertible evidence" that the call was wrong. When dealing with appeals, how much deference to show the lower court is the essence of **the standard of review**. Sometimes the appellate courts will give great deference to the trial court's decision, and sometimes the appellate courts will give no deference to the trial court's decision. How much deference to give is based on what the trial court was deciding—was it a question of fact, a question of law, or a mixed question of law and fact.

The appellate court will allow a trial court's decision about a factual matter to stand unless the court clearly got it wrong. The appellate court reasons that the judge and jury were in the courtroom listening to and watching the demeanor of the witnesses and examining the physical evidence. They are in a much better position to determine the credibility of the evidence. Thus, the appellate court will not overturn findings of fact unless it is firmly convinced that a mistake has been made and that the trial court's decision is clearly erroneous or "arbitrary and capricious." The arbitrary and capricious standard means the trial court's decision was completely unreasonable and it had no rational connection between the facts found and the decision made. The lower courts

finding will be overturned only if it is completely implausible in light of all of the evidence. One court noted, “Where there are two permissible views of the evidence, the fact finder’s choice between them cannot be clearly erroneous.” [1]

Sometimes the law requires, or at the parties’ request, that a trial judge or jury make a special finding of fact. Findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations that are better made by the trial judge sitting in the courtroom listening to the evidence and observing the demeanor of the witnesses. It is not enough that the appellate court may have weighed the evidence and reached a different conclusion unless the decision was clearly erroneous, the appellate court will defer to the trial judge.

Trial judges often make discretionary rulings., for example, whether to allow a party’s request for a continuance or to allow a party to amend its pleadings or file documents late. In these **matters of discretion**, the appellate court will only overturn the trial judge if they find such a decision was an abuse of discretion. The lower court’s judgment will be termed an **abuse of discretion** only if the judge failed to exercise sound, reasonable, and legal decision-making skills. A trial court abuses its discretion, for example, when: it does not apply the correct law, erroneously interprets a law, rests its decision on a clearly inaccurate view of the law, rests its decision on a clearly erroneous finding of a material fact, or rules in a completely irrational manner. Abuse of discretion exists when the record contains no evidence to support the trial court’s decision.

When it comes to questions of law, the appellate courts employ a different standard of review called **de novo review.** De novo review allows the appellate court to use its own judgment about whether the trial court correctly applied the law. Appellate courts give little or no deference to the trial court’s determinations and may substitute its own judgment on questions of law. Questions of law include interpretation of statutes or contracts, the constitutionality of a statute, the interpretation of rules of criminal and civil procedure. Trial courts presume that laws are valid and do not violate the constitution, and the burden of proving otherwise falls on the defendant. Trial courts sometimes get it wrong. De novo review allows the court to use its own judgment about whether the court correctly applied the law. Appellate judges are perhaps in a better position to decide what the law is as the trial judge since they are not faced with the fast-pace of the trial and have time to research and reflect.

Sometimes the trial court must resolve a question in a case that presents both factual and legal issues. For example, if police stop and question a suspect, there are legal questions, such as whether the police had reasonable suspicion for the stop or whether the questioning constituted an “interrogation”, and factual questions, such as whether police read the suspect the required warnings. Mixed questions of law and fact are generally reviewed *de novo*. However, factual findings underlying the lower court’s ruling are reviewed for clear error. Thus, if the application of the law to the facts requires an inquiry that is “essentially factual,” review is for clear error.

In reviewing the trial court record, the appellate court may discover an error that parties failed to complain about. Generally, appellate courts will not correct errors that aren’t complained about, but this is not the case when they come upon **plain error**. Plain error exists “[w]hen a trial court makes an error that is so obvious and substantial that the appellate court should address it, even though the parties failed to object to the error at the time it was made.” [2] If the appellate court determines that the error was evident, obvious, clear and materially prejudiced a substantial right (meaning that it was likely that the mistake affected the outcome of the case below in a significant way), the court may correct the error. Usually, the court will not correct plain error unless it led to a miscarriage of justice.

The selection of the appropriate standard of review depends on the context. For example, the de novo standard applies when issues of law tend to dominate in the lower court’s decision. When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters tend to dominate or control the court’s decision. The controlling standard of review may determine the outcome of the case. Sometimes the appellate court can substitute its judgment for that of the trial court and overturn a holding it does not agree with, but other times, it must uphold the lower court’s decision even if it would have decided differently.

Appellate Decisions

In most appeals filed in the intermediate courts of appeal, the appellate panel will rule but not write a supporting document called a **written opinion** stating why it ruled as it did. Instead, the appellate panel will **affirm** the lower court’s decision **without an opinion** (colloquially referred to as an AWOP). Sometimes, however, appellate court judges will support their decisions with a written opinion stating why the panel decided as it did and its reasons for **affirming** (upholding) or **reversing** (overturning) the lower court’s decision. The position and decision by the majority of the panel (or the entire court when it is a supreme court case),

is, not surprisingly, called the **majority opinion.** Appellate court judges frequently disagree with one another, and a judge may want to issue a written opinion stating why he or she has a different opinion than the one expressed in the majority opinion. If a particular judge agrees with the result reached in the majority opinion but not the reasoning, he or she may write a separate **concurring opinion**. If a judge disagrees with the result and votes against the majority's decision, he or she will write a **dissenting opinion**. Sometimes opinions are unsigned, and these are referred to as **per curium** opinions. Finally, if not enough justices agree on the result for the same reason, a **plurality opinion** will be written. A plurality opinion controls only the case currently being decided by the court and does not establish a precedent which judges in later similar cases must follow.

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1. *United States v. Yellow Cab Co.*, 338 U.S. 338. 342 (1949). ↵
2. (http://www.law.cornell.edu/wex/plain_error.) ↵

4.6: The Appeals Process, Standard of Review, and Appellate Decisions is shared under a mixed license and was authored, remixed, and/or curated by LibreTexts.

4.7: Federal Appellate Review of State Cases

Through petitions for writ of certiorari, the U.S. Supreme Court will be in a position to review cases coming to it from the state courts. Because the review is discretionary, the Court will generally accept review only when these cases appear to involve a significant question involving the federal constitution. As a case works its way through the state appeals process, the state courts may have made rulings about both the federal constitution and its own state constitution. Depending on the case and how the state opinions were written, the U.S. Supreme Court may find it difficult to determine whether the state interpreted its own constitution, in which case the Court will not accept review, or whether it interpreted the federal constitution, in which case the Court may accept review. The U.S. Supreme Court in *Michigan v. Long*, 463 U.S. 1032, at 1040-1041 (1983), explained when the Court will "weigh in" on a state court matter. [1] It held,

"When . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

This approach obviates [*does away with*] in most instances the need to examine state law in order to decide the nature of the state court decision, and will at the same time avoid the danger of our rendering advisory opinions. It also avoids the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court. We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. 'It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action' (Citations omitted)."

1. *Michigan v. Long*, 463 U.S. 1032, at 1040-1041 (1983) ↵

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4.8: Courtroom Players- Judges and Court Staff

In their 1977 book, *Felony Justice: An organizational analysis of criminal courts*, James Eisenstein and Herbert Jacob, coined the term "courtroom workgroup." [1] They specifically referred to the cooperative working relationship between prosecutors, defense attorneys, and judges in working together (as opposed to an adversarial relationship that the public might expect) to efficiently resolve most of the cases in the criminal courts. This chapter more generally uses the term to include all the individuals working in the criminal courts—judges, attorneys, and the variety of court staff.

The **accusatory phase** (the pre-trial phase) and **adjudicatory phase** (the trial phase) of the criminal justice process include individuals who regularly work together in the trial courts. The prosecutor files the accusatory instrument called either **an information** or **an indictment**, and represents the state in plea bargaining, on pretrial motions, during the trial, and in the sentencing phase. The defense attorney represents the defendant after charges have been filed, through the pre-trial process, in a trial, and during sentencing, and maybe on the appeal as well. Judges, aided by several court personnel, conduct the pretrial, trial, and sentencing hearings. Prosecutors, defense counsel, and judges perform different roles, but all are concerned with the judicial process and the interpretation of the law. These law professionals are graduates of law schools and have passed the bar examination establishing their knowledge of the law and their ability to do legal analysis. As persons admitted by the state or federal bar associations to the practice of law, they are subject to the same legal codes of professional responsibility, disciplinary rules, and ethical rules and opinions for lawyers. Although the American criminal justice system is said to represent the adversarial model, the reality is that prosecutors, defense attorneys, judges and court staff work with cooperation and consensus rather than conflict. This is understandable when considering the common goal of efficient and expedition case processing and prescribed and agreed upon rules for achieving those goals.

Trial judges: Misperceptions and Realities

Trial court judges are responsible for presiding over pre-trial, trial and sentencing hearings, as well as probation and parole revocation hearings. They issue search and arrest warrants, set bail or authorize release, sentence offenders, engage in pre-sentence conferences with attorneys, work with court clerks, bailiffs, jail staff, etc. Trial judges have considerable, but not unlimited, discretion. In addition to the ethical and disciplinary rules governing all attorneys in the state, trial judges are subject to judicial codes of conduct. Judges are bound by the applicable rules of law when deciding cases and writing their legal opinions. Some rules governing judges are flexible guidelines while other rules are very precise requirements.

During the pretrial phase, judges make rulings on the parties' motions, such as motions to exclude certain physical or testimonial evidence, motions to compel discovery, and motions to change venue. Because most cases are resolved prior to trial through plea-bargaining, one important judicial function is taking the defendant's guilty plea.

At trial, if the defendant elects to waive a jury, there is a **bench trial,** and the judge sits as the "trier of fact." Like jurors in a jury trial, the judge has considerable discretion when deciding what facts were proven (or not) by the parties and what witnesses he or she finds credible. When the defendant elects for a jury trial, the jury decides what the facts are. In either a bench or jury trial, the trial judge rules: on the admissibility of evidence (whether a jury is entitled to hear certain testimony or look at physical evidence), whether witnesses are competent, whether privileges exist, whether witnesses qualify as experts, whether jurors will be excused from jury service, etc. At the end of the jury trial, the judge gives a set of **jury instructions** to the jurors which informs them on the law that applies to the case they are deciding.

If the defendant is convicted, then the judge will impose the sentence. Except for death penalty cases, jurors are generally not involved with sentencing the defendant. Judges have perhaps the broadest discretion in their role imposing sentences. However, with more states enacting mandatory minimums and sentence guidelines, judicial discretion has been severely curtailed.

"In the eyes of most Americans, the judge is the key player in the courtroom workgroup. The symbolism and ceremony of a criminal trial reinforce this view. The judge is seated on a raised bench, robed in black, and wields a gavel to maintain order in the courtroom. Moreover, the participants and spectators—including the defense attorney and the prosecutor—are commanded to 'all rise' when the judge enters or leaves the courtroom. It is no wonder, then that the judge is seen as the most influential person in court.

This view of the judge, though accurate to some degree, is misleading for at least two reasons. First, although the judge clearly plays an important role—in many cases, the lead role—in state and federal criminal courts, other actors play significant supporting roles. This is particularly the case in the majority of criminal cases that are settled by plea, not trial. In these cases, the key player may be the prosecutor rather than the judge. A second reason why the traditional view of the judge is misleading is that it is based on an inaccurate assessment of the role of the judge. Judging involves more than presiding at trials. In fact, most of what judges do during a typical day or week is something other than presiding at trials—reading case files, conducting hearings, accepting guilty pleas, pronouncing sentences, and managing court dockets." [2]

The role played by the judge, in other words, is both less influential and more varied than the traditional view would have people believe.

Trial Judge Selection and Qualifications

The sole qualification to be a judge in most jurisdictions is graduating from a law school and membership in the state's bar association. Although the trend is for judges to be lawyers prior, a few jurisdictions do not require justices of the peace or municipal judges to be attorneys.

States procedures in selecting judges vary tremendously. "Almost no two states are alike and many states employ different methods of selection depending on the different levels of the judiciary creating 'hybrid' systems of selection" [3]. Nevertheless, the primary differences surround whether judges are elected or appointed, or selected based on merit. There are four primary methods used to select judges in the United States: appointment, with or without confirmation by another agency; partisan political election; non-partisan election; and a combination of nomination by a commission, appointment and periodic reelection (the Missouri Plan).

There are variations within these four primary methods. As noted above, states may use different methods to select judges based on the level in the judicial hierarchy. For example, municipal judges may be appointed, while supreme court judges are elected. Each selection method has its critics and advocates, and the relative merits of each are generally judged by the selection methods ability to achieve judicial independence and accountability. Notwithstanding the critiques of each of the methods, there has been little empirical evidence that the quality of judges, in terms of competency, effectiveness, or honesty, varies depending on the methods used to select the judge. [4] [5][6]

The length of time a judge will "sit", called a **term in office** or **tenure,** varies greatly, generally from four to sixteen years. Frequently, the term for a trial judge is less than a term for an appellate judge. At the appellate level, six years is the shortest term, and many states use terms of ten years or more for their appellate judges. Only a few states have lifetime tenure for their judges.

In the federal system, the President appoints Article III judges (U.S. District Court, U.S. Circuit Court, and U.S. Supreme Court judges) with the advice and consent of the Senate. In Article III, U.S. Constitution states that federal judges are appointed to "hold their Offices during Good Behavior." On February 25, 2019, the Court in Rizo v. Yovino, ___ U.S. ___ (2019) refused to address the merits of the case (an important employment wage discrimination case) because the judge who wrote the Ninth Circuit opinion died eleven days before its release. What will likely become an oft-quoted sentiment, "Federal judges are appointed for life, not for eternity."

The district courts appoint federal magistrate judges to either four or eight-year terms. Though it would seem that politics has played an increasing role in the selection of judges in the federal system, perceptions are influenced by what we currently hear and read. The reality is that complaints of political overreaching in selecting federal judges have been with us since the federal courts were first staffed.

Link to Washington Post showing political judicial appointments since President Reagan https://www.washingtonpost.com/graphics/2018/politics/trump-federal-judges/?utm_term=.479982ef3fd6)

Link to Washington Post article showing political party breakdown in the confirmation of Justice Gorsuch in 2017 and comparing the breakdown with other current U.S. Supreme Court justices https://www.washingtonpost.com/graphics/politics/scotus-confirmation-votes/?tid=graphics-story&utm_term=.35b33aa30d39

A 1952 article shows that the role of politics in judicial selection is not only a recent concern https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1952012300

Judicial Clerk, Law Clerk, and Judicial Assistants

Generally, judges have one or two main assistants. These individuals are known as “judicial clerk”, “clerk of court”, “law clerk”, or “judicial assistant”. Of course, there may be several court clerks who interact each day with all the judges in the courthouse, but generally, judges have only one or two judicial assistants who work directly with them. The clerk of court works directly with the trial judge and is responsible for court records and paperwork both before and after the trial. Usually, each judge has his or her own clerk. The clerk prepares all case files that a judge will need for the day. During hearings and the trial, these clerks record and mark physical evidence introduced in the trial, **swear in the witnesses,** or administer the oath to the witness, take notes cataloging the recordings, etc. In some jurisdictions, the law clerks are lawyers who have just completed law school and may have already passed the bar exam. In other jurisdictions, the law clerks are not legally trained but may have specialized paralegal training or legal assistant training.

Local and State Trial Court Administrators

Local and state trial court administrators oversee the administration of the courts. These administrators’ responsibility includes: hiring and training court personnel (clerks, judicial assistants, bailiffs), ensuring that the court caseloads are efficiently processed, keeping records, sending case files to reviewing courts, ensuring that local court rules are being implemented, and working with the local and state bar associations to establish effective communications to promote the expedient resolutions of civil and criminal cases.

Indigency Verification Officers

The Indigency Verification Officer (IVO) is a court employee who investigates defendants’ financial status and determines whether they meet the criteria for court-appointed counsel. More than 75% of all individuals accused of a crime qualify as indigent. How poor a defendant must be to qualify for a court-appointed attorney varies from place to place, and each IVO uses a screening device that takes into consideration the cost of defense in the locality as well as defendant’s financial circumstances. One difficulty in qualifying for a court-appointed attorney is having equity in a home that cannot be easily sold quickly enough to provide resources for the defendant to hire an attorney. Another difficulty for indigency verification officers is getting the information needed from defendants who may be suffering from mental health issues.

Bailiffs

Bailiffs are the court staff responsible for courtroom security. Bailiffs are often local sheriff deputies or other law enforcement officers (or sometimes former officers), but they can also be civilians hired by the court. Sometimes, courts will use volunteer bailiffs. Bailiffs work under the supervision of the trial court administrator. During court proceedings, bailiffs or clerks call the session to order, announce the entry of the judge, make sure that public spectators remain orderly, keep out witnesses who might testify later (if the judge orders them excluded upon request of either party), and attend to the jurors. As courtroom security becomes a bigger concern, law enforcement officers are increasingly used as bailiffs, and they are responsible for the safety of the court personnel, spectators, witnesses, and any of the parties. In some communities, law enforcement bailiffs may transport in-custody defendants from the jail to the courthouse and back. In most jurisdictions today, bailiffs screen people for weapons and require them to silence cell phones before allowing them to enter the courtroom.

Jury Clerk

The jury clerk: sends out jury summons to potential jurors, works with jurors requests for postponements of jury service, coordinates with the scheduling clerk to make sure enough potential jurors show up at the courthouse each day there is a trial, schedules enough grand jurors to fill all the necessary grand jury panels, arranges payment to jurors for their jury service, and arranges lodging and meals for jurors in the rare event of jury sequestration.

Court Clerks and Staff

Court structure varies from the courthouse to courthouse, but frequently court staff is divided into units. For example, staff may be assigned to work in the criminal unit, the civil unit, the traffic unit, the small claims unit, the juvenile unit, the family unit,

or the probate unit. In smaller communities, there may be just a few court clerks who “do it all”. With the trend towards specialized courts (drug courts, mental health courts, domestic violence courts, and veteran courts), staff may specialize in and/or rotate in and out of the various units. Court staff are expected to have a vast knowledge of myriad local court rules and protocols, statutes, and administrative rules that govern filing processes, filing fees, filing timelines, accounting, record maintenance, as well as a knowledge of general office practices such as ordering supplies, mastering office machinery, and ensuring that safety protocol is established and followed. Recently, many courts have transitioned to electronic filing of all documents, usually managed through a centralized state court system. This transition presents challenges to court staff as they learn the new filing software, keep up with new filings, and archive the past court documents.

Release Assistance Officers

Release assistance officers (RAO) are court employees who meet with defendants at the jail to gather information to pass on to the judge who makes release decisions. Release assistance officers make their recommendations based on the defendant’s likelihood of reappearance and other considerations specified by statute or local rules. In determining whether the defendant is likely to reappear, the RAO considers: the defendant’s ties to the community, the defendant’s prior record of failures to appear, the defendant’s employment history, whether the defendant lives in the community, the nature and seriousness of the charges, and any potential threat the defendant may present to the community.

The availability of space at the jail may also play a role in whether an individual is released. Court and jail staff may need to work together to establish release protocols when space is limited. The RAO should have a significant voice in drafting those protocols. Whether the RAO recommends security (bail) or conditional release, the RAO will generally suggest to the judge the conditions that the defendant should abide by if he or she makes bail or is conditionally released. Defendants released prior to trial will sign release agreements indicating the conditions of release recommended by the RAO and imposed by the judge. RAOs may also investigate the defendant’s proposed living conditions upon release to make sure that they promote lawful activity and the ability for reappearance for all scheduled court appearances.

Scheduling Clerk

The scheduling clerk, or docketing clerk, set all hearings and trials on the court docket. The scheduling clerk notes the anticipated duration of trials (most trials are concluded within one day), speedy trial constraints, statutory and local court rules time frames, etc. The role of the scheduling clerk is extremely important, and an experienced scheduling clerk contributes to the overall efficiency of the legal process. Ineffective or inefficient scheduling causes delay, frustration, and may impede the justice process. Part of scheduling, or docketing, is keeping track of law enforcement officers’ and defense attorneys’ scheduled vacations. In addition, the scheduling clerk must be mindful of the judges’ calendars which should track scheduled vacation time and training days, and also needed desk time, the time necessary for resolving cases they have **taken under advisement.** (Note that trial judges can either decide “from the bench”, meaning they will rule immediately on the issues before them during the hearing, or after taking the case under advisement, meaning they will rule through a written decision/opinion letter after spending time researching the law, reviewing the parties written pleadings, and considering the oral arguments).

1. Eisentstein, J., & Jacob, H. (1977). Felony Justice: An organizational analysis of criminal courts. Boston, MA: Little Brown and Co. ↵
2. Spohn, C. & Hemmens, C. (2012) *Courts: A Text/Reader* (2nd ed.). Los Angeles, CA: SAGE Publications, Inc. ↵
3. Berkson, L.C. (2005). J*udicial selection in the United States: A special report.* In E.E. Slotnick (Ed.) Judicial Politics: Readings from Judicature (3d ed., pp. 50). Washington, DC: CQ Press ↵
4. Atkins B.M. & Glick, H.R. (1974). Formal judicial recruitment and state supreme court decisions. *American Politics Quarterly*, 2, 427-449 ↵
5. Dubois, P.L. (1986), Accountability, independence, and the selection of state judges: The role of popular judicial elections. *Southwestern Law Journal*, 40, 31-52 ↵
6. Nagel, S. (1975). *Improving the legal process*. Lexington, MA: Lexington Books. ↵

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4.9: Courtroom Players- Prosecutors

Prosecutors play a pivotal role in the criminal justice and work closely with: law enforcement officials, judges, defense attorneys, probation and parole officers, victims services, human services, and to a lesser extent, with jail and other corrections officers. The authority to prosecute is divided among various city, state and federal officials. City and state officials are responsible for prosecutions under local and state laws, and federal officials for prosecutions under federal law. Associate Justice Robert Jackson, while he was the U.S. Attorney General addressed the Conference of United States Attorneys (federal prosecutors) in Washington, D.C. on April 1, 1940 and stated,

"The qualities of a good prosecutor are . . . [elusive and . . . impossible to define]. …

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst. …

Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done. . . .

There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases because no prosecutor can even investigate all of the cases in which he receives complaints. If the department of justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

… A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility" [1]

State Prosecuting Attorneys

Prosecutors represent the citizens of the state, not necessarily a particular victim of a crime. States vary in how they organize the groups of attorneys hired to represent the state's interest. Ordinarily, the official with the primary responsibility for prosecuting state violations is the local prosecutor who is referred to as the "district attorney", "county attorney", or "state's attorney". Local prosecutors are usually elected from a single county or a group of counties combined into a prosecutorial district. In many states, the state attorney general's office has the authority that trumps over the local prosecutors' authority, but in practice, the state attorney general rarely intervenes in local matters. The state attorney general's office will intervene, for example, if there is a conflict of interest or when requested by the district attorney. It is not uncommon for a small local prosecutor's office faced with the prosecution of a major, complex, time-consuming trial, to request the aid of the attorney general's office. In these smaller offices, there may be insufficient resources to handle complicated prosecutions and still keep up with the day-to-day filings and cases.

The prosecuting attorney and the attorney general ordinarily are the only officials with authority to prosecute violations of state law. City attorneys may be hired to prosecute city ordinances, but these attorneys primarily specialize in civil matters. When city attorneys and prosecuting attorneys have different policies for treating minor offenses, the result may be disparate, or

different, treatment of similarly situated offenders. This raises a concern of inconsistent application of the law. Additionally, different county prosecutors may follow different policies on which matters they will charge, the use of diversion programs, the use of plea bargaining, and the use of certain trial tactics. To limit some of these differences, some states have used statewide training, and district attorneys' conferences. Still, the policies and practices are far from uniform.

Generally, assistant prosecutors, called deputy district attorneys, are hired as "at will" employees by the elected district attorney. Historically, the political party of the applicant was a key criterion, and newly elected prosecutors would make a virtual clean sweep of the office and hire outsiders from the former office. Now, most offices hire on a non-partisan, merit-oriented, basis.

Most states require that the prosecutor be a member of the state bar. Some states also require that he or she have several years in the practice of law. Deputy district attorneys, on the other hand, are frequently fresh out of law school. They may have limited knowledge of state criminal law, as law school is designed to teach lawyers to enter any new field and educate themselves.

Link to the Oregon District Attorneys Association Website https://www.oregonda.org/

Federal Prosecuting Attorneys

Prosecutors in the federal system are part of the U.S. Department of Justice and work under the Attorney General of the United States. The Attorney General does not supervise individual prosecutors and relies on the 94 United States Attorneys, one for each federal district. U.S. Attorneys are given considerable discretion, but they must operate within general guidelines prescribed by the Attorney General. The U.S. Attorneys have a cadre of Assistant U.S. Attorneys who do the day-to-day prosecution of federal crimes. For certain types of cases, approval is needed from the Attorney General or the Deputy Attorney General in charge of the Criminal Division of the Department of Justice. The Criminal Division of the Department of Justice (DOJ) operates as the arm of the Attorney General in coordinating the enforcement of federal laws by the U.S. Attorneys.

Link to cite to find the U.S. Attorney https://www.justice.gov/usao/find-your-united-states-attorney

Selection and Qualifications of Prosecutors

Most local prosecuting attorneys are elected in a partisan election in the district they serve. State attorney generals may also have significant prosecutorial authority. They are elected in forty-two states, appointed by the governor in six states, appointed by the legislature in one state, and appointed by the state supreme court in another. State attorney generals serve between two to six-year terms, which can be repeated. Federally, senators from each state recommend potential U.S. Attorney nominees who are then appointed by the President with the consent of the Senate. U.S. Attorneys tend to be of the same political party as the President and are usually replaced when a new President from another party takes office.

Prosecutor's Function

Prosecutors arguably have more discretion than any other official in the criminal justice system. They decide whether to charge an individual or not. Much has been written about the prosecutor's broad discretion and the constraints on his or her discretion. If they choose not to prosecute, this is referred to as nolle prosequi, and this decision is largely unreviewable. Spohn and Hemmens (2012, p. 123) concluded in their review of the studies on prosecutor's charging decisions that "these highly discretionary and largely invisible decisions reflect a mix of (1) legally relevant measures of case seriousness and evidence strength and (2) legally irrelevant characteristics of the victim and the suspect" [2].

Prosecutors guide the criminal investigation and work with law enforcement to procure search and arrest warrants. Following arrest, prosecutors continue to be involved with various aspects of the investigation. Roles include: meet with the arresting officers, interview witnesses, visit the crime scene, review the physical evidence, determine the offenders prior criminal history, make bail and release recommendations, appear on pretrial motions, initiate plea negotiations, initiate **diversions** (pre-trial contracts between the government and the defendant which divert cases out of the system), work with law enforcement officers from other states who seek to extradite offenders, prepare the accusation to present to grand jury, call witnesses and present a *prima facia* case (present enough evidence which, when unrebutted by the defendant, shows that the defendant committed the crime) at a preliminary

hearing, represent that state at arraignments and status conferences, conduct the trial, and, upon conviction, make sentencing recommendations while representing the state at the sentencing hearing.

In many communities, the prosecutor is the spokesperson for the criminal justice system and appears before the legislature to recommend or oppose penal reform. Prosecutors make public speeches on crime and law enforcement, take positions on requests for clemency for cases they have prosecuted, work extensively with victims' services offices, which may be an arm of the prosecutor's office. In some communities, the prosecutor is also responsible for representing the local government in civil matters and may represent the state in civil commitment proceedings and answer accident claims, contract claims, and labor relation matters for the county. However, only a few counties have prosecutors still perform this function. U.S. Attorneys still have substantial responsibilities for representation of the U.S. government in civil litigation, and there is generally a civil division, a criminal division, and an appellate division of the U.S Attorneys office.

The American Bar Association (ABA) standards indicate that "the prosecutor's [ethical] duty is to seek justice". This means that the state should not go forward with prosecution if there is insufficient evidence of the defendant's guilt or if the state has "unclean hands", for example, illegally conducted searches or seizures or illegally obtained confessions. Ethical and disciplinary rules of the state bar associations govern prosecutors who must also follow state and constitutional directives when they prosecute crimes.

Link to the ABA Standards on the Prosecution Function https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents/

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1. Associate Justice Robert Jackson while he was the U.S. Attorney General addressed the Conference of United States Attorneys (federal prosecutors) in Washington, D.C. on April 1, 1940 ↵
2. Spohn, C. & Hemmens, C. (2012) *Courts: A Text/Reader* (2nd ed.). Los Angeles, CA: SAGE Publications, Inc. ↵

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4.10: Courtroom Workgroup- Defense Attorneys

The Sixth Amendment to the U.S. Constitution provides, “The accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” Most state constitutions have similar provisions. Historically, the right to counsel meant that the defendant, if he or she could afford to hire an attorney, could have an attorney’s assistance during his or her criminal trial. This right has developed over time and now includes the right to have an attorney’s assistance at all **critical stages** in the process, or at all criminal proceedings that may substantially affect the right of the accused. Importantly, the right to assistance of a defense counsel has been held to require that the state pay the costs of the defense counsel when a person is **indigent** or has insufficient financial resources to pay.

Privately Retained Defense Attorneys

Individuals accused of any infraction or crime, no matter how minor, have the right to hire counsel and have them appear with them at trial. The attorney must be recognized as qualified to practice law within the state or jurisdiction, and generally, criminal defendants do well to hire an attorney who specializes in criminal defense work. However, because many criminal defendants don’t have enough money to hire an attorney to represent them, the court will need to appoint an attorney to represent them in criminal cases.

Appointed Counsel

Federal and state constitutions do not mention what to do when the defendant wants, but cannot afford an attorney’s representation. Initially, the Court interpreted the Sixth Amendment as permitting defendants to hire an attorney who would assist them during the trial. Later, the Court held that the Due Process Clause of the Fifth and Fourteenth Amendment includes the right to a fair trial, and a fair trial includes the right to the assistance of counsel. In *Powell v. Alabama*, 287 U.S. 45, at 58 (1932), the Court concluded that the focus on trial was too narrow. It stated, “[T]he most critical period of the proceeding[s] against the defendants might be that period from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation, and preparation are vitally important. Defendants are as much entitled to . . . [counsel’s] aid during that period as at the trial itself.” [1]

Powell also dealt with the need for states to provide representation to defendants who could not afford to hire counsel in those cases where fundamental fairness required it. In a statement that led to the dramatic extensions to the right to counsel, the Court continued,

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has a small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence.” [2]

Powell was decided in 1932, and because of television and the multitude of crime drama programs, people probably know more about the criminal justice process than ever imagined by the Powell court. Nevertheless, the Court’s admonitions still ring true. Not too many non-lawyers know how to conduct themselves at trial, challenge the state’s evidence, make evidentiary objections, or file proper pretrial motions with the rudimentary knowledge gained from watching television. One could consult with the many great Internet sources that are easily accessible, however, many individuals charged with crimes have limited education and lack the sophistication to distinguish between those sources that are applicable to their case and which are not.

Between Powell (1932) and the case of Gideon v. Wainwright, 372 U.S. 335 (1963), the Court decided when the appointment of counsel was necessary for a fair trial in state prosecutions on a case-by-case basis. In Gideon, however, the Court held that this case-by case-approach was inappropriate. It held that the state had to provide poor defendants access to counsel in every state felony prosecution. Lawyers in serious criminal cases, it said, were “necessities, not luxuries”. Since Gideon, the Court has extended the obligation to provide counsel to state misdemeanors prosecutions that result in the defendant receiving a jail

term. The Court found that the legal problems presented in a misdemeanor case often are just as complex as those in felonies. [3] *In two cases, Argersinger v. Hamlin, 407 U.S. 25 (1972) and Scott v. Illinois, 440 U.S. 367 (1979), the Court tied the right to counsel in misdemeanor cases to the defendant's actual incarceration. Because it is difficult to predict when a judge will want to incarcerate a person convicted of a misdemeanor, this approach is difficult to implement.* [4] [5] *Many states instead appoint counsel to an indigent defendant charged with a crime where a possible term of incarceration could be imposed.*

The Court left it for the lower courts to decide when a person is indigent. Lower courts have generally held that the financial resources of a family member cannot be considered. Also, courts cannot merely conclude that because a college student is capable of financing his or her education that he or she is capable of hiring an attorney. A person does not have to become destitute in order to be classified as indigent. An indigent defendant may have to pay back the court-appointed attorney's fees if they are convicted or enter a plea. In practice, most courts collect appointed attorneys' fees at a standard rate and much reduced from the actual costs of representation as part of the fines that a convicted defendant must pay. When acquitted, defendants are not required to pay the state back for the attorney fees.

Public Defenders, Assigned Attorneys, and Defense Attorney Associations

Most states now have public defenders' offices. Because public defenders and assistant public defenders handle only criminal cases, they become the specialists and have considerable expertise in representing criminal defendants. Public defender offices frequently have investigators on staff to help the attorneys represent their clients. In some states, courts appoint or assign attorneys from the private bar (not from the public defender's office) to represent indigent defendants. The mixed system uses both assigned counsel, or associations of private attorneys who contract to do indigent criminal defense, and public defenders. For example, the public defender's office may contract with the state to provide 80% of all indigent representations in a particular county. The remaining 20% of cases would be assigned to the association of individual attorneys who do criminal defense work- some retained clients, some indigent clients-or private attorneys willing to take indigent defense cases.

In practice, there is no purely public defender system because of "conflict cases." Conflicts exist when one law firm tries to represent more than one party in a case. Assume, for example, that Defendant A conspired with Defendant B to rob a bank. One law firm could not represent both Defendant A and Defendant B. Public defender offices are generally considered one law firm, so attorneys from that office could not represent both A and B, and the court will have to assign a "conflict" attorney to one of the defendants.

Controversial Issue: *Link to the 2017 report from the Oregon Public Defense Services about indigent representation in Oregon*

https://www.oregon.gov/opds/commission/reports/EDAnnualReport2017.pdf

Link to the National Legal Aid and Defenders Association

http://www.nlada.org/

Link to the Oregon Criminal Defense Lawyers Association

https://www.ocdla.org/

The Right to Counsel in Federal Trials

The Court in *Johnson v. Zerbst*, 304 U.S. 458 (1938), held that in all federal felony, trials counsel must represent a defendant unless the defendant waives that right. The Court further held that the lack of counsel is a jurisdictional error which would render, or make, the defendant's conviction void. A court that allows a defendant to be convicted without an attorney's representation has no power or authority to deprive an accused of life or liberty. [6]

Zerbst also established rules for a proper waiver of the Sixth Amendment right to counsel. The court said that it is presumed that the defendant has not waived her right to counsel. For a waiver to be constitutional, the court must find that the defendant knew he or she had a right to counsel and voluntarily gave up that right, knowing that he or she had the right to claim it. Therefore, if the defendant silently goes along with the court process without complaining about the lack of counsel, his or her silence does not amount to a waiver. The Court defined waiver as an "intelligent relinquishment or abandonment of a known right or privilege".

In 1945 Congress passed the Federal Rules of Criminal Procedure (FRCP). Rule 44 of the FRCP requires defendants to have counsel, or affirmatively waive counsel, either retained or appointed, at every stage of the proceedings from the initial appearance through appeal. This rule was difficult to implement because there was no recognized federal defense bar, or federal defense attorneys, available or willing to take on appointed cases. So, in 1964, Congress passed the Criminal Justice Act of 1964 that established a national system for providing counsel to indigent defendants in federal courts.

When Does a Defendant Have the Right to Assistance of an Attorney?

Critical Stages of the Criminal Justice Process

In *White v. Maryland*, 373 U.S 59 (1963), the Court found that defendants are entitled to the right to counsel at any critical stage of the proceeding, defined as a stage in which he or she is compelled to make a decision which may later formally be used against him or her. The Court has found the following court procedures to be critical stages:

- The initial appearance in which the defendant enters a non-binding plea–*White v. Maryland*, 373 U.S.59 (1963).
- A preliminary hearing–*Coleman v. Alabama*, 399 U.S. 1 (1970).
- A lineup that includes a previously indicted defendant–*Wade v. United States*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967).

During Other Proceedings

The Court has extended the right to counsel to psychiatric examinations, juvenile delinquency proceedings [7], civil commitments proceedings [8]and probation and parole hearings (see, below). Further, the court in *Estelle v. Smith*, 451 U.S. 454 (1981), held that a defendant charged with a capital crime and ordered by the court to be examined by a psychiatrist, to evaluate possible future dangerousness, was entitled to consult with counsel. Similarly, in *Satterwhite v. Texas*, 486 U.S. 249 (1988), the Court found prejudicial error occurs when defense counsel was not appointed to represent a defendant subjected to a psychiatric evaluation. The Court further held that counsel must be made aware of the projected psychiatric evaluation before it occurs.

During Probation and Parole Revocation Hearings

In *Mempa v. Rhay*, 389 U.S. 128 (1967), 17-year-old Mempa was placed on probation for two years after he pleads guilty to "joyriding". About four months later, the prosecutor moved to have petitioner's probation revoked alleging that Mempa had committed a burglary while on probation. Mempa, who was not represented by counsel at the probation revocation hearing. admitted being involved in the burglary. The court revoked his probation based on his admission to the burglary. The U.S. Supreme Court held that Mempa should have had counsel to assist him in his hearing.

Five years later, in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the state sought to revoke defendant's probation. Originally, Gagnon was sentenced to fifteen years of imprisonment for armed robbery, but the judge had suspended the imposition of sentence and placed him instead on seven years of probation. The Court found that the probation revocation hearing did not meet the standards of due process. Because a probation revocation involves a loss of liberty, the probationer was entitled to due process. The Court did not adopt a *per se* rule that all probationers must have the assistance of counsel in every revocation hearings, but rather stated:

"We find no justification for a new, inflexible constitutional rule with respect to the requirement of counsel. We think rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of sound discretion by the state authority charged with responsibility for administering the probation and parole system. . . . Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request based on a timely and colorable claim. . . . In passing on a request for the appointment of counsel, the responsible agency should also consider, especially in doubtful cases, whether probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal shall be stated succinctly in the record." [9]

At Some Post-Trial Proceedings

The Sixth Amendment's right to the assistance of counsel does not stop when the jury finds the defendant guilty. When an out-of-custody defendant is found guilty at the end of a trial, the judge may remand the defendant to custody- has the bailiff take

the defendant into custody and transport them to the jail- and revokes conditions of bail if there had been any. Counsel must assist the defendant through the end of the sentencing hearing, and the defendant's attorney has the legal obligation to make post-trial motions to preserve the defendant's rights.

The Court has distinguished between the defendant's right to the assistance of counsel on mandatory appeals and discretionary appeals. In *Douglas v. California*, 372 U.S. 353 (1963), the Court found that indigent counsel should be provided to individuals when an appellate court must review their appeal or **an appeal of right**. Once the first appeal has been dismissed or resolved, however, *Ross v. Moffitt*, 417 U.S. 600 (1974), holds that indigent defendants do not have a right to appointed counsel for discretionary review in either the state supreme court or with the U.S. Supreme Court. The *Ross* majority reasoned that the defendant did not need an attorney to have "meaningful access" to the higher appellate courts because all the legal issues would have already been fully briefed in the intermediate appellate court. Additionally, the Court noted that the concept of equal protection does not require absolute equality. The majority opinion states,

"We do not believe that the Due Process Clause requires North Carolina to provide the respondent with counsel on his discretionary appeal to the State Supreme Court. At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him" (Citations omitted).

By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a word to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. . . . (Citations omitted.)

The facts show that respondent … received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had "once been presented by a lawyer and passed upon by an appellate court." We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage, he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials . . . would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review" (Citations omitted).

This is not to say, of course, that a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would not prove helpful to any litigant able to employ him. An indigent defendant seeking review in the Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. But both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in Douglas. And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. (Emphasis added). The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent

defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. We think the respondent was given that opportunity under the existing North Carolina system." [10]

Similarly, prisoners have a limited right to legal assistance for the purpose of filing writs of habeas corpus. In *Bounds v. Smith*, 430 U.S. 817 (1977), the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law". Prisons can meet this obligation by training prisoners to be paralegal assistants to work under a lawyer's supervision or by using law students, paralegals, and volunteer lawyers. Again, it may seem inconsistent that the court requires more for habeas corpus relief than it does for discretionary review on appeals. The difference lies in the nature of habeas corpus as a collateral attack, or side attack, where the claim is often being advanced for the first time and therefore the need for legal assistance may be greater.

Functions of Defense Attorneys

Defense lawyers investigate the circumstances of the case, keep clients informed of any developments in the case, and take action to preserve the legal rights of the accused. Some decisions, such as which witnesses to call, when to object to evidence, and what questions to ask on cross-examination, are considered to be strategic ones and may be decided by the attorney. Other decisions must be made by the defendant, most notably, after getting advice from the attorney about the options and their likely consequences. Defendants' decisions include whether to plead guilty and forego a trial, whether to waive a jury trial, and whether to testify in their own behalf.

The ABA Standards relating to the Defense Function established basic guidelines for defense counsel in fulfilling obligations to the client. The primary duty is to zealously represent the defendant within the bounds of the law. Defense counsel is to avoid unnecessary delay, to refrain from misrepresentations of law and fact, and to avoid personal publicity connected with the case. Fees are set on the basis of the time and effort required by counsel, the responsibility assumed, the novelty and difficulty of the question involved, the gravity of the charge, and the experience, reputation, and ability of the lawyer.

ABA Standard 4- 1.2, The Function of Defense Counsel, states:

(a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

(b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

(c) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

(d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.

(e) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with the law or such standards. Defense counsel is the professional representative of the accused, not the accused's alter ego.

(f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.

(g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.

(h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in legal aid or defender program. [11]

Tricky Issues in Representation

Defendants sometimes want to have a friend or family member speak up for them, but, the Court will not permit that. The right to counsel means the right to be represented by an attorney, someone legally trained and recognized as a member of the bar association. Similarly, defendants may not necessarily get the attorney of their choice. For example, in Wheat v. United States, 486 U.S. 153 (1988), one defendant who wanted to be represented by the same attorney who was representing his accomplice/co-conspirator in a complex drug distribution conspiracy was not allowed to have that attorney. The Court disallowed his application for the appointment of counsel noting that irreconcilable and unwaivable conflicts of interest would be created since there was the likelihood that the petitioning defendant would be called to testify at a subsequent trial of his co-defendant and that his co-defendant would be testifying in petitioner's trial. On the other hand, in United States. v. Gonzalez-Lopez, 553 U.S. 285 (2008), the Court reversed the defendant's conviction because the trial court erroneously deprived the defendant of his choice of counsel. The defendant, Gonzales-Lopez, had hired counsel from a different state, and during pretrial proceedings, the judge and the counsel had some disagreements. The judge then prohibited the attorney from taking part in the defendant's trial. The Court found that a trial judge violated the defendant's Sixth Amendment rights.

Defendants cannot repeatedly "fire" their appointed counsel as a stall tactic, and, at some point, the court will not allow the defendant to substitute attorneys and will require the defendant work with whatever attorney is currently assigned. A defendant may not force an unwilling attorney to represent him or her, but a court does have the discretion to deny an attorney's motion to withdraw from representation after inquiring about counsel's reasons for wishing to withdraw. This may present an ethical dilemma for the attorney because professional rules of responsibility require that even when an attorney withdraws from a case, he or she must still maintain attorney-client confidences. If, for example, the attorney knows that the defendant insists on taking the stand and presenting perjured testimony, the attorney must withdraw. But, at the same time, the attorney cannot discuss with the court why he or she needs to withdraw. At some point in the inquiry, after the judge has asked and the attorney has talked around the subject, the judge hopefully catches on, and the judges will allow the attorney to withdraw.

Effective Assistance of Counsel

Defendant's attorneys must provide competent assistance and should not harm the defendant's case by their legal representation. According to *McMann v. Richardson*, 397 U.S. 759 (1970), the right to counsel means the right to effective assistance of counsel. The constitutional standard for evaluating effective assistance was determined in *Strickland v. Washington*, 466 U.S. 688 (1984). The *Strickland* decision looked at two aspects of the representation to determine whether counsel was ineffective. First, the defense attorney's actions were not those of a reasonably competent attorney exercising reasonable professional judgment; and second, the defense attorney's actions caused the defendant prejudice, meaning that they adversely affected the outcome of the case (i.e., they likely caused the jury to find the defendant guilty).

Courts may be more inclined to find ineffective assistance of counsel in a death penalty case than other run-of-the-mill cases. For example, the Court found the defense attorneys provided ineffective assistance in the sentencing portion of defendant's death penalty trial for the murder of a 77-year-old woman because they had failed to conduct an adequate "social history" investigation of the defendant's life and had not presented information to the jury they did have which showed that defendant had been subject to regular sexual abuse as a child. *Wiggins v. Smith*, 539 U.S. 510 (2003). The Court stated,

"In finding that Schlaich and Nethercott's investigation did not meet Strickland's performance standards, we emphasize that Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of Strickland. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that reasonable professional judgments support the limitations on investigation. . . . A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances.

Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records–evidence that would have led a reasonably competent attorney to investigate further. Counsel's pursuit of bifurcation until the eve of sentencing and their partial presentation of a

> mitigation case suggest that their incomplete investigation was the result of inattention, not reasoned strategic judgment. In deferring to defense counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland."*

Waiving Counsel

Sometimes, a defendant wishes to waive counsel and appear ***pro se,*** *or represent him or herself at trial. The Court, in Faretta v. California, 422 U.S. 806 (1975), held that the Sixth Amendment includes the defendant's right to represent himself or herself. The Faretta Court found that, where a defendant is adamantly opposed to representation, there is little value in forcing him or her to have a lawyer. The Court stressed that it was important for the trial court to make certain and establish a record that the defendant knowingly and intelligently gave up his or her rights.*

"Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish he knows what he is doing and his choice is made with eyes open." [12]

In McKaskle v. Wiggins, 465 U.S. 168, at 174 (1984), the Court held that a "defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course." The constitutional right to self-representation does not mean that the defendant is free to obstruct the trial, and a judge may terminate self-representation by a defendant who is obstructing the process. Frequently, judges will assign a ***standby counsel*** *to assist defendants. Stand-by counsel is an attorney who can be available to answer questions of a pro se defendant, and if necessary, standby counsel can step in if the defendant is engaging in misconduct.*

Conclusion

Court jurisdiction determines where a case will be filed and which courthouse has the legal authority to hear a case. Jurisdiction can be based on geography, subject matter, or seriousness of the offense. Jurisdiction is also divided between trial courts (original jurisdiction) and appellate courts (appellate jurisdiction).

More than 51 court systems operate in the United States. We have a dual court system comprised of federal trial and appellate courts and state trial and appellate courts. Federal and state courts have similar hierarchical structures with cases flowing from lower trial courts through intermediate courts of appeals and up to the supreme courts.

Defendants who wish to appeal their convictions are entitled to have their cases reviewed at least once, a mandatory appeal of right in the intermediate courts of appeal. After that, the review is discretionary and rare. Appellate courts generally affirm the decision of the trial courts, but may also reverse and remand the case back to the trial court if they determine that prejudicial error occurred. At the intermediate appellate court level, judges most frequently affirm the trial court's decision without writing an opinion, but sometimes the judges will write opinions informing the parties of their decision and the reasons for holding as they did. Judges don't always agree, and at times, judges will write dissenting opinions or concurring opinions. Appellate court opinions become precedent that must be followed in the trial courts.

Judges, prosecutors, defense attorneys work together along with court clerks, bailiffs, and other court staff to process tens of thousands of cases daily in trial courts across the nation. Judges, prosecutors, and defense attorneys play an important role in the criminal justice process. Although few cases actually go to trial, and the vast majority of criminal cases are resolved in the trial courts at the pre-trial stage, the defendants must be represented by an attorney at critical stages in the process, and at the government's expense if they cannot afford to hire an attorney, unless they have voluntarily waived the right and wish to represent themselves.

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1. *Powell v. Alabama, 287 U.S. 45, at 58 (1932)* ↵
2. *Powell v. Alabama, 287* U.S. 45, at 68-69 (1932) ↵
3. *Gideon v. Wainwright*, 372 U.S. 335 (1963) ↵
4. *Argersinger v. Hamlin*, 407 U.S. 25 (1972) ↵
5. *Scott v. Illinois*, 440 U.S. 367 (1979) ↵
6. *Johnson v. Zerbst*, 304 U.S. 458 (1938) ↵
7. *In re Gault*, 387 U.S. 1 (1967) ↵
8. Stefan, S. (1985). Right to Counsel in Civil Commitment Proceedings. *Mental & Physical Disability L. Rep.*, 9, 230. ↵
9. *Gagnon v. Scarpelli*, 411 U.S. 788, 790 (1973). ↵
10. *Ross v. Moffitt*, 417 U.S. 600, 610-611, 614, 616 (1974). ↵
11. ABA Standard 4- 1.2 The Function of Defense Counsel (2015). *Criminal Justice: Prosecution and Defense Function.* American Bar Association. ↵
12. *Faretta v. California*, 422 U.S. 806, 835 (1975). ↵

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SECTION OVERVIEW

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5.1.1.1: Introduction



Figure 5.1.1.1.1: The American and Californian Flags (public domain; via pxhere)

Learning Objectives

- To analyze the critical constitutional issues regarding federalism.
- To describe the historical development of federalism.
- To develop our own opinions regarding three case studies about federalism.
- To develop our own political philosophies about federalism.

Introduction

Federalism matters. Walk down the street and arrive at a crosswalk. The ramp at the end of the sidewalk allows a disabled person to make their way across the intersection more easily due to the 1990 Americans with Disabilities Act enforced by the federal government. Go to a bar anywhere in the United States; you better be twenty-one. Congress could not mandate a national drinking age without running afoul of states' reserved powers, but they made it a prerequisite for states to receive federal highway funds in 1984. Are you gay or lesbian and want to get married? For a time, states could decide for themselves if they wanted to have same-sex marriages or accept them from other states. Then, in 2015, the US Supreme Court (*Obergefell v. Hodges)* directed that all states license marriage as a union between two people. These examples show the impact of federal laws on the states.

Yet, there are many areas where state laws dominate. Want to smoke marijuana legally? It is legal in many states for medicinal purposes, with a smaller number allowing recreational smoking. How about firearms? Where can you walk down the street carrying a loaded handgun in a holster? Open carry is permitted in many states but not in California, except in a few rural counties that only allow it with a permit. Then, there are all the laws governing abortion. In the more liberal states, there is no required waiting period, no need for parental notification if the mother is underage, and the state government will pay for the abortion if the mother cannot afford to do so. However, go to a conservative state, especially in the South, where there are few abortion clinics, waiting periods, and counseling are required, and no state aid is available. The point is that where we live matters. Laws vary by state because states have their own political cultures and traditions. The question is, to what extent should there be uniformity across the country? How "united" should the United States be?

In short, the concept of federalism may initially seem like a dry legalistic topic. However, federalism is fascinating because it is an intrinsically political topic regarding who should rule over what aspects of our lives: the states or the federal government. Let us review the critical constitutional issues and the history of federalism. Then, three case studies will help you develop your own points of view.

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5.1.1.2: Constitutional Issues

Federal-State Relations and the US Constitution

We might expect that the Constitution would provide clear rules regarding federal-state relations. However, the Constitution is often considered an "invitation to struggle" (Corwin 201) because there is so much ambiguity about the relations among its parts. For example, Article I, Section 8 sets out the expressed powers of the U.S. Congress, but then clause 18 of this section, the Necessary and Proper Clause, allows Congress to extend its influence. Congress has the power:

> *To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Consider the expressed powers enumerated in clauses 12 and 13: Congress can create an army and a navy. If Congress can create an army and a navy, can it create an Air Force? A Space Force? With the Necessary and Proper Clause, these expansions of power are constitutional. However, at the time of the Constitution's ratification after the 1787 Philadelphia Convention, many states demanded the addition of a Bill of Rights to stop the federal government from intruding on individual rights and the traditional powers of state governments. Hence, the Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

States have reserved powers, meaning that states have jurisdiction in all areas of law unless the Constitution has expressly given control to the federal government.

However, the constitutional evolution of federal-state relations did not stop with its ratification. The federal government has gained much more power as the Supreme Court has required that states incorporate the US Bill of Rights into state law as mandated by the Fourteenth Amendment added in 1868:

> *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Table 3.2.1 summarizes the most important parts of the Constitution that establish the relationship between states and the national government.

Table **5.1.1.2.1**: Constitutional Clauses Regarding Federalism

Constitutional Clause or Amendment	Impact
Article I, Sec. 8, clauses 1-17: the Expressed Powers	Article I, concerning the organization and powers of Congress, establishes the enumerated powers of Congress.
Article I, Sec. 8, clause 18: The Necessary and Proper Clause	Congress has additional "implied" powers not necessarily specified in Article I if they are necessary and proper to exercise one of the expressed powers
Article IV: The Full and Faith Credit Clause	States shall "recognize" each other's laws and legal decisions, but Congress may regulate these relationships
Article VI: the Supremacy Clause	The Constitution is the supreme law of the land
The Ninth Amendment	While the Constitution and the Amendments set out explicit rights, other rights are "retained" by the people
The Tenth Amendment	Powers that are not given to the federal government by the Constitution are "reserved" to the states.
The Fourteenth Amendment	States cannot make laws that deprive their citizens or any persons in their jurisdiction of their rights as Americans or deny them the "equal protection of the laws."

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5.1.1.3: Debating Who Should Be in Charge- Three Types of Federalism

Conceptualizing Changes in Federal-State Relations

The Constitutional parameters that established the relations between the states and the national government and among the states gradually evolved. For analytical purposes, political scientists categorize them into three kinds of federalism. The first is dual federalism; the states and the national government have separate responsibilities based on a clearly delineated view of the federal government's expressed powers and the states' reserved powers. This type dominated from the Constitutional founding to the Great Depression of the 1930s. For example, the federal government managed interstate commerce, and states managed elementary and high school education. The second is cooperative federalism, marked by the dramatic increase in federal control over state and local affairs as our country fought the Great Depression and the Cold War and tried to achieve various national goals such as civil rights and civil liberties. An example of the daily impact of cooperative federalism is the Supplemental Nutrition Assistance Program (SNAP), which provides money for food to tens of millions of Americans.

As the federal government increased in power, conservatives became alarmed by the growth of the central government and advocated greater state power. Beginning in the late 1960s, with the election of Republican President Richard Nixon, states started to share in decision-making regarding federal programs. The result was "new federalism," the third type of federalism that blends dual and cooperative varieties. One example is welfare reform. In the 1990s, states were allowed to develop some of their own welfare programs using federal funding. Another example discussed later in this chapter is the Affordable Care Act (often informally called Obamacare), which allows states quite a bit of latitude regarding health care programs and coverage.

All three kinds of federalism are very much present today (see Table 3.3.1). States still control many policies, the federal government controls others, and then there are many areas of policy that are explicitly shared between the two levels of government.

Table **5.1.1.3.1**:Types of Federalism

Type of Federalism	Definitions	Examples	Origins
Dual	State and the federal government have distinct responsibilities with separate programs, financed independently.	Federal level: foreign policy State-level: state licensing for occupations, barbers, teachers, attorneys, etc.	1789 (implementation of the US Constitution)
Cooperative	The federal government directs policy, paying for programs for states.	Federal Level: SNAP (food assistance)	1933 (Roosevelt Administration)
New	The federal government pays for programs; states can design programs for their residents.	Welfare Reform: Temporary Assistance For Needy Families (CalWORKs in California)	1969 (Nixon Administration)

Analyzing the State of Federalism Today

Do you ever people-watch? For example, sit on a park bench and watch couples walk by, and study their body language, wondering about what each partner thinks about the other, just by their posture, smile, or perhaps a sparkle in their eyes. Transfer this same sort of curiosity to observing the relationship between the states and the national government. See how each is reacting to the other, the policy changes, the posturing, and the rhetoric. We observe many dynamics in the mid-2020s, with the advent of the second Trump Administration. Just as it is difficult to generalize about a relationship from watching only a few interactions between people in a park, conclusions that we can make about current federal-state relations will also be tentative. Many of these changes discussed below would be best described as ongoing efforts, subject to changes by the president or rejection by courts. Four strands of federalism are evident so far.

First is the Trump Administration’s skepticism about the efficacy of big government and the effort to reduce its size by trying to slim down or even eradicate whole departments and return some government responsibilities to the states. Mr. Trump invited financier and entrepreneur Elon Musk to head the effort of a newly created Department of Government Efficiency (DOGE) to cut

regulations and spending and reduce the number of federal employees. As of June 2025, according to the Bureau of Labor Statistics, 59,000 federal jobs will have been lost (Hsu). Mr. Trump issued an executive order declaring that the "Department of Education's main functions can and should be returned to the states." ("Improving Education Outcomes"). Those that could not, such as the administration of student loans, would be assumed by other departments. The President has also argued for returning disaster management and mitigation entirely to the states by abolishing the Federal Emergency Management Agency. Yet after devastating floods killed over one hundred people in central Texas in July 2025, the President changed his mind (Allison).

The second strand is the exact opposite: the Trump administration is making great efforts to centralize control of policy and remove or reduce existing state authority or responsibility. This is especially evident in policy areas that are a high priority for the Administration. For example, the Trump Administration doubts the wisdom of rapidly changing to electric vehicles and is more sympathetic to the use of traditional gasoline fuels. Hence, Trump signed a joint resolution by Congress to end California's ability under the Clean Air Act of 1970 to define its own pollution standards (Friedman). If this section of the Clean Air Act were to be revoked, California would be unable to reach its goal to end the sale of gasoline-powered cars by 2035.

A third strand continues with the effort of centralizing policy at the federal level and is distinct because of the use of the tool of conditioning grants-in-aid to state policy changes. The Trump Administration threatens to withhold grant money for health, education, welfare, transportation, and many other programs unless the state changes policies in policy areas that have been prioritized by the Trump Administration. These include banning Diversity, Equity, and Inclusion (DEI) initiatives to promote civil rights and affirmative action policies in schools, colleges, and universities, reducing civil rights for transgender individuals, and ending state and local policies that provide benefits to undocumented immigrants. For example, after the fires that destroyed two Southern California neighborhoods (Altadena and Pacific Palisades), Mr. Trump threatened to condition disaster aid on California requiring voters to show identification cards at polling places (Trump's Threats).

After a transgender athlete won medals at a California state and field championship, Trump posted on Truth Social (Echelman):

> "A Biological male competed in California Girls State Finals, WINNING BIG, despite the fact that they were warned by me not do so. As Governor Gavin Newscum fully understands, large scale fines will be imposed!!!"

The Trump Administration withheld more than five billion dollars in education grants in an effort to ensure that school districts complied with the Trump Administration's anti-DEI and anti-transgender policies. Aid was released following the filing of another lawsuit by states and pressure from Congress (Mervosh).

All of these efforts by the Trump Administration have yielded a fourth strand of federalism: a cycle of action and reaction between the federal government and the states, with federalism becoming a very active arena for policy conflict between Democrats and Republicans. As of July 2025, California, either on its own or in concert with other states, has filed thirty-six lawsuits against the Trump Administration. These lawsuits uniformly argue that the Trump Administration is threatening the reserved powers as set out by the Tenth Amendment of the US Constitution. For example, California objects to Mr. Trump tying transportation dollars to requiring state law enforcement authorities to participate in immigration raids. It also objects to the end of federal government health insurance coverage under the Affordable Care Act for gender-affirming care. (Zinshteyn).

Given our observations of federal-state dynamics, how do we generalize about the general character of contemporary federalism and its underlying causes? In some ways, there is continuity with the past. The federal government's use of its financial resources to change society is the hallmark of cooperative federalism. In the past, its purpose was for liberal causes—welfare, health care, civil rights, etc.—now federal activism is being used to promote the priorities of the Trump Administration. The Trump Administration uses all available tools—grants, mandates, preemptions, etc.—to change American society in specific ways. Political scientists are generalizing about Trump's policies as creating a new type of federalism: "transactional federalism," defined as simply using the tools of federalism to further a partisan agenda rather than adhering to general principles regarding how states should interact with the federal government (Dichio).

One might argue that politicians have always used federalism to promote their interests and that today's federalism is simply a reflection of the party polarization that is gripping our nation. Nonetheless, the fundamental principle for the creation of federalism at the 1787 Convention was to find a just balance between state and national power—for each state to have a degree of autonomy within a common American home. We can return to the metaphor of watching couples walk by at the park and wonder if they have successfully negotiated the right balance between "I" and "thou," between individual autonomy and the unity of love or marriage. In the coming years, we shall gain a better understanding of the consequences of 'transactional federalism."

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5.1.1.4: You Decide- Case Studies in Federalism

Imagine you are a policymaker deciding each of the following policy issues. A crucial question is how much freedom local and state governments should have. Think about your responsibilities based on your particular role in each of the following case studies, and then decide what you will do. Each section concludes with a discussion of what actually happened.

Case Study One: Shall all California high school students be required to take an Ethnic Studies Course?

You are the governor of California. The California legislature passed a bill mandating all high school students complete a one-semester ethnic studies course. The course emphasizes the history and culture of four groups: African Americans, Asian Americans and Pacific Islanders, Latina/o/x Americans, and Native Americans. Should you sign the bill?

Advocates for the course argue that traditional social studies do not sufficiently address multicultural history, leaving students ignorant of our state's rich heritage. They also say that ethnic studies help students have more pride in their own histories, improve general academic performance, increase intercultural understanding, and contribute to a more educated citizenry better able to understand the challenges we face as a diverse society.

Opponents of the course favor teaching multicultural history, but they are concerned that the course omits many other groups, such as Armenian and Jewish Americans. Additionally, they are worried that the curriculum may overly emphasize oppression as a theme and demand that white students confess their "privilege." They argue that existing social studies courses already use a multicultural approach. At best, the class should be an elective.

Under dual federalism, the state government establishes the public school curriculum. Your choices are to sign the bill and make ethnic studies a requirement or veto it. You will be expected to justify your actions in your signing statement or veto message. What will you do and why?

What Happened?

In 2020, Governor Newsom vetoed the ethnic studies bill ("Veto Message"). Newsom expressed support for an ethnic studies curriculum, pointing out that he had already approved a bill requiring the course for California State University students. However, he asked that the curriculum be revised so that it "achieves balance, fairness and is inclusive of all communities." For the next several months, the State Board of Education revised the curriculum and included the experiences of many more ethnic groups. In 2021, a bill reflecting these changes made its way through the California legislature, and Governor Newsom signed it into law (Fensterwald).

Case Study Two: Shall all states be required to license marriage as between two people?

You are a U.S. Supreme Court justice. You are one of nine responsible for deciding whether the laws and practices of government are constitutional. It is 2015. The case before you is regarding marriage. Shall states be able to define the nature of marriage as a union between only a man and a woman, or should the U.S. Supreme Court tell states that they must offer marriage licenses to any two people?

Traditionally, the states have defined the nature of marriage. States respect the legitimacy of the marriage contracts of other states under the Full Faith and Credit Clause of the U.S. Constitution (Article IV). There are precedents for the Supreme Court to intervene. In the nineteenth century, the Court ruled that marriage shall be monogamous in all the states (*Reynolds v. United States*, 1878), outlawing a man having multiple wives. More recently, the Court ruled that a state ban on interracial marriage was unconstitutional based on the Fourteenth Amendment's equal protection clause *(Loving v. Virginia*, 1967).

There are also precedents for the Supreme Court about gay rights. In 1986, the Court affirmed the right of a state to ban homosexual relations (*Bowers v. Hardwick*). It then reversed this decision in *Lawrence v. Texas* (2003), with the majority arguing that the right to privacy includes a right to consensual sex between two people.

State laws about marriage were rapidly changing beginning in the mid-1990s. Some states legalized same-sex marriage; others defined marriage as only between a man and a woman. A few had a middle ground of "civil union" that gives states, but not federal,

marriage rights to same-sex couples without using the word marriage. The U.S. Congress passed the Defense of Marriage Act (1996), permitting states to refuse to recognize same-sex marriages from other states.

California voters passed Proposition 22 in 2003, which defined marriage as only between a man and a woman. The California Supreme Court declared this proposition unconstitutional because it violated California equal protection laws. Then California voters passed Proposition 8 in 2008, which added an amendment to the California Constitution, again defining marriage as solely between a man and a woman. The drama continued with gay rights advocates turning to the federal courts, which ruled Proposition 8 unconstitutional. Meanwhile, similar messes were brewing in the rest of the country with a mishmash of laws and conflicting Court rulings causing legal and practical confusion.

Now, let's move forward to 2015. The Supreme Court has consolidated several cases from multiple federal appeals courts to focus on whether the states shall be required to legalize same-sex marriage. The question before us is also very much a question regarding federalism. Shall the federal government impose its will on the states regarding marriage? If so, this nation-centered approach is an example of cooperative federalism. Alternatively, the Court may defer to the states and let their legislative or judicial authorities resolve the matter, an example of dual federalism.

Advocates for requiring states to license same-sex marriages make two arguments based on the Fourteenth Amendment and prior Court cases that provide the precedents for promoting privacy and equal protection of the law. First, lesbian and gay people are entitled to equal dignity before the law. Dignity means that states respect the autonomy and privacy of two people of the same sex to marry. The due process and equal protection clauses of the Fourteenth Amendment provide this fundamental right to dignity concerning marriage. Second, particular costs burden gays and lesbians and their children if marriage is limited to heterosexual couples. Health insurance and family leave may be inaccessible. Hospital visits and next-of-kin medical decisions are off-limits. Property laws leave partners destitute in the event of the breakup of relationships. Marriage gives the children and spouses in same-sex families the same rights as those in heterosexual unions.

Opponents of same-sex marriage make two general arguments, one substantive and the other procedural. First, they argue that states have traditionally defined marriage as between a man and a woman. It is in the child's interest to receive care and financial support from both their mother and father. Hence, the institution of marriage is central for one generation to raise the next. Second, procedurally, opponents argue that the Supreme Court should not have jurisdiction over this matter. Instead, elected officials, whether at the state or the national level, are the proper authorities to address this question. The Supreme Court should avoid establishing fundamental rights not clearly enumerated in the Constitution.

You are a Supreme Court justice. Redefining marriage will force all states to change their laws to increase liberty and equality. On the other hand, retaining the absence of a federal definition of marriage respects dual federalism. It leaves the states to address the issue through the democratic process, allowing for a diversity of choices among the states. How will you rule?

What Happened?

In 2015, in *Obergefell v. Hodges*, the U.S. Supreme Court ruled 5-4 to legalize same-sex marriage. The majority decision, authored by Justice Anthony Kennedy, argued that the Fourteenth Amendment requires that same-sex marriage be protected under law to extend equal dignity, or marriage equality, to the same-sex couple:

"No union is more profound than marriage, for it embodies the highest ideal of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. They hope not to be condemned to loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."



Figure **5.1.1.4.1**: The White House, the day after the *Obergefell* decision in 2015 (public domain; A1Cafel via Wikimedia)

Chief Justice Roberts, in one of the dissenting opinions, argued that the Supreme Court was exceeding its jurisdiction with its decision, that elected officials rather than justices should decide this issue:

"If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it."

After the Supreme Court decision, a single policy for all Americans applied: states must allow same-sex couples to marry, and they will enjoy the same state and federal rights and benefits as opposite-sex couples. The marriage contract and all other marriage-related laws changed to reflect the new view about our fundamental rights as Americans.

Case Study Three: Should the Affordable Care Act be repealed?

It is 2017. You are a Republican member of the United States House of Representatives representing the 25th district of California (in 2022, this district, encompassing the Santa Clarita and Antelope valleys, was renamed the 27th district as part of the redistricting process). The 25th district is what political scientists call a swing district, meaning that the district is evenly divided between Democrats and Republican voters, with candidates winning with less than 55% of the vote. In 2016, you won reelection with 53% of the vote ("California's 25th Congressional District Election"). However, the Democratic presidential candidate, Hillary Clinton, won the district by 50.3%, suggesting that some voters engaged in split-ticket voting, voting for both Republican and Democratic candidates ("Presidential Election in California").

The President, Mr. Trump, is a Republican. One of Mr. Trump's central campaign platforms was to repeal the Affordable Care Act (the "ACA") passed under his predecessor, President Obama. You must decide whether to vote to repeal the ACA, which will improve your support among Republicans, especially the President, or reject the repeal to avoid alienating yourself from moderates and Democrats in your district.

Some background about the Affordable Care Act and the arguments by supporters and critics will help you decide this issue. The ACA is often called "Obamacare" for short because President Obama's central campaign platform in 2008 was to help Americans with health care by improving existing health insurance coverage and expanding coverage to reach uninsured people. It was quite a political battle to push it through a very polarized Congress. When it finally passed in 2010, Obamacare had become the most significant change in healthcare policy in more than a generation. It also represented a substantial shift in the relations between the federal government and states. Some aspects of the ACA expand national power, hence representing a deepening of cooperative federalism. Other parts allow states to set their own policies, representing a deepening of new federalism.

The reach of the federal government increased in many ways. Some of the most significant were: first, employers with fifty or more full-time employees were required to provide health insurance; second, individuals were mandated to buy health insurance and received subsidies from the federal government if their income was up to 400% of the poverty level, and third, insurance companies had to cover preexisting conditions and preventative care. In addition, the ACA preempted, or displaced, state health insurance regulations and hence is an example of cooperative federalism where the national government takes control over a policy area and mandates changes in state policies.

However, aspects of the ACA gave states some freedom to implement the law and are therefore consistent with new federalism. First, states were allowed to create state health insurance exchanges for their residents to buy private insurance. If they chose not to, their residents would have to buy from the federal health insurance exchange. As of 2024, twenty-two states and Washington D.C. have set up their own exchanges, including California (CoveredCalifornia.com). The state exchanges allow states to have greater autonomy. Second, the ACA expanded Medicaid, the existing public health insurance plan for low-income people established in the 1960s, to cover people who make up to 133% of the federal poverty level. However, because both the federal and state governments fund Medicaid, the U.S. Supreme Court ruled (*National Federation of Independent Business v. Sebelius*, 2012) that states were not required to expand Medicaid eligibility. Hence, eligibility and income requirements for Medicaid vary from one state to another. These variances in ACA policies and programs among the states illustrate the signature characteristic of New Federalism: giving states flexibility based on state political preferences (Health Reform).

Now, we return to your dilemma as a representative. Should you vote to abolish and replace the Affordable Care Act with the American Health Care Act? Most prominently, this 2017 bill ends the expansion of the Medicaid program and income-based subsidies, saving the federal government hundreds of billions of dollars but causing approximately fifteen million people to lose coverage.

Advocates of replacing the ACA are motivated by ideological and partisan reasons. Ideologically, conservatives are skeptical of further government involvement in the healthcare sector of the economy. Seeing health care as an optional consumer product, individual consumers, businesses, and health insurance companies should not be subject to government coercion. Historically, states have been in control of their insurance markets. The ACA undermines state autonomy. Second, for many years, the health care debate has become intensely partisan, with this issue having a prominent role in the platforms of each party. Republicans had invested much importance in defeating President Obama's program. Mr. Trump promised he would succeed in this regard when other Republicans had failed.

Supporters of the Affordable Care Act argue that millions more Americans have health insurance coverage; health insurance coverage is better, and, in the long term, these improvements will lead to a healthier population. Further, they argue that the federal government's appropriate role is to devise a program that provides affordable health care for all. It has long been noted that the U.S. spends far more per capita with far worse health outcomes than other countries and is the only high-income country without some form of universal health care ("U.S. Health Care from a Global Perspective"). The ACA is a significant step to remedy this situation.

Public opinion is split along ideological and partisan lines in your district and the country. However, given that more people in your congressional district voted for Hillary Clinton than Donald Trump, it is likely that a vote in favor of repeal will make you less popular. On the other hand, if you vote to keep the ACA, you will likely be ostracized by Republicans in Congress and publicly criticized by the President, making it harder for you to accomplish anything else. Will you vote to repeal and replace Obamacare?

What Happened?

This case study has assigned you the role of Representative Steve Knight. He was elected in 2014 to represent California's 25th district, encompassing the Antelope and Santa Clarita valleys and a portion of Simi Valley. Representative Knight chose to vote with the Republican majority. The vote was intensely partisan and highly visible. Along party lines, the bill passed the House, 217-213, but then a similar bill failed in the Senate, 49-51. Nevertheless, the Affordable Care Act survived.

As a representative, Mr. Knight found that he was in an increasingly difficult position. As a Republican in a swing district, he tried to chart a moderate course. Still, because of the increasingly polarized nature of party politics and the shift of the Republican party to the right, this was increasingly difficult. As a result, in 2018, Knight was defeated by his Democratic opponent.

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5.1.1.5: Summary- Developing Your Philosophy about Federalism

Reflecting On Your Own Viewpoints

A cynic may argue that philosophy is simply a rationalization for self-interest. The wealthy glorify conservatism and the poor favor state help. A philosophy of federalism may be similar: we may merely favor that level of government that will provide what we want. If the cynic is correct, then constructing a general philosophy of federalism is, at best, irrelevant. However, such cynicism flies in the face of the framers of the US Constitution, who set out arguments for the value of federalism based on fundamental principles. For example, if we read the *Federalist Papers*, James Madison argued that federalism discourages tyranny and supports pluralism and liberty.

Thus, let us set out a premise that philosophy matters. Let us assume that our philosophies help shape our attitudes and opinions, which in turn direct our actions. Therefore, our beliefs about federalism are worth considering. I suggest three principles that are helpful in constructing a federal philosophy (Table 3.5.1):

Table **5.1.1.5.1**:Three Guiding Principles

Principle	Consideration
Unity	Should all Americans comply with the same policies and have the same rights and responsibilities?
Diversity	To what extent should local and state differences in needs and wants cause differences in policies, rights, and responsibilities?
Democracy	What balance between state and national control allows for the best democratic deliberations, considering questions about representation, rights, and policy effectiveness?

Consider the three case studies discussed in this chapter: an ethnic studies requirement, marriage rights, and health care reform. Each outcome presents an implicit preference for a particular federal philosophy. In the first case, it is up to the state to decide on the ethnic studies curriculum, a type of dual federalism. Do you agree? Presumably, the state government is best at responding to demands for a new class. However, could we not argue that this class is needed just as much in other states and should be a national policy? On the other hand, the demographics of each state vary, so perhaps the substance of an ethnic studies curriculum would also change, and it might be best left to people within each state to deliberate among themselves about the nature of such a course.

Marriage equality falls under the category of debating about rights. Do you prefer rights to be defined at the state or national levels? Since the civil rights movements of the 1950s and 1960s, the trend has been to nationalize rights, to argue that we have rights as Americans, and hence unity is far more critical than diversity. Moreover, the trend has been for an activist Supreme Court to step in often and define these rights, although the US Congress has also provided landmark legislation. The deliberation about same-sex marriage in this country was relatively quick, lasting from the mid-1990s until the *Obergefell* decision in 2015. In that time, the scope of the decision shifted from the state to the national level. As a result, same-sex marriage became a matter of federal authority, a form of cooperative federalism. States no longer have leeway; they must follow national policy.

The third example represents the most nuanced. Unlike an issue such as marriage equality, which is mainly dichotomous (either yes or no), the extent and nature of health care policies allow for a blend of national and state laws, characteristics of new federalism. In this country, unlike left-wing democracies, we don't conceive of economic needs as rights, so if a state chooses not to provide health insurance, we don't usually argue that the state has violated the *rights* of people experiencing poverty. Perhaps, if we lean politically more toward the left in the future, there would be a greater nationalization of social policies. In the meantime, a balance of unity and diversity as principles has yielded Obamacare with policy decisions occurring at both state and national levels.

What do you believe? When do you want the national government to decide policies, when do you want the states to choose, and when do you want decision-making to be shared? Consider your opinions about the three case studies discussed in this chapter. Consider other issues. What is your federal philosophy?

For Further Inquiry

1. Throughout the pandemic, I was struck by the disparities among the states regarding the efforts to reduce the spread of the coronavirus. I visited my elderly father in Arizona; about half of the customers at the local Safeway have masks on; when I went running in Santa Clarita, many bicyclists, off essentially by themselves, were wearing masks. It's pretty apparent that politics mattered. Some states required face coverings in stores; others did not. It's also the political culture; some people perceived a mask as an unwarranted infringement on liberty, and others just saw it as one's duty during a crisis. In your opinion, was federalism a hindrance or a strength in fighting the pandemic?
2. Survey the current news using your favorite media. Select a particular policy issue that is currently being debated. Ask yourself who is debating the issue. Is the scope of the debate at the local, state, or national level or at more than one level? Do you believe the issue is best considered at the level you observe? Reflecting on your opinion regarding the particular issue, how does your consideration help you better understand your own political philosophy?

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5.3: Introduction

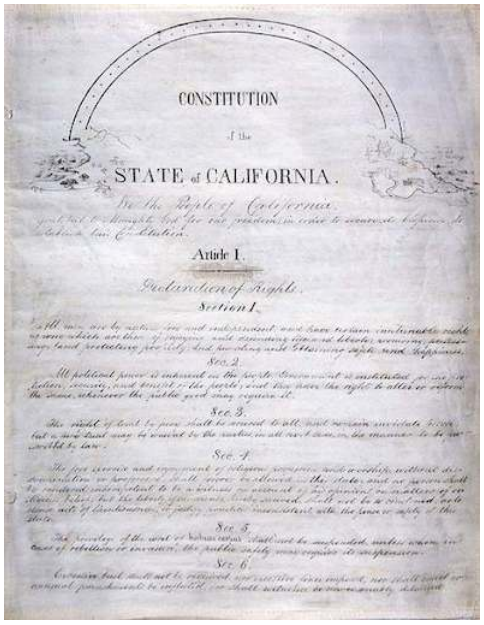

CONSTITUTION
of the
STATE of CALIFORNIA.
We the People of California
Article I.
Declaration of Rights.
Section 1.
Sec. 2.
Sec. 3.
Sec. 4.
Sec. 5.
Sec. 6.

Figure **5.3.1**: A photo of the original California Constitution from 1849 (public domain; Zscout370 via Wikimedia)

Learning Objectives

- To describe how the Constitution of 1849 established the basic framework for state government.
- To analyze the impact of the Constitution of 1849 and the political events of this era on Native Americans and African Americans.
- To examine how the events of the 1870s, in particular, increasing prejudice against Chinese Americans, led to the replacement of the Constitution of 1849 with the Constitution of 1879.
- To analyze the political reforms of the Progressive Era in California, including the fight for women's suffrage.
- To evaluate California's constitutional history with regard to the question of who rules.

Introduction

Novelist William Faulkner wrote, "The past is not dead. It's not even past." The choices that we make today are framed and constrained by the past. Just as we better understand ourselves by learning about family history, we better understand California politics by studying its history. Let us focus on California's constitutional development in this chapter.

A constitution is an act of political creation. People join together in a social contract to create a political community. A constitution establishes the organization of government, its powers, and the rights and responsibilities of the people. It provides the foundational answers to such questions as who should rule and what political values should be promoted. Using the standards for democracy asserted by Abraham Lincoln in the Gettysburg Address in 1863, do we actually have a "government of the people, by the people, and for the people?" Or do we invite some, but not all, to the political table? Our study of California constitutional development examines how the 1849 and 1879 Constitutions and the Progressive reforms following the 1910 elections shape our institutions and policies.

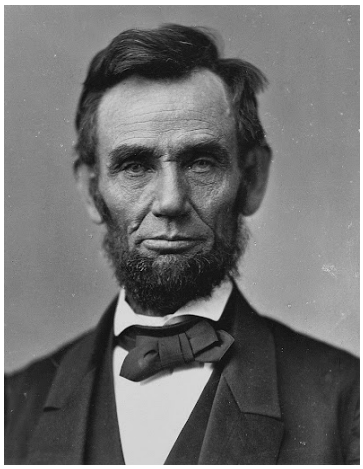


Figure 5.3.2: Abraham Lincoln (public domain; FMSky via Wikimedia)

The timeline (Figure 2.1.3) shows the critical shifts in California's constitutional development in the modern era, beginning with thousands of years of Native American history followed by the comparatively brief Spanish and Mexican periods. In 1769, the first Catholic mission in California was established in San Diego. Only two generations later, in 1821, Mexico achieved independence, but its control of California was short-lived. After the Mexican-American War, American control of California began with US occupation in 1846. The origins of today's political system started with the state of California's first Constitution, the Constitution of 1849. This Constitution created California as a distinct political community within the United States. Thirty years later, discontent with political corruption and anti-Chinese prejudice led to the Constitution of 1879, our current governing law. Then, a generation later, further dissatisfaction with corruption led to the election of Governor Hiram Johnson followed by the Progressive reforms of 1911, adding direct democracy to our representative system. These three constitutional developments shape California's government and politics. Let us examine each one.



Figure 5.3.3: Timeline of Constitutional Change (CC BY 4.0; Alexa Johnson)

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5.4: The Constitution of 1849

> *"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Article 1 of the California Constitution)*

The Origins of Our State Government

It was 1849. The Mexican War has ended, and American troops occupied California. Most people believed that the state would join the United States. The military governed California as temporary administrators using existing California laws originating from Mexico. General Bennett Riley, the military governor, called for a constitutional convention to meet in Monterey on September 1 (Saunders 450).



Figure **5.4.1**: Colton Hall, now a museum, Monterey, California (CC BY-SA 3.0; McGhiever via Wikimedia)

At Colton Hall, forty-eight delegates debated a constitution that the California people would then ratify. Most delegates arrived in California recently, and only eight were Latino. Delegates wanted to write a constitution based on American law by following the example of other U.S. states. Any vestige of Mexican law would be an exception.

They began the California Constitution with a Declaration of Rights that closely followed the U.S. Bill of Rights and the declarations of rights of other state constitutions to protect civil liberties. Slavery was not allowed. There was little conflict about this. Abolitionist sentiment in California was high, and the Convention was dominated by miners who did not want to compete with southerners bringing enslaved people to the goldfields (Broussard).

The second Article of the Constitution discussed voting rights. There was agreement that all white males, Americans, and *Californios* (Mexicans that remained in California) should have the right to vote. *Californio* delegates wanted to follow Mexican customs and allow Native Americans the right to vote. However, the majority rejected this motion, so it was referred to the future state legislature, where it failed.

The following articles established a government of three branches—legislative, executive, and judicial—emulating other state governments. As in many other states, the governor and other executive officers are elected directly by the people. Additional articles mandated the creation of local school systems, reduced California's size dramatically by fixing California's eastern border near the Sierra Nevada Mountains instead of in present-day Utah, and created local elections for tax assessors. The delegates debated and agreed to retain the Mexican civil law of allowing women to retain sole ownership of property acquired before or during the marriage.

On October 12, 1849, the delegates signed the Constitution. California voters ratified it on November 13, 1849, albeit with a low turnout, with 12,061 in favor and 811 opposed (Saunders). The U.S. Congress accepted California into the union on September 9, 1850. The Declaration of Rights and the organization of the government into three branches remain the foundation for California government today.

Let us go beyond the organization of government established by the Constitution of 1849 and examine how the Constitution impacted Californians. Many prospered, but by the 1870s, economic turmoil led to calls for a new Constitution. Moreover, this era was marked by racial prejudices against Native Americans, African Americans, and Chinese Americans.

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5.4.1: The Impact of the Constitution of 1849 on Native Americans

The Collapse of the Native American Population in California

The population of California dramatically increased after 1849. At the end of the Mexican War, there were about 150,000 Native Americans and 12,000 non-Native Americans, with a majority of the latter, *Californios*, ranching and farming what was once considered a distant and quiet province of Mexico. After admittance to the US, the US census records the following (See Table 2.2.1.1):

Table **5.4.1.1**: Population Growth in California

Census Year	Population of California
1850	92,597
1860	379,994
1870	560,247
1880	864,694

Source: US Census

During this time, Native American tribes suffered steep declines in populations through murder, starvation, disease, and displacement. By 1870, only about 30,000 survived (Madley 659). Essentially, as the non-Native population increased by 600%, the Native American population decreased by 80%. Coercive labor practices often exploited California Indians.

We are accustomed to thinking in terms of freedom and slavery, free states and slave states. California is a free state, according to the Compromise of 1850. The reality of labor relations is historically quite a bit more nuanced. The variety of legal and informal ways that California coerced Native Americans shows that forms of forced labor and indentured servitude that resemble formal slavery were still very much present during this period.

Historically, the Spanish and then Mexican law forced many Native Americans to work as agricultural labor, often using a “debt peonage” system; they had no choice but to work to pay what they owed to the *rancheros* (Madley). The US military governors continued Mexican practices while awaiting constitutional change. *Rancheros* could hold Native Americans as labor unless they chose to release them to another employer: “All Indians must be required to obtain employment and not permitted to wander about an idle and dissolute manner, if found so doing, they will be liable to arrest and punishment, by labor on the Public Works, at the discretion of the Magistrate” (Madley 633).

White militias supplied more agricultural labor by attacking Native American villages and pressing prisoners into servitude. Authorities usually paid no heed to the atrocities of kidnappers and killers. The murder of parents to sell their children into slavery was commonly reported in the early 1860s.

In 1847, California instituted a statewide pass system for employed Native Americans. Those who objected, such as the United States Indian Affairs Commissioner Edward Beale, could do little without support from local authorities. Every Native American had to show a certificate regarding who was employing him, and an unemployed Native American needed to acquire a passport. The *New York Herald* recounted a correspondent sent to report on the gold rush in 1848 describing an Ohlone Indian “...kept in a kind of slavery and bondage by the rancheros, and often flogged and punished. Their {sic} performing all the drudgery and heavy labor, leaves but little demand for laborers of white complexion” (Madley 638).

Upon statehood, the California legislature denied Native Americans the right to vote and legalized Native American convict labor. When convicted of minor crimes such as vagrancy, Native Americans would be forced into the service of a white employer. Impressment was usually around harvest time. “Los Angeles had its slave mart,” attorney Horace Bell wrote. A Native American could not testify against a white man if he questioned his servitude.

In 1865, the Thirteenth Amendment to the US Constitution banned slavery and indentured servitude. When Governor Henry Haight persuaded the legislator in 1867 to allow Native Americans to testify in court, they could now testify against kidnappers, giving them more protection from forced servitude. California did not formally abolish convict leasing until 1937 (Madley 661).

In 1850, the US government negotiated eighteen treaties in which Native Americans relinquished claims to land in exchange for 8.5 million acres of reservation land. The California legislature attacked the treaties as taking good land from whites, and they were defeated in the US Senate in 1852. Although much smaller reservations were set aside by the federal government over the next several decades, they were far too small to sustain large numbers of people. In summary, one of the foundational acts of this state was Native American genocide (McWilliams 53).

For Your Consideration

History is both a record of what happened in the past and a subjective understanding of our heritage, a story we tell ourselves about who we are and how we came to arrive at the present. Much of history-telling is explicitly told to students from a young age. History is also taught to the public in the form of government memorialization. We explicitly or implicitly ennoble, ignore, or villainize historical figures with the names of our streets, schools, and public buildings, the monuments we commission, with state and local holidays, and with parades, festivities, and commemorations.

Since the beginning of the modern-day civil rights movements of the 1960s, there has been a more significant effort to teach honest history. Our textbooks are much more inclusive than they were in earlier periods. However, public history has often lagged behind these efforts. In the last few years, monuments to historical figures that elicited widespread admiration, such as to Father Junipero Serra, are now more controversial as the actions of the people that they memorialize are being questioned for their ethics (See, for example, this analysis of Father Serra.)

With regard to Father Serra, he is, on the one hand, a Catholic saint; on the other hand, as the one who is most often credited with spreading Catholicism in eighteenth-century Spanish California with the mission system, he is criticized for helping to conquer, enslave, and decimate Native American tribes up and down the coast of California. There are monuments to Father Serra in many places in California. What would you do if you were on a city council and residents came to you asking for his monument to be removed? How would you decide?

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5.4.2: The Impact of the Constitution of 1849 on African Americans

Racism in post-1849 California

How were African Americans treated during this time? One might think that California would not have the racism of other states. After all, the first Spaniards to settle in Los Angeles in 1769 had mixed Native American and Spanish heritage (Moss 222). The 1849 Convention banned slavery (Grodin et al. 12). Moreover, as part of the Compromise of 1850, California entered the Union as a free state. It might follow that African Americans would enjoy economic opportunities and liberties promised "to all men" by the Declaration of Rights in the 1849 California Constitution. Sadly, this was not the case.

First, the Convention of 1849 is better characterized as anti-slavery *and* anti-African American. Miners were worried that African Americans brought here by their owners either as enslaved people or as contract labor would be used to work gold claims and thereby push out white miners. Thus, the Convention debated a motion to ban all African American immigration but thought better of it because this might impede joining the Union (Grodin et al.12).

Second, part of the Compromise of 1850 that brought California into the Union included the Fugitive Slave Act. States were obligated to find and enslave African Americans who escaped from southern states. The California government even passed its own Fugitive Slave Act in 1852. The first governor, Peter Burnett, preferred that all Black people be removed from California (Wee). Nevertheless, enslaved people sued for their freedom in California courts. One of the most famous cases was that of Biddy Mason, brought to California by Mormon settlers. When they wanted to return to Texas, Mason fled and then persuaded a state court to free her in 1856. She went on to work as a midwife in Los Angeles, and as she invested in real estate, she became quite wealthy. Mason helped establish the First African Methodist Episcopal Church of Los Angeles in 1872 ("Bridget 'Biddy' Mason").

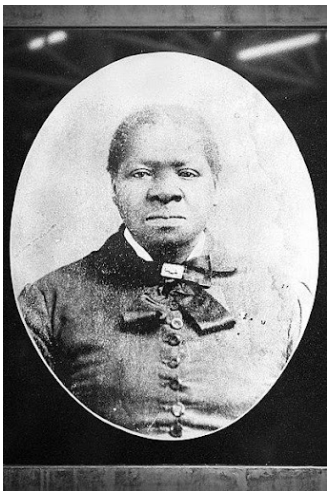


Figure 5.4.2.1: Portrait of Biddy Mason (CC BY-SA 4.0; Levy Clancy via Wikimedia)

Third, African Americans did not have the same rights as whites. Suffrage was reserved for white men. Like Native Americans and Chinese Americans, they could not testify in court if the case involved white defendants or plaintiffs. Four "Conventions of Colored Citizens" (1855, 1856, 1857, and 1865) met to consider African American rights and petitioned the state government to overturn discriminatory laws. In 1863, with Republicans controlling the state government, African Americans won the right to testify.

However, when Democrats were in control of the statehouse and the Courts, African American rights languished. The Sacramento legislature rejected the Fourteenth Amendment (ratified in 1868 nationally) and the Fifteenth Amendment (1870). State courts ruled that school segregation was constitutional (*Ward v. Flood*, 1874), as well as segregated public accommodations such as streetcars. No laws protected African Americans from employment and housing discrimination. In short, for the relatively small population of African Americans in California (4,000 in 1860), the Constitution of 1849 was a set of rights for white men, with only some piecemeal civil rights improvements during this period. Jim Crow was alive and well in California (Hudson 2020, chap. 1).

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5.4.3: The Impact of the Constitution of 1849 on Chinese Americans

Prejudice against Asians

How shall the immigrant be treated? More specifically, how should the non-citizen be treated under the law? Suppose a nation professes to establish that people possess natural rights. Are these rights extended to the immigrants it invites to labor in its fields, dig in its mines, and lay track across the mountains for the transcontinental railroad? The delegates at the 1849 Convention pondered this question when confronted with whether to adopt the following amendment:

> "No **member** of this State shall be disenfranchised, or deprived of any of the rights or
>
> privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.
>
> Mr. Botts moved to strike out the word "member" and insert "citizen...
>
> ...Mr. Norton suggested the word "inhabitant….
>
> Mr. Hastings: ...Whether it is designed or not, the adoption of this section of the bill of rights would secure to certain classes, Indians and Africans (if Africans are ever introduced here,) precisely the same rights that we ourselves enjoy…The word "inhabitant" would not be proper. Indians are inhabitants but do not enjoy those privileges in any portion of the United States; they are disenfranchised.
>
> …Mr. Botts withdrew his amendment" (Report of the Debates of the Convention of California 35-36)

This exchange shows the intent of the majority of the delegates. The Convention defined the scope of equality, democratic participation, and natural rights as only applying to those groups in California considered citizens, leaving the Native American, Black, and Chinese residents with few legal protections.

As Chinese immigrants arrived in California in the late 1840s, they found that the new Constitution gave them few rights. Fleeing the war and disruption of the Taiping Rebellion and hearing of the "Gold Mountain" in California, Chinese immigrants arrived in California to find their fortune. Many were able to make their way across the Pacific by promising to work for mining companies in exchange for the cost of their passage. By 1852, about ten percent of the non-Native population in California were Chinese. Angry with the competition from these Chinese miners working to pay off their tickets, non-Chinese miners lobbied the California legislature in 1852 to pass a foreign miners' license tax of $3 a month, about 50% of what a miner earned a month. This tax was only levied on Chinese and Latin American miners.

Over time, Chinese immigrants settled in California cities and towns. Because only white people could become naturalized according to the Naturalization Act of 1790, the Chinese could not protect themselves through the vote. In 1854, in *People v. Hall*, the California State Supreme Court ruled that Chinese people could not testify in court "either in favor of, or against a white man." In 1863, Chinese children were excluded from public schools ("California Anti-Chinese Legislation, 1852-1878").

The railroad kings (Collis P. Huntington, Leland Stanford, Charles Crocker, and Mark Hopkins) organized the Central Pacific Railroad to build the western half of the transcontinental railroad in the 1860s. They recruited 30,000 Chinese laborers from California and China to clear the rock, build the trestles, and lay the track across the Sierra Nevada and through the desert until the line joined the Union Pacific track at Promontory, Utah, in 1869.

As the 1870s began, Chinese Americans benefited from the Reconstruction-era federal laws. Federal courts ruled that the Fourteenth Amendment applied to non-citizens: San Francisco could not cut off male inmates' queues (waist-length hair braid). Discriminatory taxes, such as the miners' tax, were abolished because they violated the Civil Rights Acts of 1870, which allowed the federal government to enforce the Fourteenth Amendment.

However, anti-Chinese attitudes remained severe in California, fueled by prejudice, as more Chinese immigrants came to the state. The worst manifestation of this prejudice occurred on October 24, 1871, when a mob of five hundred murdered nineteen residents of Los Angeles's Chinatown in reaction to the injury of a police officer and the death of a white man who had come to his aid ("Forgotten Los Angeles History"). When California plunged into a recession after the Panic of 1873, many California whites blamed rising unemployment, low wages, and generally poor business conditions on the Chinese Americans' willingness to accept low wages either individually or as part of China's immigrant labor contract systems. Anti-Chinese public demonstrations in California and harassment and intimidation of Chinese Americans became very common.

Many Californians believed that wealthy interests used Chinese immigrants to keep laborers poor. Led by Dennis Kearney, the Workingmen's Association of California was formed in the summer of 1877. It aimed its wrath at two foes: the monopolies and the Chinese. The party's slogan was "The Chinese must Go!" This rallying cry led to various discriminatory measures at the Constitutional Convention of 1878-1879. Without the vote, Chinese Californians did not have the political power to help protect themselves from discrimination (Rawls and Bean, pp.191-97).

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5.5: The Constitution of 1879

A New Constitution

Recall the central principles of American constitutional thought: the Lockean social contract based on natural rights and the Madisonian notion of countervailing political power by separating powers and checks and balances among government branches. These fundamental concepts, narrowly defined to fully apply only to white men, motivated California's constitutional reform in the 1870s. The logic was straightforward: just as one branch of government can check another, the government should grow in power to check corporations, especially the railroads.

Nationally, it was a time of ferment and activism. As the country was modernizing, farmers found themselves at the mercy of predatory railroad companies who exercised monopoly power over fares for freight costs. The National Grange of the Order of Patrons of Husbandry (the Grangers) helped pass laws in several states to regulate railroad rates and establish railroad commissions. California small farmers wanted to do the same to limit the power of the Central Pacific (which controlled some 85 percent of railroad tracks) to set freight prices. Moreover, farmers bore a disproportionate share of the tax burden because much of the land held by railroads and banks was exempt from taxation (Lustig 50).

The United States tumbled into a recession after the Panic of 1873, a banking crisis that led to the nationwide collapse of many banks and thousands of businesses, with the consequence that unemployment dramatically rose. In the largest city in California, San Francisco, Kearney's Workingmen's Association grew rapidly, blaming the Chinese for the sudden high unemployment of their heavily Irish immigrant members. At every meeting, they shouted: "The Chinese must go!" The party quickly spread across the state, putting political pressure on Sacramento to call for a constitutional convention to address the perceived problems of monopoly, unfair taxes, and Chinese immigration.

One hundred fifty-two delegates met in Sacramento in the fall of 1878. One hundred twenty were elected, three per senatorial district, and the remaining thirty-two were at-large delegates. Fifty-one were from the Workingmen's Party, with the remaining majority being Democrats and Republicans. Their intent was straightforward: they believed that the legislature created by the 1849 Constitution failed to safeguard the rights of California workers and small farmers. Therefore, the Convention must step in and directly add laws to the Constitution to address needed policy reforms.

The Convention successfully passed several reforms, creating a Board of Equalization to equalize tax rates across the state and a railroad commission to check the monopoly power of the Central Pacific to set rates. Workers' rights included an eight-hour day for public employees, limits on convict labor, and the abolition of debtor's prison. Then the delegates turned on the Chinese, writing an entire article of the Constitution (Article XIX) to persecute one group:

> *"No corporation now existing or hereafter formed under the laws of this State, shall, after the adoption of this Constitution, employ directly or indirectly, in any capacity, any Chinese or Mongolian...No Chinese shall be employed on any State, county, municipal, or other public work."*

The Convention delegates knew that the anti-Chinese language in the new Constitution violated federal law, especially the Fourteenth Amendment. They argued at the Convention that the federal government should not have jurisdiction over this issue because the "reserved powers" set forth by the Tenth Amendment allow California to discriminate (Willis 635). It is unsurprising, however, that federal courts quickly overturned the enforcement of Article XIX (Scheiber). Then, as the Jim Crow years began nationally, opponents of Chinese immigration successfully pressured the US Congress to ban almost all Chinese immigration with the Chinese Exclusion Act of 1882.

The Convention ended on March 3, 1879. Railroads, mining interests, and water and gas companies spent three million dollars trying to defeat the Constitution's ratification at the polls. However, on May 7, the voters ratified the new Constitution, 77,959 to 67,134 (Lustig 61).

If the purpose of the new Constitution was to control private power, it was clear that its policy reforms were failures. A state constitution does not operate within a vacuum; it is a creature of national political and legal forces. The Central Pacific Railroad (merged with the Southern Pacific in 1885) gained political control over the railroad commission. The US Supreme Court declared

that corporations were legally to be considered “people” and, therefore, possessed property rights that limited government regulations over them. The desired reforms of the 1870s would not be accomplished until the Progressive era, a generation later (Rawls and Bean 198-200).

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5.6: The Progressive Reforms

Direct Democracy Reforms the 1879 Constitution

After the Constitution of 1879, several trends propelled California toward adopting many of the nationwide reform efforts that historians collectively characterize as Progressivism or the Progressive era. First, California's rapid population growth, economic development, and incorporation into the national economy established the preconditions whereby progressive ideas gained a following in California. Second, just as California's politics reflected national trends, the gender politics within the state also reflected the more prominent national struggles regarding this issue. Third, the Constitution of 1879 provided a historical precedent for progressives' open-ended reforms of California politics. When social and economic forces in opposition to the railroad grew in strength, the Progressives succeeded. Let's examine each of these trends.

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5.6.1: The Impact of Economic Growth on California Politics

Prosperity and Reform

Between 1880 and 1810, California's population nearly tripled.

Table 5.6.1.1:Population Growth

Year	CA Population
1880	864,694
1890	1,213,398
1900	1,485,053
1910	2,377,549

Source: U.S. Census

Until the early 1900s, the California economy primarily focused on agriculture and mining. With the transcontinental railroads inexpensively connecting California to national markets, California became much more integrated into the national economy. Agricultural production began with wheat and livestock and, increasingly, by the late 1880s, many kinds of fruits and vegetables. Farms were large "factories in the field," employing thousands of laborers who migrated from farm to farm up and down the state. Manufacturing in California lagged behind the rest of the country until World War I (Rhode 11).

Nationally, the late nineteenth century became known as "The Gilded Age," when bankers and industrialists dominated politics by controlling Congress with bribery and political favors. The federal government helped exacerbate this oligarchic system by giving vast amounts of land to the railroads to develop transcontinental and intrastate lines. These bequests included prime farmland along each line, making the railways the largest private landowner in California. The "Octopus," as the Southern Pacific was called by its critics, controlled the state legislature through bribery and favors (Rawls and Bean 232). Although it mostly ensnared the Republican establishment (dominant nationally), party affiliation did not matter so much as simple loyalty or patronage to the railroad.

Just as the federal planning and funding of the railroad created the "Octopus," national trends were its undoing. The Progressive movement in the early 1900s had many incarnations; one manifestation was the presidency of Theodore Roosevelt, who ran his campaigns and his presidency (1901-1909) on a progressive Republican platform to oppose the power of monopolies and political machines. In California, Progressives were intent on promoting more popular control of government using mechanisms of direct democracy and the regulation of monopolies by government bureaucracies. Progressive demands were similar to those voiced by populists in the 1870s; the difference was that twenty years of California growth had created a much larger middle and working class with much more electoral clout.

The three elements of direct democracy, the initiative, the referendum, and recall, were first added to the charter of Los Angeles in 1903. Then Lincoln-Roosevelt Republican leagues sprang up statewide to oppose the old Republican machine. By the end of the decade, Hiram Johnson was touring the state as the progressive Republican gubernatorial candidate touting reform, namely to "kick the Southern Pacific Railroad out of politics" (Rawls and Bean 261). Governor Johnson would introduce significant reforms to the California government after his election in 1910.

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5.6.2: Impact of Constitutional Developments on Women

The Slow Growth of Women's Rights

The thread of women's rights history in nineteenth and early twentieth-century California began at the Convention of 1849 when there was a short debate among delegates regarding whether inheritance laws should follow Mexican precedent or shift to American practices. Under Mexican law, a woman retained ownership of property acquired before marriage and gained community property acquired during the marriage. In contrast, American law at the time made men the sole owner of women's property acquired before marriage. The lack of community property statutes also meant that a woman had to assert claims to property in probate court if she were widowed and there was no will. The Convention of 1849 opted to retain the Mexican system, perhaps out of deference to existing practices and to attract women to emigrate to California (Schuele 170). However, over the next several decades, subsequent laws and court cases undermined this constitutional provision. They brought California inheritance laws in line with standard practices in the rest of the US. Efforts to improve women's property rights were already underway nationally, and in 1872, a new civil code in California allowed women to have control of property acquired before marriage.

The national struggle for women's suffrage began with the Seneca Falls Convention in 1848 and did not succeed nationally until the Nineteenth Amendment to the US Constitution was ratified in 1920. The struggle for suffrage also occurred within each state. The territory of Wisconsin was the first to give women the right to vote in 1869. The California Woman Suffrage Society was founded a year later. Petitions by suffragists to Sacramento legislators received press attention. Laura de Force Gordon's testimony in 1870 before a senate committee was reported favorably with the words, "None could deny the eloquence of this lady…" (Shuele 179). However, proposals for suffrage were defeated. One small success occurred in 1874, with women gaining the right to be elected to school boards and to become superintendents. By the late 1870s, women's rights groups were not as well-organized, and as a consequence, there was no strong effort to lobby for suffrage at the Convention of 1878. The issue was briefly debated and rejected.



Figure **5.6.2.1**: Clara Shortridge Foltz. (public domain; Scewing via Wikimedia)

The Convention of 1879 improved the status of professional women. Supported by the California Bar Association, women's rights advocates Laura de Force Gordon and Clara Shortridge Foltz persuaded the legislature in 1878 to allow them to join the Bar. Then, at the Convention, they successfully secured and broadened this change to include a provision stating that no person is disqualified from "any lawful business, vocation, or profession on account of sex" (Schuele 192).

As California grew in population and developed economically and socially, women's clubs formed in many parts of the state. Many of these clubs went beyond social roles to support civic and political reforms, including helping to alleviate poverty, prohibit alcohol, and promote women's suffrage. Women's clubs successfully pressured the Republican Party to support suffrage in 1894. During a time of intense party competition, Republicans viewed suffrage as a way to attract more support. In 1896, the majority Republican legislature placed a referendum on the ballot for the enfranchisement of women. Suffrage groups campaigned hard

throughout California for its passage, but the measure failed. Voters, especially in San Francisco, were afraid that the enfranchisement of women would mean greater success by the temperance movement to limit or ban liquor.

Disappointed and demoralized, the women's clubs retreated from the suffrage fight for several years. However, California was rapidly changing, and by 1905, the conjunction of a rejuvenated suffrage movement with the rapid growth of the Progressive wing of the Republican party led to success. Suffragists, such as Lillian Harris Coffin of the California Club, adopted an explicitly party-oriented strategy of working to secure the endorsement of suffrage by all political parties, which, with the exception of the Republican Party, they were able to achieve in 1906.

In 1908, delegates to the Republican Party state convention again rejected women's suffrage and did not adopt the Lincoln-Roosevelt League progressive reforms. The suffrage and progressive movements now had a common cause to work together; both advocated for "good government" and new policies to address the ills of modern-day society, and both opposed the machine politics that foiled reform efforts and disenfranchised women. When progressive Republican Hiram Johnson won the Republican nomination for governor, he promised that suffrage would be one of the reforms brought before the California people by referendum.

Suffragists did not limit the campaign for suffrage to their middle-class supporters. They contacted unions, such as the Woman's International Union Label League, and worked hard for labor issues, especially the eight-hour day. In return, labor unions lobbied the state legislature in 1911 to support the suffrage referendum and mobilized the male working class.

On October 10, 1911, the progressives led by now Governor Johnson placed twenty-three proposed amendments before California voters to break the corruption of machine politics. Among them was Proposition 4, women's suffrage. It passed by a margin of two percent; its victory narrowly won with more working-class support than in 1896 (Gullet chap. 4).

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5.6.3: Reform under the Progressives

Governor Johnson's Agenda

On January 3, 1911, Governor Johnson set out his reform agenda in his inaugural address. He argued that the purpose of government is to achieve the good of the people as directed by the people. Too often, since the Constitution of 1879, private interests have defined the public policy interests of the California government. For the government to live up to the ideals of American democracy, the Governor and his progressive coalition sought changes in three areas: first, in the electoral arena, the people should have more of a role in selecting candidates through primaries. Second, the role of the people to directly propose and make laws should be expanded through the addition of three mechanisms of direct democracy: the initiative, the referendum, and the recall. Third, the government should actively regulate private interests, especially those with monopoly power.



Figure **5.6.3.1**: Governor Hiram Johnson (public domain; Flamehorn via Wikimedia)

Under the Constitution of 1879, the legislature had the power to submit changes to the California Constitution through the referendum process. On October 10, 1911, the Progressives submitted twenty-three amendments for the approval of Californians in the special election. Of note are the following (Statement of the Vote of California, 1911):

1. Direct Primaries: Selection of party nominees for general elections by voters themselves
2. Women's Suffrage
3. Voters can directly place initiatives and referenda on the ballot
4. Voters can recall public officials
5. The legislature can create a system of workers' compensation insurance
6. The state railroad commission can regulate companies as public utilities

In his inaugural address, Governor Johnson stated:

> *"I do not by any means believe the initiative, the referendum, and the recall are the panacea for all our political ills, yet they do give to the electorate the power of action when desired, and they do place in the hands of the people the means by which they may protect themselves."*

The Progressive Reforms of 1911 ended the power of the Southern Pacific Railroad to control California politics. Advocates of direct democracy argued that the legislature itself needed to be checked and regulated by the people through the initiative, the referendum, and the recall. Each device has specific procedures:

Table **5.6.3.1**: Progressive Reforms of 1911 (Rules regarding the Initiative, Referendum, and Recall, Source: Secretary of State of California "Ballot Measures")

Mechanism of Direct Democracy for Statewide Elections	Procedure
The Initiative	*Initiative Statute*: Placed on the ballot by a petition signed by 5% of the voters in the last gubernatorial election. The initiative passes by a simple majority of voters. *Initiative Constitutional Amendment*: Placed on the ballot by a petition signed by 8% of the voters in the last gubernatorial election. Passes by a simple majority of the voters
The referendum	*Popular referendum*: voters repeal an existing law, same procedure as an initiative *Legislative referendum*: measure approved by ⅔ of the legislature and then by a simple majority of the voters (already present in the Constitution of 1879)
The recall	12% of the number of voters in the last gubernatorial election must sign the petition, a simple majority of voters to recall

The Progressive reforms of 1911 added direct democracy to the Constitution of 1879. It allows the people to make policy directly to circumvent the state legislature and Governor. In the 1912 to January 31, 2024 period, 2,147 initiatives were circulated. Of the 396 that qualified for the ballot, 137 were approved, 54 of which were constitutional amendments (“Secretary of State of California Ballot Measures Summary Data”).

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5.7: For Your Consideration- What is Your Constitutional Philosophy?

Introduction

Imagine that you learn that when you wake up tomorrow morning, you will have no memory of who you are. Perhaps your doctor tells you news of some obscure neurological problem, or maybe you fear some ancient curse will befall you. You want to leave a note to yourself to quickly erase this amnesia so you can continue with your life. What would you say to your future self? What would be important? Who do you love? What are your values? What matters? Where is the kitchen?

Now, imagine that instead of a single person, we wish to continue the identity of a group of people over many generations. Babies are born, young people grow up, age, and die, but the group remains the same. How could this feat be accomplished? Would there be some master book that everyone memorizes, a set of cultural practices taught to the next generation, or a set of rules that are enforced? And if one generation changes the rules, rewrites the book, or alters the rituals, will the group still have the same identity? How much change is allowed before we can say that we are no longer the same as the previous generation?

This is the dilemma of any group, whether that of a culture, a nation, or a state, such as California. How much change is appropriate? How does a state pass its ways on to the next generation? Drawing on the earlier sections of this chapter, I would like you to develop your own philosophy of constitutional change. How much change is acceptable and what kinds of change do you prefer? Let's review the formal and informal processes of state constitutional change to help you develop your opinion.

There are different opinions regarding the acceptability of political change. The conservative approach is to be foundationalist—to conceive of a set of fundamental principles that are enshrined in a constitution and establish the structure and process of government, civil liberties, and civil rights. These foundations should define our lives. All laws, government practices, and rights must conform to these foundations; and only in rare circumstances, requiring near unanimity, should there be any change. Policy changes should not be present in a constitution, but should simply be the substance of laws passed by the government. This foundationalist depiction is consistent with conservative preferences with regard to the US Constitution: stick with precedent, and follow the same ways of interpreting the Constitution.

Returning to the story above about forgetting who you are, you might leave yourself a list of the most significant principles that you care about—treating others kindly, working hard, and being honest—with the hope that your future self would keep this philosophy in mind as they approach each hour of the new day. They wake up, read the list, and treat others with kindness in all sorts of situations that simply can't be predicted the night before.

Thus, for foundationalists, the Constitution functions like the keel of a sailboat. The keel is the long fin below the water that provides stability and support. Without it, even a mild storm would swamp and overturn the boat. In the same way, the state constitution provides the fundamental organization of government, including how the different parts of government will interact, such as the legislative, executive, and judicial branches. It establishes the basic civil liberties and civil rights that we as citizens of California rely on to define our roles. The superstructure of the sailboat—the hull, the cabin, masts, etc.—must be constructed to be consistent with the keel. So if we want to change the keel, we must proceed with utmost caution, for the entire sailboat may founder.

The Framers of the US Constitution made formal constitutional change difficult. Two-thirds of the states are required to call a Constitutional Convention, a step that has never been taken. Instead, hundreds of constitutional amendments are proposed by senators or members of the House of Representatives, and they require a two-thirds majority to pass in both houses, in which case they must still be ratified by three-fourths of the states. As a result, only twenty-seven amendments have been added to the US Constitution. In the place of constitutional amendments, other strategies have changed the nation, such as new laws like New Deal legislation under President Franklin Roosevelt and court cases expanding the scope of civil liberties and civil rights since World War II. For instance, the Civil Rights Act of 1964 and the Voting Rights Act of 1965 profoundly impacted the nation. Yet each new court decision or legislation must be tested against the words of the US Constitution.

In contrast, in California, there is no sharp divide between the California Constitution and legislation; instead, one primary arena for changes in law is amending the Constitution. It is as if, in our story above, at the national level, you gave yourself the Constitution to read so that you would understand who you are as an American, but if you were Californian, a far longer Constitution with blank pages for your future self to write on would be your gift to your future.

Let's review the many ways that the Constitution can be changed through current processes with the aim of helping you to develop your opinion on what is best—a more foundationalist approach to the California Constitution like what we have at the national level or the more anti-foundationalist approach that we have today in California that serves the demands and needs of the present. A more foundationalist approach would prioritize stability and adherence to established principles, while an anti-foundationalist approach would be more flexible and responsive to current needs. At stake is the deeper ethical question of whether you perceive rules and principles as objective—true and unchanging—or more malleable, relative to the values and preferences of the people living at a given time and place.

Changing the California Constitution

What are the sources of constitutional change? We can divide them into formal and informal methods. The formal methods include actual amendments to the Constitution. The informal methods include changes in the interpretation of the state law by the state and federal courts or changes in the interpretation or enforcement of constitutional procedures, rights, and liberties by state or federal executive authorities.

"We, the people of California, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this Constitution."

So the 1849 California Constitution begins, first setting out a Declaration of Rights, then the legislative, executive, and judicial branches, plus a few more miscellaneous provisions. Modeled after the New York and Iowa state constitutions, it bears a familial resemblance to the US Constitution, emphasizing a republican form of government, three branches of government with the separation of powers, checks and balances, and provisions for civil liberties. With an eye toward joining the Union, the state constitutional framers banned slavery. Amendments to the Constitution required a majority vote of both houses of the legislature, followed by approval of the next elected legislature with a majority vote, and finally ratification by the people with a majority vote. This rather difficult process resulted in only three amendments added to the California Constitution in 1856, 1862, and 1871 ("The California Constitution of 1849," California Secretary of State). The legislature could also call for a new Constitutional Convention through a similar process, which is how they convened the Constitutional Convention of 1879.

The delegates of the 1879 Convention made it far easier for the legislature to amend the Constitution, only requiring a two-thirds majority of the legislature, followed by submission to the people. Any revision of the Constitution through a convention had to be initiated by the legislature. Then, in 1911, amendments were added to the California Constitution allowing for the people to amend the Constitution or pass new laws through the initiative process (described earlier in this chapter), bypassing the state legislature altogether. The consequence has been the proliferation of amendments to the Constitution; it has been amended over five hundred times ("California Constitution"). For example, the Constitution of 1879 begins with a California Declaration of Rights that states in Section 1:

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

In 2022, Californians drafted and approved Proposition 1, which added to this section:

"The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which include their fundamental right to choose to have an abortion…"

In short, the California Constitution today reflects the values and prejudices of mid-nineteenth-century America, plus the contemporary concerns of majorities who can pass constitutional amendments by gathering the requisite signatures of 8% of registered voters, followed by simple majorities of the electorate. Revisions of the Constitution, defined as broad changes to the legislative procedures and powers of the branches of government, must originate with the legislature. The Legislature may call for a constitutional convention (which must be approved by the people), but since 1879, there has not been a majority in the Legislature willing to do so; perhaps because of the drastic nature of such a move, the outcome on state politics is hard to predict. Note that governors have no formal authority when considering initiatives, amendments, or legislative referenda; their signatures are not part of the process. Hence, direct democracy methods are a way to circumvent gubernatorial power.

There are two other sources of constitutional change in California that arise not from actually changing the Constitution but from changing the interpretation of the Constitution or its enforcement. State policies are embedded within a larger federal framework. The Ninth Amendment of the US Constitution safeguards rights that are not necessarily stated in the US Constitution, and the Tenth

Amendment protects the power of states to have jurisdiction over areas of policy not delegated to the US government. These amendments and the general role of the courts in interpreting state law according to state and federal law give judges significant power. For example, in *Pruneyard Shopping Center v. Robins* (1980), the US Supreme Court upheld the California Supreme Court's extension of freedom of speech onto private property. High school students had set up a table in a private shopping center to distribute literature supporting Israel, and the Court ruled that the shopping center could not limit their activity based on the California Constitution and the Ninth Amendment of the US Constitution.

The relationship between the federal and state governments can also dramatically change how constitutional provisions and civil rights and liberties are enforced. In 2025, the Trump Administration used the US Civil Rights Act of 1964 to protect the rights of Jewish students at the University of California to study in a harassment-free environment. This is in marked contrast to prior years, where universities were emphasizing the rights of protestors to freedom of speech even when it was offensive to other students (Associated Press).

In summary, constitutional change can occur both formally through amending the Constitution or less formally through changes in enforcement by the executive branches or judicial branches at the state or national level. The question remains: first, how much change do you believe is good in a constitutional democracy? Second, do you prefer formal constitutional change through new amendments to the California constitution or informal change through new interpretations by judges and executive officials? The constitutional aspect of our political systems advises stability, continuity, maintaining foundations; the democratic aspect recommends flexibility and responsiveness to political needs and public opinion. What do you think is best?

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5.8: Summary- Making Sense of California Constitutional History

Returning to the Question of Who Really Rules

As the founding document of California, the Constitution of 1849 established the state's territory, government, and a set of rights for its citizens. Its origins lie at a time when the oppression of Native Americans was severe, and although California was nominally a free state, slavery and indentured servitude were still present. The Constitution of 1879 created a new constitution during an era of populist revolt against business monopolies. This Constitution also reflects the social context of the time with its prejudices against nonwhite Californians and other ethnic groups, as well as the prevailing sexism of the late nineteenth century. It utterly failed in its efforts to limit the power of monopolies. It would take the Progressive reforms of 1911 to tackle the goals set out some thirty years earlier. California continues to use direct democracy to channel new social demands into law. Formally, the trend of constitutional reform has been from a representative form of government to a hybrid form that includes both representative and direct forms of democracy.

There are several dynamics regarding the question of who really rules California. Recall the debate is among those who say that we have an elite running the state versus those who argue that the people govern democratically, with a middle position occupied by pluralists who emphasize the role of groups. An alternative argument is that all three dynamics are at work, with their relative influence varying with the times. Considering California's historical development, a rather exclusive elite wrote the Constitution of 1849, but then it was ratified by the public, although suffrage was not universal. The dominance of railroad interests in state politics also reinforces the elitist view of who rules.

On the other hand, as the state has grown, large social movements have significantly changed state politics. Dennis Kearney's Workingmen's Party in the 1870s, the Progressive Party in the early 1900s, and the suffrage movement show the influence of ordinary people. Pluralism matters in state politics, with the efforts of groups often ratified by the people through initiatives and referenda, illustrating the crucial role of majority rule. Hence, the impact of all three dynamics is evident.

For Further Inquiry

1. The story of Biddy Mason is fascinating. In the last few years, there has been a revival of attention about her life. A memorial park in her honor presents her biography. . Research her history and the history of African Americans in the Los Angeles area in the late nineteenth century. What have you learned?
2. Locate a copy of the California Constitution and compare its Declaration of Rights to the US Bill of Rights. What do you notice? What explains the difference? Which do you prefer and why?
3. Four generations ago, women fought for the right to vote. Go to this online photography exhibit of the movement's history. What do you notice? How are there similarities with the civil rights movements of today?

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5.9: Introduction



Figure 5.9.1: The American and Californian Flags (public domain; via pxhere)

Learning Objectives

- To analyze the critical constitutional issues regarding federalism.
- To describe the historical development of federalism.
- To develop our own opinions regarding three case studies about federalism.
- To develop our own political philosophies about federalism.

Introduction

Federalism matters. Walk down the street and arrive at a crosswalk. The ramp at the end of the sidewalk allows a disabled person to make their way across the intersection more easily due to the 1990 Americans with Disabilities Act enforced by the federal government. Go to a bar anywhere in the United States; you better be twenty-one. Congress could not mandate a national drinking age without running afoul of states' reserved powers, but they made it a prerequisite for states to receive federal highway funds in 1984. Are you gay or lesbian and want to get married? For a time, states could decide for themselves if they wanted to have same-sex marriages or accept them from other states. Then, in 2015, the US Supreme Court (*Obergefell v. Hodges)* directed that all states license marriage as a union between two people. These examples show the impact of federal laws on the states.

Yet, there are many areas where state laws dominate. Want to smoke marijuana legally? It is legal in many states for medicinal purposes, with a smaller number allowing recreational smoking. How about firearms? Where can you walk down the street carrying a loaded handgun in a holster? Open carry is permitted in many states but not in California, except in a few rural counties that only allow it with a permit. Then, there are all the laws governing abortion. In the more liberal states, there is no required waiting period, no need for parental notification if the mother is underage, and the state government will pay for the abortion if the mother cannot afford to do so. However, go to a conservative state, especially in the South, where there are few abortion clinics, waiting periods, and counseling are required, and no state aid is available. The point is that where we live matters. Laws vary by state because states have their own political cultures and traditions. The question is, to what extent should there be uniformity across the country? How "united" should the United States be?

In short, the concept of federalism may initially seem like a dry legalistic topic. However, federalism is fascinating because it is an intrinsically political topic regarding who should rule over what aspects of our lives: the states or the federal government. Let us review the critical constitutional issues and the history of federalism. Then, three case studies will help you develop your own points of view.

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5.10: Constitutional Issues

Federal-State Relations and the US Constitution

We might expect that the Constitution would provide clear rules regarding federal-state relations. However, the Constitution is often considered an "invitation to struggle" (Corwin 201) because there is so much ambiguity about the relations among its parts. For example, Article I, Section 8 sets out the expressed powers of the U.S. Congress, but then clause 18 of this section, the Necessary and Proper Clause, allows Congress to extend its influence. Congress has the power:

> *To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Consider the expressed powers enumerated in clauses 12 and 13: Congress can create an army and a navy. If Congress can create an army and a navy, can it create an Air Force? A Space Force? With the Necessary and Proper Clause, these expansions of power are constitutional. However, at the time of the Constitution's ratification after the 1787 Philadelphia Convention, many states demanded the addition of a Bill of Rights to stop the federal government from intruding on individual rights and the traditional powers of state governments. Hence, the Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

States have reserved powers, meaning that states have jurisdiction in all areas of law unless the Constitution has expressly given control to the federal government.

However, the constitutional evolution of federal-state relations did not stop with its ratification. The federal government has gained much more power as the Supreme Court has required that states incorporate the US Bill of Rights into state law as mandated by the Fourteenth Amendment added in 1868:

> *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Table 3.2.1 summarizes the most important parts of the Constitution that establish the relationship between states and the national government.

Table **5.10.1**: Constitutional Clauses Regarding Federalism

Constitutional Clause or Amendment	Impact
Article I, Sec. 8, clauses 1-17: the Expressed Powers	Article I, concerning the organization and powers of Congress, establishes the enumerated powers of Congress.
Article I, Sec. 8, clause 18: The Necessary and Proper Clause	Congress has additional "implied" powers not necessarily specified in Article I if they are necessary and proper to exercise one of the expressed powers
Article IV: The Full and Faith Credit Clause	States shall "recognize" each other's laws and legal decisions, but Congress may regulate these relationships
Article VI: the Supremacy Clause	The Constitution is the supreme law of the land
The Ninth Amendment	While the Constitution and the Amendments set out explicit rights, other rights are "retained" by the people
The Tenth Amendment	Powers that are not given to the federal government by the Constitution are "reserved" to the states.
The Fourteenth Amendment	States cannot make laws that deprive their citizens or any persons in their jurisdiction of their rights as Americans or deny them the "equal protection of the laws."

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SECTION OVERVIEW

5.11: The Impact of Federalism

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5.12: Debating Who Should Be in Charge- Three Types of Federalism

Conceptualizing Changes in Federal-State Relations

The Constitutional parameters that established the relations between the states and the national government and among the states gradually evolved. For analytical purposes, political scientists categorize them into three kinds of federalism. The first is dual federalism; the states and the national government have separate responsibilities based on a clearly delineated view of the federal government's expressed powers and the states' reserved powers. This type dominated from the Constitutional founding to the Great Depression of the 1930s. For example, the federal government managed interstate commerce, and states managed elementary and high school education. The second is cooperative federalism, marked by the dramatic increase in federal control over state and local affairs as our country fought the Great Depression and the Cold War and tried to achieve various national goals such as civil rights and civil liberties. An example of the daily impact of cooperative federalism is the Supplemental Nutrition Assistance Program (SNAP), which provides money for food to tens of millions of Americans.

As the federal government increased in power, conservatives became alarmed by the growth of the central government and advocated greater state power. Beginning in the late 1960s, with the election of Republican President Richard Nixon, states started to share in decision-making regarding federal programs. The result was "new federalism," the third type of federalism that blends dual and cooperative varieties. One example is welfare reform. In the 1990s, states were allowed to develop some of their own welfare programs using federal funding. Another example discussed later in this chapter is the Affordable Care Act (often informally called Obamacare), which allows states quite a bit of latitude regarding health care programs and coverage.

All three kinds of federalism are very much present today (see Table 3.3.1). States still control many policies, the federal government controls others, and then there are many areas of policy that are explicitly shared between the two levels of government.

Table **5.12.1**:Types of Federalism

Type of Federalism	Definitions	Examples	Origins
Dual	State and the federal government have distinct responsibilities with separate programs, financed independently.	Federal level: foreign policy State-level: state licensing for occupations, barbers, teachers, attorneys, etc.	1789 (implementation of the US Constitution)
Cooperative	The federal government directs policy, paying for programs for states.	Federal Level: SNAP (food assistance)	1933 (Roosevelt Administration)
New	The federal government pays for programs; states can design programs for their residents.	Welfare Reform: Temporary Assistance For Needy Families (CalWORKs in California)	1969 (Nixon Administration)

Analyzing the State of Federalism Today

Do you ever people-watch? For example, sit on a park bench and watch couples walk by, and study their body language, wondering about what each partner thinks about the other, just by their posture, smile, or perhaps a sparkle in their eyes. Transfer this same sort of curiosity to observing the relationship between the states and the national government. See how each is reacting to the other, the policy changes, the posturing, and the rhetoric. We observe many dynamics in the mid-2020s, with the advent of the second Trump Administration. Just as it is difficult to generalize about a relationship from watching only a few interactions between people in a park, conclusions that we can make about current federal-state relations will also be tentative. Many of these changes discussed below would be best described as ongoing efforts, subject to changes by the president or rejection by courts. Four strands of federalism are evident so far.

First is the Trump Administration’s skepticism about the efficacy of big government and the effort to reduce its size by trying to slim down or even eradicate whole departments and return some government responsibilities to the states. Mr. Trump invited financier and entrepreneur Elon Musk to head the effort of a newly created Department of Government Efficiency (DOGE) to cut

regulations and spending and reduce the number of federal employees. As of June 2025, according to the Bureau of Labor Statistics, 59,000 federal jobs will have been lost (Hsu). Mr. Trump issued an executive order declaring that the "Department of Education's main functions can and should be returned to the states." ("Improving Education Outcomes"). Those that could not, such as the administration of student loans, would be assumed by other departments. The President has also argued for returning disaster management and mitigation entirely to the states by abolishing the Federal Emergency Management Agency. Yet after devastating floods killed over one hundred people in central Texas in July 2025, the President changed his mind (Allison).

The second strand is the exact opposite: the Trump administration is making great efforts to centralize control of policy and remove or reduce existing state authority or responsibility. This is especially evident in policy areas that are a high priority for the Administration. For example, the Trump Administration doubts the wisdom of rapidly changing to electric vehicles and is more sympathetic to the use of traditional gasoline fuels. Hence, Trump signed a joint resolution by Congress to end California's ability under the Clean Air Act of 1970 to define its own pollution standards (Friedman). If this section of the Clean Air Act were to be revoked, California would be unable to reach its goal to end the sale of gasoline-powered cars by 2035.

A third strand continues with the effort of centralizing policy at the federal level and is distinct because of the use of the tool of conditioning grants-in-aid to state policy changes. The Trump Administration threatens to withhold grant money for health, education, welfare, transportation, and many other programs unless the state changes policies in policy areas that have been prioritized by the Trump Administration. These include banning Diversity, Equity, and Inclusion (DEI) initiatives to promote civil rights and affirmative action policies in schools, colleges, and universities, reducing civil rights for transgender individuals, and ending state and local policies that provide benefits to undocumented immigrants. For example, after the fires that destroyed two Southern California neighborhoods (Altadena and Pacific Palisades), Mr. Trump threatened to condition disaster aid on California requiring voters to show identification cards at polling places (Trump's Threats).

After a transgender athlete won medals at a California state and field championship, Trump posted on Truth Social (Echelman):

> "A Biological male competed in California Girls State Finals, WINNING BIG, despite the fact that they were warned by me not do so. As Governor Gavin Newscum fully understands, large scale fines will be imposed!!!"

The Trump Administration withheld more than five billion dollars in education grants in an effort to ensure that school districts complied with the Trump Administration's anti-DEI and anti-transgender policies. Aid was released following the filing of another lawsuit by states and pressure from Congress (Mervosh).

All of these efforts by the Trump Administration have yielded a fourth strand of federalism: a cycle of action and reaction between the federal government and the states, with federalism becoming a very active arena for policy conflict between Democrats and Republicans. As of July 2025, California, either on its own or in concert with other states, has filed thirty-six lawsuits against the Trump Administration. These lawsuits uniformly argue that the Trump Administration is threatening the reserved powers as set out by the Tenth Amendment of the US Constitution. For example, California objects to Mr. Trump tying transportation dollars to requiring state law enforcement authorities to participate in immigration raids. It also objects to the end of federal government health insurance coverage under the Affordable Care Act for gender-affirming care. (Zinshteyn).

Given our observations of federal-state dynamics, how do we generalize about the general character of contemporary federalism and its underlying causes? In some ways, there is continuity with the past. The federal government's use of its financial resources to change society is the hallmark of cooperative federalism. In the past, its purpose was for liberal causes—welfare, health care, civil rights, etc.—now federal activism is being used to promote the priorities of the Trump Administration. The Trump Administration uses all available tools—grants, mandates, preemptions, etc.—to change American society in specific ways. Political scientists are generalizing about Trump's policies as creating a new type of federalism: "transactional federalism," defined as simply using the tools of federalism to further a partisan agenda rather than adhering to general principles regarding how states should interact with the federal government (Dichio).

One might argue that politicians have always used federalism to promote their interests and that today's federalism is simply a reflection of the party polarization that is gripping our nation. Nonetheless, the fundamental principle for the creation of federalism at the 1787 Convention was to find a just balance between state and national power—for each state to have a degree of autonomy within a common American home. We can return to the metaphor of watching couples walk by at the park and wonder if they have successfully negotiated the right balance between "I" and "thou," between individual autonomy and the unity of love or marriage. In the coming years, we shall gain a better understanding of the consequences of 'transactional federalism."

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5.13: You Decide- Case Studies in Federalism

Imagine you are a policymaker deciding each of the following policy issues. A crucial question is how much freedom local and state governments should have. Think about your responsibilities based on your particular role in each of the following case studies, and then decide what you will do. Each section concludes with a discussion of what actually happened.

Case Study One: Shall all California high school students be required to take an Ethnic Studies Course?

You are the governor of California. The California legislature passed a bill mandating all high school students complete a one-semester ethnic studies course. The course emphasizes the history and culture of four groups: African Americans, Asian Americans and Pacific Islanders, Latina/o/x Americans, and Native Americans. Should you sign the bill?

Advocates for the course argue that traditional social studies do not sufficiently address multicultural history, leaving students ignorant of our state's rich heritage. They also say that ethnic studies help students have more pride in their own histories, improve general academic performance, increase intercultural understanding, and contribute to a more educated citizenry better able to understand the challenges we face as a diverse society.

Opponents of the course favor teaching multicultural history, but they are concerned that the course omits many other groups, such as Armenian and Jewish Americans. Additionally, they are worried that the curriculum may overly emphasize oppression as a theme and demand that white students confess their "privilege." They argue that existing social studies courses already use a multicultural approach. At best, the class should be an elective.

Under dual federalism, the state government establishes the public school curriculum. Your choices are to sign the bill and make ethnic studies a requirement or veto it. You will be expected to justify your actions in your signing statement or veto message. What will you do and why?

What Happened?

In 2020, Governor Newsom vetoed the ethnic studies bill ("Veto Message"). Newsom expressed support for an ethnic studies curriculum, pointing out that he had already approved a bill requiring the course for California State University students. However, he asked that the curriculum be revised so that it "achieves balance, fairness and is inclusive of all communities." For the next several months, the State Board of Education revised the curriculum and included the experiences of many more ethnic groups. In 2021, a bill reflecting these changes made its way through the California legislature, and Governor Newsom signed it into law (Fensterwald).

Case Study Two: Shall all states be required to license marriage as between two people?

You are a U.S. Supreme Court justice. You are one of nine responsible for deciding whether the laws and practices of government are constitutional. It is 2015. The case before you is regarding marriage. Shall states be able to define the nature of marriage as a union between only a man and a woman, or should the U.S. Supreme Court tell states that they must offer marriage licenses to any two people?

Traditionally, the states have defined the nature of marriage. States respect the legitimacy of the marriage contracts of other states under the Full Faith and Credit Clause of the U.S. Constitution (Article IV). There are precedents for the Supreme Court to intervene. In the nineteenth century, the Court ruled that marriage shall be monogamous in all the states (*Reynolds v. United States*, 1878), outlawing a man having multiple wives. More recently, the Court ruled that a state ban on interracial marriage was unconstitutional based on the Fourteenth Amendment's equal protection clause *(Loving v. Virginia*, 1967).

There are also precedents for the Supreme Court about gay rights. In 1986, the Court affirmed the right of a state to ban homosexual relations (*Bowers v. Hardwick*). It then reversed this decision in *Lawrence v. Texas* (2003), with the majority arguing that the right to privacy includes a right to consensual sex between two people.

State laws about marriage were rapidly changing beginning in the mid-1990s. Some states legalized same-sex marriage; others defined marriage as only between a man and a woman. A few had a middle ground of "civil union" that gives states, but not federal,

marriage rights to same-sex couples without using the word marriage. The U.S. Congress passed the Defense of Marriage Act (1996), permitting states to refuse to recognize same-sex marriages from other states.

California voters passed Proposition 22 in 2003, which defined marriage as only between a man and a woman. The California Supreme Court declared this proposition unconstitutional because it violated California equal protection laws. Then California voters passed Proposition 8 in 2008, which added an amendment to the California Constitution, again defining marriage as solely between a man and a woman. The drama continued with gay rights advocates turning to the federal courts, which ruled Proposition 8 unconstitutional. Meanwhile, similar messes were brewing in the rest of the country with a mishmash of laws and conflicting Court rulings causing legal and practical confusion.

Now, let's move forward to 2015. The Supreme Court has consolidated several cases from multiple federal appeals courts to focus on whether the states shall be required to legalize same-sex marriage. The question before us is also very much a question regarding federalism. Shall the federal government impose its will on the states regarding marriage? If so, this nation-centered approach is an example of cooperative federalism. Alternatively, the Court may defer to the states and let their legislative or judicial authorities resolve the matter, an example of dual federalism.

Advocates for requiring states to license same-sex marriages make two arguments based on the Fourteenth Amendment and prior Court cases that provide the precedents for promoting privacy and equal protection of the law. First, lesbian and gay people are entitled to equal dignity before the law. Dignity means that states respect the autonomy and privacy of two people of the same sex to marry. The due process and equal protection clauses of the Fourteenth Amendment provide this fundamental right to dignity concerning marriage. Second, particular costs burden gays and lesbians and their children if marriage is limited to heterosexual couples. Health insurance and family leave may be inaccessible. Hospital visits and next-of-kin medical decisions are off-limits. Property laws leave partners destitute in the event of the breakup of relationships. Marriage gives the children and spouses in same-sex families the same rights as those in heterosexual unions.

Opponents of same-sex marriage make two general arguments, one substantive and the other procedural. First, they argue that states have traditionally defined marriage as between a man and a woman. It is in the child's interest to receive care and financial support from both their mother and father. Hence, the institution of marriage is central for one generation to raise the next. Second, procedurally, opponents argue that the Supreme Court should not have jurisdiction over this matter. Instead, elected officials, whether at the state or the national level, are the proper authorities to address this question. The Supreme Court should avoid establishing fundamental rights not clearly enumerated in the Constitution.

You are a Supreme Court justice. Redefining marriage will force all states to change their laws to increase liberty and equality. On the other hand, retaining the absence of a federal definition of marriage respects dual federalism. It leaves the states to address the issue through the democratic process, allowing for a diversity of choices among the states. How will you rule?

What Happened?

In 2015, in *Obergefell v. Hodges*, the U.S. Supreme Court ruled 5-4 to legalize same-sex marriage. The majority decision, authored by Justice Anthony Kennedy, argued that the Fourteenth Amendment requires that same-sex marriage be protected under law to extend equal dignity, or marriage equality, to the same-sex couple:

"No union is more profound than marriage, for it embodies the highest ideal of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. They hope not to be condemned to loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."



Figure **5.13.1**: The White House, the day after the *Obergefell* decision in 2015 (public domain; A1Cafel via Wikimedia)

Chief Justice Roberts, in one of the dissenting opinions, argued that the Supreme Court was exceeding its jurisdiction with its decision, that elected officials rather than justices should decide this issue:

"If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it."

After the Supreme Court decision, a single policy for all Americans applied: states must allow same-sex couples to marry, and they will enjoy the same state and federal rights and benefits as opposite-sex couples. The marriage contract and all other marriage-related laws changed to reflect the new view about our fundamental rights as Americans.

Case Study Three: Should the Affordable Care Act be repealed?

It is 2017. You are a Republican member of the United States House of Representatives representing the 25th district of California (in 2022, this district, encompassing the Santa Clarita and Antelope valleys, was renamed the 27th district as part of the redistricting process). The 25th district is what political scientists call a swing district, meaning that the district is evenly divided between Democrats and Republican voters, with candidates winning with less than 55% of the vote. In 2016, you won reelection with 53% of the vote ("California's 25th Congressional District Election"). However, the Democratic presidential candidate, Hillary Clinton, won the district by 50.3%, suggesting that some voters engaged in split-ticket voting, voting for both Republican and Democratic candidates ("Presidential Election in California").

The President, Mr. Trump, is a Republican. One of Mr. Trump's central campaign platforms was to repeal the Affordable Care Act (the "ACA") passed under his predecessor, President Obama. You must decide whether to vote to repeal the ACA, which will improve your support among Republicans, especially the President, or reject the repeal to avoid alienating yourself from moderates and Democrats in your district.

Some background about the Affordable Care Act and the arguments by supporters and critics will help you decide this issue. The ACA is often called "Obamacare" for short because President Obama's central campaign platform in 2008 was to help Americans with health care by improving existing health insurance coverage and expanding coverage to reach uninsured people. It was quite a political battle to push it through a very polarized Congress. When it finally passed in 2010, Obamacare had become the most significant change in healthcare policy in more than a generation. It also represented a substantial shift in the relations between the federal government and states. Some aspects of the ACA expand national power, hence representing a deepening of cooperative federalism. Other parts allow states to set their own policies, representing a deepening of new federalism.

The reach of the federal government increased in many ways. Some of the most significant were: first, employers with fifty or more full-time employees were required to provide health insurance; second, individuals were mandated to buy health insurance and received subsidies from the federal government if their income was up to 400% of the poverty level, and third, insurance companies had to cover preexisting conditions and preventative care. In addition, the ACA preempted, or displaced, state health insurance regulations and hence is an example of cooperative federalism where the national government takes control over a policy area and mandates changes in state policies.

However, aspects of the ACA gave states some freedom to implement the law and are therefore consistent with new federalism. First, states were allowed to create state health insurance exchanges for their residents to buy private insurance. If they chose not to, their residents would have to buy from the federal health insurance exchange. As of 2024, twenty-two states and Washington D.C. have set up their own exchanges, including California (CoveredCalifornia.com). The state exchanges allow states to have greater autonomy. Second, the ACA expanded Medicaid, the existing public health insurance plan for low-income people established in the 1960s, to cover people who make up to 133% of the federal poverty level. However, because both the federal and state governments fund Medicaid, the U.S. Supreme Court ruled (*National Federation of Independent Business v. Sebelius*, 2012) that states were not required to expand Medicaid eligibility. Hence, eligibility and income requirements for Medicaid vary from one state to another. These variances in ACA policies and programs among the states illustrate the signature characteristic of New Federalism: giving states flexibility based on state political preferences (Health Reform).

Now, we return to your dilemma as a representative. Should you vote to abolish and replace the Affordable Care Act with the American Health Care Act? Most prominently, this 2017 bill ends the expansion of the Medicaid program and income-based subsidies, saving the federal government hundreds of billions of dollars but causing approximately fifteen million people to lose coverage.

Advocates of replacing the ACA are motivated by ideological and partisan reasons. Ideologically, conservatives are skeptical of further government involvement in the healthcare sector of the economy. Seeing health care as an optional consumer product, individual consumers, businesses, and health insurance companies should not be subject to government coercion. Historically, states have been in control of their insurance markets. The ACA undermines state autonomy. Second, for many years, the health care debate has become intensely partisan, with this issue having a prominent role in the platforms of each party. Republicans had invested much importance in defeating President Obama's program. Mr. Trump promised he would succeed in this regard when other Republicans had failed.

Supporters of the Affordable Care Act argue that millions more Americans have health insurance coverage; health insurance coverage is better, and, in the long term, these improvements will lead to a healthier population. Further, they argue that the federal government's appropriate role is to devise a program that provides affordable health care for all. It has long been noted that the U.S. spends far more per capita with far worse health outcomes than other countries and is the only high-income country without some form of universal health care ("U.S. Health Care from a Global Perspective"). The ACA is a significant step to remedy this situation.

Public opinion is split along ideological and partisan lines in your district and the country. However, given that more people in your congressional district voted for Hillary Clinton than Donald Trump, it is likely that a vote in favor of repeal will make you less popular. On the other hand, if you vote to keep the ACA, you will likely be ostracized by Republicans in Congress and publicly criticized by the President, making it harder for you to accomplish anything else. Will you vote to repeal and replace Obamacare?

What Happened?

This case study has assigned you the role of Representative Steve Knight. He was elected in 2014 to represent California's 25th district, encompassing the Antelope and Santa Clarita valleys and a portion of Simi Valley. Representative Knight chose to vote with the Republican majority. The vote was intensely partisan and highly visible. Along party lines, the bill passed the House, 217-213, but then a similar bill failed in the Senate, 49-51. Nevertheless, the Affordable Care Act survived.

As a representative, Mr. Knight found that he was in an increasingly difficult position. As a Republican in a swing district, he tried to chart a moderate course. Still, because of the increasingly polarized nature of party politics and the shift of the Republican party to the right, this was increasingly difficult. As a result, in 2018, Knight was defeated by his Democratic opponent.

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5.14: Summary- Developing Your Philosophy about Federalism

Reflecting On Your Own Viewpoints

A cynic may argue that philosophy is simply a rationalization for self-interest. The wealthy glorify conservatism and the poor favor state help. A philosophy of federalism may be similar: we may merely favor that level of government that will provide what we want. If the cynic is correct, then constructing a general philosophy of federalism is, at best, irrelevant. However, such cynicism flies in the face of the framers of the US Constitution, who set out arguments for the value of federalism based on fundamental principles. For example, if we read the *Federalist Papers*, James Madison argued that federalism discourages tyranny and supports pluralism and liberty.

Thus, let us set out a premise that philosophy matters. Let us assume that our philosophies help shape our attitudes and opinions, which in turn direct our actions. Therefore, our beliefs about federalism are worth considering. I suggest three principles that are helpful in constructing a federal philosophy (Table 3.5.1):

Table **5.14.1**:Three Guiding Principles

Principle	Consideration
Unity	Should all Americans comply with the same policies and have the same rights and responsibilities?
Diversity	To what extent should local and state differences in needs and wants cause differences in policies, rights, and responsibilities?
Democracy	What balance between state and national control allows for the best democratic deliberations, considering questions about representation, rights, and policy effectiveness?

Consider the three case studies discussed in this chapter: an ethnic studies requirement, marriage rights, and health care reform. Each outcome presents an implicit preference for a particular federal philosophy. In the first case, it is up to the state to decide on the ethnic studies curriculum, a type of dual federalism. Do you agree? Presumably, the state government is best at responding to demands for a new class. However, could we not argue that this class is needed just as much in other states and should be a national policy? On the other hand, the demographics of each state vary, so perhaps the substance of an ethnic studies curriculum would also change, and it might be best left to people within each state to deliberate among themselves about the nature of such a course.

Marriage equality falls under the category of debating about rights. Do you prefer rights to be defined at the state or national levels? Since the civil rights movements of the 1950s and 1960s, the trend has been to nationalize rights, to argue that we have rights as Americans, and hence unity is far more critical than diversity. Moreover, the trend has been for an activist Supreme Court to step in often and define these rights, although the US Congress has also provided landmark legislation. The deliberation about same-sex marriage in this country was relatively quick, lasting from the mid-1990s until the *Obergefell* decision in 2015. In that time, the scope of the decision shifted from the state to the national level. As a result, same-sex marriage became a matter of federal authority, a form of cooperative federalism. States no longer have leeway; they must follow national policy.

The third example represents the most nuanced. Unlike an issue such as marriage equality, which is mainly dichotomous (either yes or no), the extent and nature of health care policies allow for a blend of national and state laws, characteristics of new federalism. In this country, unlike left-wing democracies, we don't conceive of economic needs as rights, so if a state chooses not to provide health insurance, we don't usually argue that the state has violated the *rights* of people experiencing poverty. Perhaps, if we lean politically more toward the left in the future, there would be a greater nationalization of social policies. In the meantime, a balance of unity and diversity as principles has yielded Obamacare with policy decisions occurring at both state and national levels.

What do you believe? When do you want the national government to decide policies, when do you want the states to choose, and when do you want decision-making to be shared? Consider your opinions about the three case studies discussed in this chapter. Consider other issues. What is your federal philosophy?

For Further Inquiry

1. Throughout the pandemic, I was struck by the disparities among the states regarding the efforts to reduce the spread of the coronavirus. I visited my elderly father in Arizona; about half of the customers at the local Safeway have masks on; when I went running in Santa Clarita, many bicyclists, off essentially by themselves, were wearing masks. It's pretty apparent that politics mattered. Some states required face coverings in stores; others did not. It's also the political culture; some people perceived a mask as an unwarranted infringement on liberty, and others just saw it as one's duty during a crisis. In your opinion, was federalism a hindrance or a strength in fighting the pandemic?
2. Survey the current news using your favorite media. Select a particular policy issue that is currently being debated. Ask yourself who is debating the issue. Is the scope of the debate at the local, state, or national level or at more than one level? Do you believe the issue is best considered at the level you observe? Reflecting on your opinion regarding the particular issue, how does your consideration help you better understand your own political philosophy?

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CHAPTER OVERVIEW

6: Civil Rights and Civil Liberties

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6.1: Chapter 62- The Difference Between Civil Rights and Civil Liberties

> *"Laws passed after years of untiring effort, guaranteeing married women certain rights of property, and mothers the custody of their children, have been repealed in states where we supposed all was safe. Thus have our most sacred rights been made the football of legislative caprice, proving that a power which grants as a privilege that what by nature is a right, may withhold the same as a penalty when deeming it necessary for its own perpetuation."*
>
> *—National Woman Suffrage Association in 1876 (1)*

Americans are accustomed to using "civil rights" and "civil liberties" interchangeably, as though they mean the same thing. That is acceptable for daily conversation, but you do need to know the difference between these concepts for this class. Part of the confusion is due to the fact that both civil rights and civil liberties ultimately originate from the idea of natural rights, which we discussed at the beginning of the course. We should also note that mankind went through a **civil liberties revolution** between the Medieval period and the nineteenth century. We all continue to benefit from that revolution. What we mean is that our entire frame of reference has changed from one that emphasized the primacy of royal and aristocratic privileges to one centered on individual liberties. It was a slow and difficult revolution, but it happened through the struggles of many people. (2) If you'd like to test this proposition, try this experiment: Get in your time machine and travel back to the year 800 and talk to some European serfs about their individual freedom of religion, speech, conscience, and the like. They would not know what the Hell you were talking about. If you then transported yourself to 1880 and talked with some farmers about the same topics, you would be speaking a language that they understood and embraced.

Civil Liberties

Your **civil liberties** are essentially your natural rights of life, liberty, and property translated into specific guarantees by the United States Constitution, especially the Bill of Rights and the **due process clause** of the **Fourteenth Amendment**, which says that no state may "deprive any person of life, liberty, or property, without due process of law." These guarantees were designed to protect each individual from the potentially abusive power of government, although civil libertarians today are growing increasingly concerned about the ability of large corporations to infringe on individual liberties as well. The bulk of your civil liberty guarantees are located in the **Bill of Rights**. These include freedom of speech and the press, freedom of religion, freedom from unreasonable searches and seizures, procedural guarantees if you are accused of a crime, freedom from cruel and unusual punishment, and property rights. Some civil liberties protections are included in the body of the Constitution itself, including the privilege of *habeas corpus*, and prohibitions against bills of attainder, *ex post facto* laws, and the impairment of contracts.

The last Constitutional protections mentioned above are things you should know. ***Habeus corpus*** literally means "you have the body," and refers to a court ordering state or federal authorities to bring a detained person to the court and show cause for the detention or incarceration. A **bill of attainder** is when a legislative body acts like a judicial body by passing a law that declares a person or a group guilty of a crime and punishes them. Congress and state legislatures are forbidden from doing that. *Ex post facto* means "after the fact," so an **ex post facto law** is one that declares an action illegal after it has already happened and subjects the person or group who did it to arrest and trial. It would also refer to a law that increased the penalty for a crime if the legislature tried to apply the stiffer penalty to those who committed the crime before the law was passed. Congress and state legislatures are forbidden from doing that. **Congress and state legislatures are also forbidden from impairing the obligation of contracts**. If I render services to you and you owe me a great deal of money according to the contract that we both signed, you might be tempted to go to your friends in Congress and get them to pass a law saying that you do not have to pay me. That is not allowed.

Civil Rights

In addition to life, liberty, and property, natural rights philosophers were concerned that individuals be treated equally. Of course, those very same philosophers had a fairly limited notion of "the people" for whom they sought equal treatment. The same is true for the Constitution's framers, who did not concern themselves with equal treatment of women, men without property, and non-Whites. Our modern notion of **civil rights**—freedom from discriminatory treatment based on some characteristic—is tied in large

part to the **civil rights clause** of the **Fourteenth Amendment**, which says that no state may "deny to any person within its jurisdiction the equal protection of the laws." The verb "to discriminate," in its generic sense, brings to mind someone who is making fine distinctions between two things that are otherwise similar. For instance, a wine connoisseur with a discriminating palate might be able to tell whether a German wine came from the Rhine Valley or the Mosel Valley. In the political arena, **discrimination** occurs when people—who are otherwise quite similar—are not receiving the equal protection of the laws or equal access to liberties based on a characteristic such as their gender, race, religion, national origin, sexual orientation, age, or disability.

Similar to civil liberties, we've gone through a **civil rights revolution**. This revolution happened more recently, between the mid-eighteenth century and now. We used to have no real qualms about parsing out civil liberties on an unequal basis, with the determining factors being sex, race, religion, class, and so forth. We used to take it for granted that some people were freer than were others. We no longer think so, although we do still argue about civil rights.

Civil Rights and Civil Liberties Issues

The key contextual clue in determining whether a particular situation is a civil rights or a civil liberties issue is the presence or absence of discrimination. Were a state to pass a law stripping all citizens of the right to possess firearms, that would be regarded as a civil liberties issue. If that same state were instead to pass a law—similar to actual laws that several states used to have—that forbid African Americans from possessing firearms, then that would be a civil rights issue. In the latter case, a person's freedom from government intrusion is contingent upon their race, which is an idea that is no longer constitutionally acceptable in the United States.

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6.2: Chapter 63- Incorporation or Nationalization of the Bill of Rights

> *"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."*
>
> *—Justice Hugo Black (1)*

Does the Bill of Rights, which is where many of your civil liberties are located, protect you only against infringements by the United States government, or does it protect you against your state and local government as well? The answer is that it protects you against abuses from all levels of government, but this has not always been true. The important case is ***Barron v. The Mayor of Baltimore* (1833)**. John Barron owned a wharf in the eastern section of Baltimore harbor. Beginning in 1815, Baltimore began a series of construction and paving projects that involved the diverting streams. As it happened, the diverted streams came out into the harbor immediately next to Barron's wharf. By 1822, Barron sued Baltimore city and the mayor because the newly diverted streams were causing silt to build up to such a degree that ships were no longer able to access his wharf. Barron's lawsuit rested on the Fifth Amendment, which says that no one's property may be seized for public use without due process and just compensation. Since there was neither due process nor any compensation for damage to the economic viability of his property, Barron felt he would win. However, the Supreme Court ruled in favor of Baltimore, saying that the Bill of Rights protects people from actions of the central government, not state and local actions. The Supreme Court said that Barron needed to seek redress from the Maryland state constitution, but there was no such provision in that document that would help Barron. The significance of the *Barron* decision is that it set up a dual system of civil liberties: a national one to protect individuals from the central government, and widely varying standards to protect people from state and local government abuses. Therefore, your civil liberties depended upon where you lived and what level of government you faced.

After the Civil War, the Fourteenth Amendment seemed to correct the imbalance defined in *Barron* by saying that no state "shall abridge the privileges and immunities of citizens of the United States." However, the Supreme Court did not interpret the **privileges and immunities clause** as a corrective to *Barron*. Instead, in the late nineteenth century, the Court began **incorporating the Bill of Rights protections** using the Fourteenth Amendment's **due process clause** instead of the privileges and immunities clause. The due process clause says that states may not "deprive any person of life, liberty, or property, without due process of law." Many people see this as an odd way of nationalizing the Bill of Rights and other broad liberties, but there it is. (2) In specific cases, the Court incorporated individual Bill of Rights protections into the due process clause by limiting states' ability to infringe upon them. The Court did this selectively and patiently, waiting for individuals to challenge their state when it infringed on specific civil liberties. The process of **incorporation** lasted into the early twenty-first century as cases came to the Court.

You do not need to know all of the incorporation cases, but you should be familiar with the following three examples. They not only illustrate the concept of incorporation, but also are cases whose impacts are still felt today.

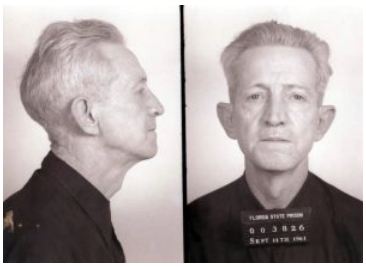
Important Incorporation Cases

***Mapp v. Ohio* (1961)–**This case involved the Fourth Amendment's provision that people be protected from unreasonable searches and seizures. The Amendment says that search warrants need to be issued by judges upon probable cause and that warrants need to be specific rather than general. Under the *Barron* precedent, the Fourth Amendment only protected you against federal officials. State and local officials were regulated by state constitutions, which varied in how much they protected people from unreasonable searches and seizures.

On May 23, 1957, three Cleveland, Ohio police officers came to Ms. Dollree Mapp's house looking for a male suspect whom they believed was related to a bombing incident as well as an illegal gambling outfit. Ms. Mapp called her lawyer and refused to let the officers in because they did not have a warrant. Three hours later, the officers, whose ranks had grown to seven, forcibly entered Mapp's house, roughed her up and handcuffed her, and proceeded to search the house. They did not find the man, bomb-making

equipment, or gambling paraphernalia, but they did find that Mapp possessed “obscene materials,” for which she was arrested on the spot. Mapp was convicted but appealed her conviction all the way to the Supreme Court, which ruled in her favor and incorporated the Fourth Amendment into the Fourteenth. State and local authorities now face the same obligation that federal officials do to respect the Fourth Amendment. Additionally, the *Mapp* case also applied the **exclusionary rule** to state and local police: any evidence they gather in violation of the Fourth Amendment must be excluded from the defendant’s trial.

***Gideon v. Wainwright* (1963)–**This case deals with the Sixth Amendment’s provision that criminal defendants have a **right to counsel** for their defense. Following the *Barron* precedent, the Court had long held that indigent defendants facing federal charges would be provided a public defender, but states could set their own rules for defendants facing state criminal charges. Later, the Supreme Court ruled that defendants charged with a capital offense must be provided a lawyer if they could not afford one. Still, the vast majority of criminal defendants do not face either federal or capital charges.



Clarence Earl Gideon in 1961

In 1961 Clarence Earl Gideon was a 51-year old drifter who had been in and out of trouble with the law since he had run away from home at age sixteen. Gideon was arrested in Panama City, Florida for breaking into a poolhall and stealing some money and alcohol. At his trial, he asked the judge for a lawyer to defend himself against the charges but was denied because he was charged with neither federal nor capital offenses. Without a lawyer, he was convicted and sentenced to five years in prison. While incarcerated, Gideon made use of *in forma pauperis*, a Supreme Court procedure that waives the filing fees and other requirements for indigent petitioners. He wrote a letter to the Supreme Court asking them to take his case. The Court granted certiorari and appointed Abe Fortas, a well-respected Constitutional lawyer and future Supreme Court justice himself, to represent him. The majority ruled in Gideon’s favor, and remanded the case back to Florida where Gideon was given a retrial with a public defender. Gideon’s lawyer was able to show that the state of Florida could not meet its burden of proving beyond a reasonable doubt that Gideon had done the crime, so he was released. The result of the case is that the Sixth Amendment was incorporated into the Fourteenth, and criminal defendants must be appointed lawyers if they cannot afford one. This is extremely important, because approximately 80 percent of all criminal defendants are too poor to hire their own lawyer. (3) Public defenders are clearly overworked and underpaid—earning below minimum wage in some cases—but defendants without any legal assistance are at a huge disadvantage when faced with state power in a court of law.

***McDonald v. Chicago* (2010)–**The most recent incorporation case occurred in 2010 and involved the Second Amendment’s guarantee of the right to bear arms. In 1983, Chicago banned the sale and ownership of handguns. This ban was similar to those in other cities, such as Washington, D.C. In 2008, the Chicago Police Department refused Otis McDonald, a 76-year old retired maintenance engineer, permission to own a handgun. McDonald wanted a gun to protect himself in his crime-ridden neighborhood. Supported by gun rights groups and joined by three other petitioners, McDonald sued the city of Chicago.

Meanwhile, in the same year the Supreme Court struck down Washington D.C.’s gun ban in a case known as *The District of Columbia v. Heller* (2008). Despite the language in the Second Amendment clearly predicating the right to bear arms in the context of a “well-regulated militia,” the Court narrowly ruled in *Heller* that the Second Amendment confers an individual right to own and carry weapons. However, the *Heller* case did not have immediate implications for other city and state gun laws because of D.C.’s special status as a federal district. In***McDonald v. Chicago*(2010),** the Supreme Court decided (5-4) in McDonald’s favor and incorporated the individual right to bear arms into the Fourteenth Amendment. The ruling, therefore, made it applicable to states and cities across the United States. The Court also said that the individual right to bear arms was subject to regulation. In the D.C case, Justice Antonin Scalia wrote: “Like most rights, the right secured by the Second Amendment is not unlimited. . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” He was also clear that the list of restrictions he just mentioned was

not “exhaustive.” (4) However, in the case of *New York State Rifle and Pistol Association Inc. vs. Bruen* (2022), the conservative majority on the Court struck down a 109-year-old New York state law requiring people to show cause for why they needed to carry a handgun in public. Effectively, this decision struck down laws in a number of states where a quarter of the U.S. population lives. It also shifted the gun debate to the issue of “sensitive places” where bearing arms could still be restricted. Is a court of law a sensitive place? A legislative chamber? What about a grocery store or a political rally? Due to incorporation, future decisions of the Court on these matters will apply to all states.

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6.3: Chapter 64- The Boundaries of Freedom of Speech and the Press

> *"Pussy Power"*
>
> *"Our Voices Together Can't Be Silenced"*
>
> *"Fuck the Electoral College"*
>
> *—Protest signs during a march in Manhattan on January 21, 2017 (1)*

The First Amendment to the U. S. Constitution says that "Congress shall make no law…abridging the freedom of speech, or of the press…" Because of incorporation, this protection also applies to state and local governments. Does this mean, then, that you are free to say or print anything you want and remain protected by the First Amendment? The answer is "No." However, the Supreme Court often applies a standard known as strict scrutiny to cases where government attempts to restrict overtly political or ideological speech. **Strict scrutiny** means that limiting speech is presumptively unconstitutional unless the government can "show that the law is narrowly tailored to achieve a compelling government interest." (2) The case law regarding freedom of speech and press is considerably larger than we can cover here, so we will focus on some of the boundaries and cutting-edge law.

Endangering Others

For many years, one of the most widely recognized guidelines in constitutional law was the **clear and present danger doctrine**, which came out of ***Schenck v. United States* (1919).** Basically, this doctrine held that speech is not protected by the First Amendment if it clearly endangers the lives, health, and property of others, or the national security of the United States. In the *Schenck* case, socialists were prosecuted for distributing flyers during World War I that encouraged men to avoid service in the army. (3) The Court upheld their prosecution because it considered their actions to be a threat to American national security. In his opinion, Justice Oliver Wendell Holmes argued hypothetically that someone could not shout "Fire!" falsely in a crowded theater, and then hide behind the First Amendment. That kind of utterance imperils the lives of others as well as the theater owner's property, because the crowd will stampede to get out. The clear and present danger standard essentially still applies, although the Court does not explicitly rely on it. Note that it refers to speech that is essentially lawful, but that in certain contexts crosses the line. If the theater really is on fire, by all means shout "Fire!" Or, better yet, pull the fire alarm.

What about speech that is unlawful or that advocates lawless behavior? In these cases, the Court relies on the imminent lawless action standard. Consider when someone threatens to assassinate the president or incites people to riot. Those forms of speech are not protected by the First Amendment. In ***Brandenburg v. Ohio* (1969),** however, the Court established the **imminent lawless action standard** in its majority opinion. The case dealt with Ohio prosecuting a Ku Klux Klan leader for publicly advocating violence. The majority ruled against Ohio and said that the First Amendment does not allow a state statute "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless actions and is likely to incite or produce such action." Essentially the Court said that *advocacy* of violence is not punishable in general, but *inciting* violence is punishable.

Fighting Words and Hate speech

The Court defined the idea of **fighting words** in ***Chaplinsky v. New Hampshire* (1942)** as words that "by their very utterance inflict injury or tend to incite an immediate breach of peace." Civil libertarians worried about fighting words as a Constitutional principle, largely because it was so vague—there is no list of words and phrases that fall under it. For instance, in the *Chaplinsky* case, one man started a fight after he was called "a damned Fascist" and "a goddamned racketeer!"—phrases which seem quaint today. As a result, the Court backed away from fighting words as legitimate grounds for restricting speech.



Demonstrators from Westboro Baptist Church

Many people argue that the First Amendment shouldn't protect hate speech. The American Library Association says that hate speech doesn't have a formal legal definition, but that it refers to "any form of expression through which speakers intend to vilify, humiliate, or incite hatred against a group or a class of persons." (4) Hate speech is disgusting because no one wants to hear people say things that are racist, sexist, anti-Semitic, and otherwise bigoted, but such utterances in a public forum are protected by the First Amendment if they are intended to make a political point. For example, most college campuses have student codes of conduct that discourage hate speech, but most of these restrictions cannot be enforced unless the words in question are targeted at specific people and used to harass or threaten them. A college campus is a public forum—much like a public street, a public square in front of city hall, or even a county cemetery—in which really distasteful things can be injected into the marketplace of political ideas. Hate speech cases are gut wrenching. For example, in ***Snyder v Phelps* (2011)**, the Court ruled in favor of Westboro Baptist Church, whose members picketed funerals of U.S. servicemen and women, carrying signs that said, "You're Going to Hell," "Fag Troops," and "*Semper fi* Fags."

Libel

Libel—written defamation of another person, especially of public figures—is not protected by the First Amendment either, but the Court has set high standards for victims to win libel cases. In ***The New York Times v. Sullivan* (1964)**, the Court announced guidelines that the public figure needs to establish in court if they are to win a libel case. In that case, the *New York Times* was sued in an Alabama court by a police commissioner named Sullivan, who claimed that an advertisement taken out by the Committee to Defend Martin Luther King had libeled him by implication. The Supreme Court ruled in favor of the *New York Times* and said in what is known as the **Sullivan Test** that the victim must show: 1) that the information printed about them was false, 2) that the publisher either knew it was false or the statements "were made with a reckless disregard for the truth," 3) the information was written due to malice, and 4) publication of the information damaged the victim. The Court set the standard high in order to avoid public officials being able to escape public criticism by threatening lawsuits against newspapers and magazines. Later, in ***Hustler Magazine v. Jerry Falwell* (1988),** the Court held that the allegedly libelous statement had to be a statement of fact, and not a joke. *Hustler Magazine* had run a cartoon ad spoof indicating that Jerry Falwell's first sexual experience was with his mother in an outhouse. Rather than pay Falwell damages for the false, malicious cartoon, *Hustler* publisher Larry Flynt took the case to the Supreme Court and won. This decision protected magazines, websites, and comedy shows that poke fun at public figures.

Obscenity

Obscenity is not protected by the First Amendment, but the Court has set the bar fairly high for defining obscenity. In the not too distant past, officials could arbitrarily ban various published materials that they personally deemed inappropriate. In the post-World War II period, the courts stepped in to provide more rigorous definitions—although they are still open to considerable debate. In ***Miller v. California* (1973)** the Court articulated a set of criteria by which lower courts could determine whether something was officially obscene. Popularly known as the **Miller Test**, these standards have been incorporated into federal and state statutes. A work—e.g., a novel, magazine, video, play, or statue—may be declared obscene if it passes *all three* of the following:

1. The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to a prurient interest in sex.
2. The work depicts or describes sexual conduct in a patently offensive way as specifically defined in an applicable law.
3. The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

If a work is determined to be obscene, it can be banned. However, many juries have difficulty coming to consensus about obscenity, given the difficulty of passing the Miller Test.

The Internet changed the relationship between producer and consumer in the porn world just as it has in many other commercial areas. In 1996, Congress passed the **Communications Decency Act**, and President Clinton signed it into law. The law made it a federal crime to knowingly transmit to a minor—or post on a web site where a minor might visit—any obscene, indecent, or patently offensive picture or text. Many groups immediately sued, and the American Civil Liberties Union carried the case. In *Reno v. ACLU* (1997), the Court unanimously struck down the Communications Decency Act because the law would require that the Internet only carry information suitable for children. Quoting one of its earlier decisions, the Court said, "the level of discourse reaching a mailbox cannot be limited to that which would be suitable for a sandbox."

To replace the Communications Decency Act, Congress passed the **Child Online Protection Act of 1998**, which threatened prison and fines for anyone caught placing material that is "harmful to minors" on a Web site available to children under the age of seventeen. The law became the focus of a legal battle for more than a decade until it died a quiet death in 2009 when the Supreme Court declined to review yet another appeal. During the legal battle, most courts were uncomfortable with the broad language of the law. In addition to the vagueness of the phrase "harmful to minors" is the problem that the law applied local community standards to the Internet. Most federal judges and Supreme Court justices were concerned that the law allowed any community—even the most rural and conservative—to define the content of the Internet for everyone in the country. In distinction to this legal morass, the Supreme Court firmly established in 1982 that bans on child pornography are constitutional, so long as the material in question depicted an actual—as opposed to a virtual—child. (5)

Symbolic Speech



Mary Beth Tinker as an Adult

Another controversial area of free speech case law surrounds **symbolic speech**, which we define as nonverbal or nonwritten behavior or symbols that convey a political viewpoint. Since the 1930s, the Court has recognized the right of Americans to engage in symbolic speech. In ***Stromberg v. California* (1931)** the Court struck down a California law that banned displays of red flags that were symbols of socialist and Communist organizations. Later, during the Vietnam War, the Court confronted the issue of symbolic speech again when students in Iowa protested the war by wearing black armbands to school. The students were peaceful and did not disrupt classes, but the school board had banned the wearing of armbands in an effort to head-off the students' protest. Several students–including Mary Beth Tinker–sued when they were suspended for wearing the armbands, and the Court ruled in ***Tinker v. Des Moines School District* (1969)** that such peaceful symbolic speech was protected even for minors. Another aspect of symbolic speech concerns flag burning. At the 1984 Republican National Convention in Dallas, Texas, Gregory Johnson was arrested for burning a U.S. flag while making a speech condemning the Reagan administration. He filed suit, claiming his freedom of speech was violated. In a narrow 5-4 decision, the Supreme Court agreed with Johnson in ***Texas v. Johnson* (1989)** and ruled that flag burning is protected by the First Amendment as a form of symbolic speech. Congress repeatedly tried to overturn this decision by passing a Constitutional amendment but came just short of having sufficient votes to do so.

Two Considerations with Respect to News Outlets

This is a good opportunity to make ourselves aware of two important considerations regarding the First Amendment rights of news organizations. The Court has interpreted freedom of the press to mean that government should not be able to engage in what is known as **prior restraint**, which is when the government prevents publication of something that it finds to be objectionable or illegal. The most famous case involving this principle was ***New York Times v. United States* (1971).** During the Vietnam War, **Daniel Ellsberg** stole a copy of a secret history of America's involvement in that conflict. As an employee of the Rand Corporation, Ellsberg had participated in producing this secret report for the Secretary of Defense. Ellsberg gave it to Neil Sheehan, a reporter for the *New York Times*, which began to print the report in installments, collectively called ***The Pentagon Papers***. It was explosive, because it revealed the extent of the morass in Vietnam, important decisions along the way, and the considerable degree

to which the American people were deceived by the government. Even though most of the deception had occurred under Democratic administrations, Republican President Richard Nixon *wanted The Pentagon Papers* suppressed. The government got a federal court to issue an order to the *New York Times* to desist from further publication, arguing that publication violated the Espionage Act's prohibition against willfully communicating information it "knew or had reason to believe. . . could be used to the injury of the United States. . . to persons not entitled to receive such information." In a 6-3 decision, the Court ruled that the government had not met its "heavy burden of showing justification" for prior restraint of *The Pentagon Papers*. (6)

Another important aspect of constitutional interpretation that affects news outlets has to do with the confidentiality of journalists' sources. Journalists often obtain information from sources who wish to be anonymous, but governments are often interested in knowing the names of those sources in case they have violated any laws in revealing the information or in the course of their duties. Sadly, government officials' desire to know the names of journalistic sources is sometimes because they want to discredit them or endanger their lives—witness the furor over revealing the whistleblower's name during President Trump's first impeachment. Many states have **shield laws** that protect journalists from having to reveal their sources, but the federal government does not. In 2005, *New York Times* reporter Judith Miller was jailed by a federal court for eighty-five days for refusing to reveal her sources in a story about the Bush Administration, which revealed the name of CIA operative Valerie Plame. (7)

Corporate Speech

We've already talked about the growing power of corporate political speech, so we don't need to spend too much time on it here. The Supreme Court's logic runs like this: People are protected by the First Amendment to express their political opinions. Corporations are people under the law. Therefore, corporations have the same level of First Amendment protection of their right to speak about political issues. In addition, the Court has ruled in cases like *Buckley v. Valeo* (1976) and *Citizens United v. Federal Election Commission* (2010) that spending money is a form of protected free speech. The Court's majority refuses to make a free speech distinction between different types of corporations—e.g., those that are for-profit like oil companies and pharmaceutical companies that lobby governments, and companies that are in the business of reporting on political events. Nor does the majority appreciate or care about the potential for legalized corruption and gross political inequity when it allows deep-pocketed corporations to fund political advocacy and campaigns on an "equal" basis with people like schoolteachers, store clerks, and rideshare drivers.

The Supreme Court has empowered corporations in another respect by taking an increasingly pro-corporate stance on government regulating commercial speech. **Commercial speech** refers to when corporations speak to potential consumers about products and services. This sort of advertising is not political speech. As David Schultz wrote for the First Amendment Encyclopedia, for much of American history corporate commercial speech "had been subject to significant regulation to protect consumers and prevent fraud," and courts had generally upheld such regulations. (8) In ***Valentine v. Chrestensen* (1942),** the Court ruled that unlike with political speech, which is presumptively constitutional and difficult for government to regulate, "the Constitution imposes no such restraint on government as respects purely commercial advertising."

Often, the Court has acted to ensure that consumers are able to get information via commercial advertisement. For example, in *Central Hudson Gas and Electric Corporation v. Public Services Commission* (1980), the Court established what is known as the **Central Hudson Test**: Government may regulate commercial speech under the following conditions:

1. The government may regulate commercial speech that is fraudulent or misleading.
2. The government's interest in regulating a particular instance of commercial speech must be substantial.
3. The regulation must directly advance the government's asserted interest in regulating the commercial speech.
4. The regulation must be narrowly tailored to advance the government's interest in regulating the commercial speech.

In the time since the *Central Hudson Gas* case, Supreme Court has placed greater limits on government's ability to regulate commercial speech, and this development is an object lesson on corporate power in modern American politics. The Court has worked to empower corporations with the kind of freedom of expression traditionally reserved for natural persons, and corporations are taking full advantage of the leeway granted to them by the conservative majority. **Justice Clarence Thomas** firmly asserted in his concurring opinion in ***44 Liquormart, Inc. v. Rhode Island* (1996)** "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial speech.'" Many scholars applaud this view. Writing in the *Northwestern University Law Review*, William French argues that commercial speech "is purely persuasive—most notably, advertisements meant to persuade others to purchase. Such an expression falls in line with other forms of speech

that receive unquestioned protection, like political campaigning during an election." (9) Others are quite concerned about the direction being set by the Supreme Court on commercial speech. Law professor Tamara Piety, author of *Brandishing the First Amendment: Commercial Expression in America*, makes this argument about unregulated commercial speech:

"Once everything becomes 'expression' then nothing is regulable. It's not like we haven't tried . . . laissez faire before as a country. We had that in the 19th century; it didn't work out so well. That seems to have been the consensus from those who were living during that period and the decades that followed." (10)

If a strict standard is applied to commercial speech like it is with political speech, it might become difficult for government to regulate anything corporations say to the public unless it is blatantly fraudulent. For example, can the government require that dairy products containing bovine growth hormone be so labeled? Doing so would be in the interest of consumers, but courts have sided with the dairy associations that such government-mandated labeling violates their free speech rights. (11)

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6.4: Chapter 65- The Law and Politics of Religious Freedom

> *"Man has turned his back on God. We have sinned against Him and we need to ask for God's forgiveness. . . This pandemic — this is a result of a fallen world, a world that has turned its back on God."*
>
> *—Franklin Graham (1)*

America's Religious Schizophrenia

On first glance, the words of the First Amendment appear to be clear: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These words, however, have given rise to at least as many arguments as those dealing with freedom of speech. With so many cases, it's difficult to understand what the legal status of religion is in the United States, particularly when it clashes with other values such as civil rights.

Much of the problem stems from America's cultural schizophrenia about religion's place in public life. We seem to have conflicting traditions. While America has a long tradition of people fleeing religious persecution, some of the groups who fled religious persecution moved rather quickly to establish their own "official" religions or to set up theocracies. As Americans, we have a long tradition of opposing religious intolerance. Indeed, Thomas Jefferson advocated for a "wall of separation" between church and state. We also have a long tradition of invoking God's blessing and making other religious displays at public events. We also have a long train of religious and political leaders who, like Christian evangelist Franklin Graham, attribute our misfortunes to God's disapproval of our sinful ways. Simultaneously, we have embraced science and empiricism. Reconciling these often-conflicting traditions has not been easy.

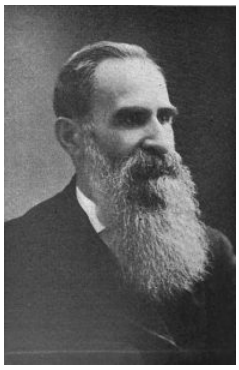
Establishment and Free Exercise of Religion

The First Amendment's treatment of religion consists of two related phrases. One is called the **establishment clause** because it restricts Congress' ability to legislate regarding "an establishment of religion." The second phrase, "or prohibiting the free exercise thereof," is referred to as the **free exercise clause**. What do these phrases mean when taken together? Clearly, the founders did not want America to become a country like England and its Church of England, with an established official religion. Interestingly, the only time religion is mentioned in the Constitution is when it says, "No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." This forbids the government from requiring that elected or appointed leaders be from a particular religion or even that they believe in God at all.

An important milestone in how the Constitution interpreted the establishment clause developed in ***Lemon v. Kurtzman* (1971).** Rhode Island was subsidizing private religious schools for money spent on teacher salaries, and Pennsylvania was reimbursing private religious schools for money spent on teacher salaries. In both states, these provisions were part of larger, general state statutes that supported elementary and secondary education. The Court struck down these practices as a violation of the establishment clause. And in doing so, it set forth the Lemon Test for government laws concerning religious organizations:

1. The statute "must have a secular legislative purpose."
2. Its "principal or primary effect must be one that neither advances nor inhibits religion."
3. It must not foster "an excessive government entanglement with religion." (2)

Beyond this, the Supreme Court has generally ruled the following: that the government should not show a preference for a particular religion, not support the propagation of religion, and not endorse religious symbols on public facilities unless all other kinds of expression are also supported or unless there is a secular justification for the symbols. The Court has also allowed "incidental" religious displays on public property—think "In God We Trust" on our money—that are unlikely to do much to forward the cause of a particular religious tradition. The court has allowed tax dollars to support students going to religiously affiliated colleges and universities, as well as to support some aspects of elementary and secondary religious school attendance, such as purchasing books and tests and providing transportation.



George Reynolds in 1909

In other areas, the Court has allowed government to restrict religion in some instances, but not in others. In ***Reynolds v. United States* (1878),** the Court upheld a federal law banning polygamy, even though George Reynolds was married to more than one wife because it accorded with his religious beliefs. This case was particularly important because the Court made the distinction between religious beliefs, which the government could not regulate, and religious practices, which the government could regulate. Without this distinction, the Court argued, people could hide all sorts of outrageous and/or dangerous behavior behind the curtain of religion. More recently, the Court ruled in *Goldman v. Weinberger (1986)* that an Orthodox Jew in the Air Force could be prohibited from wearing a yarmulke. Finally, in *Employment Division v. Smith (1990)*, the Court ruled against Native Americans who had been fired and denied state unemployment benefits because they used peyote as part of an off-duty religious ceremony. However, in *West Virginia State Board of Education v. Barnette (1943)*, the Court ruled that a compulsory flag salute law violated the religious rights of Jehovah's Witnesses, whose religious practices prohibit them from worshipping graven images. And in *Wisconsin v. Yoder (1972)*, the justices ruled that because of the Amish's religious beliefs, they were not bound by state compulsory school attendance laws.

In 1993, Congress passed the **Religious Freedom Restoration Act (RFRA),** which was designed to reverse the *Smith* decision and other restrictions on religious practice. The RFRA prohibited state and federal governments from limiting a person from exercising their religion unless it was in the government's compelling interest to do so and unless the regulation in question is the least restrictive way to achieve the government interest. In 1997, the Supreme Court struck down part of the RFRA as intruding too greatly on state powers. The case involved the Catholic Archdiocese in San Antonio Boerne, Texas, which wanted to expand a 1920s-era church building. The town of Boerne denied the building permit based on a local ordinance forbidding construction on historic district buildings. The Court sided with the town. (3) In response, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000, which gives religious organizations special land-use considerations.

The RFRA continues to be used as a defense against government intruding on religious practices. For example, it was central to a Supreme Court decision forbidding the government from banning the use of sacramental tea that contained schedule 1 illegal drugs. (4) The Supreme Court's conservative majority has looked very favorably on religious expression, even when it conflicts with other values. Consider the Court's recent decisions:

- Since Missouri funds playground construction and maintenance at public schools, it must also fund playground construction and maintenance at church schools as well. (5)
- The Colorado Civil Rights Commission displayed bias against religion in its treatment of a wedding cake baker who refused on religious grounds to bake and decorate a cake for a same-sex wedding. (6)
- The religious owners of privately held companies can be exempt from the Affordable Care Act mandate that their health insurance cover contraception for their employees. (7)
- Stores cannot have dress codes that forbid employees from wearing any kind of head scarf because it would discriminate against employees who wear head scarves for religious reasons. (8)
- Governments can own and maintain religious statues on public land—in this case a cross commemorating soldiers who died in World War I—if they have existed for a long time and if their display serves secular purposes as well as religious ones. (9)

And yet the Court also ruled that. . .

- A Muslim death row inmate could not have an imam present when he was given lethal injection, even though Alabama routinely allows Christians in that situation to have clergy with them. (10)
- President Trump's travel-ban that was clearly motivated by anti-Muslim animus does not violate the establishment clause if it is officially justified on national security grounds. (11)

Overall, the current Supreme Court is more pro-religion now than it has been in modern memory. For example, professors Lee Epstein and Eric Posner calculated that while the Court ruled in favor of religious interests 58 percent of the time during the period from 1985 to 2005, since then the Court has ruled in favor of religious interests 86 percent of the time. (12) In *Carson v. Makin (2022)*, the Court ruled that Maine's private school voucher program must allow parents to use the taxpayer-funded vouchers at religious schools.

Religion in Public Schools

A great example of the First Amendment's establishment clause and the free exercise clause intersecting is the vexing problem of religion in public school. In the 1960s, the Court limited some religious expression that could legally occur in public schools. In ***Engel v. Vitale* (1962),** the Court struck down a New York law that required students to recite daily the following prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." Despite the fact that the prayer was nondenominational and that students with permission from parents could opt out of reciting the prayer, the Court ruled that the practice constituted an establishment of religion. The next year, in ***Abington School District v. Schempp* (1963),** the Court struck down a Pennsylvania school's daily practice of having a student read the Lord's Prayer and a Bible passage over the school's PA system. In this case, the Schempp's were church-going Unitarians who objected to the practice. At the time of the *Engel* and *Abington* cases, organized prayer in public schools was not as common as many would believe today. Around 70 percent of public schools did *not* have public prayer in the early sixties. (13)

Progressives and conservatives alike have grossly distorted these and other decisions for their own political reasons. Some on the far left have argued, because this is the reality they want to see happen, that the Court has banned prayer from public schools. Similarly, to mobilize conservative voters over a false issue, some on the far right have argued that the Court has indeed banned prayer from public schools. The Supreme Court has not banned prayer or other religious expression from public schools. The table below delineates the **forms of religious expression that are and are not allowed in public schools.** (14)

Students in Public Schools Can:	**Students in Public Schools Cannot:**
Pray any time they want, so long as it is not disruptive.	
Observe a moment of silence and be asked to observe a moment of silence.	
Express their religious beliefs in homework or other course assignments, if such expression fits the assignment.	
Form and join religious clubs at school.	
Proselytize fellow students in a non-harassing manner.	Be asked to recite a prayer by school officials.
Distribute religious literature to the same extent as they are allowed to distribute other literature.	Be asked to observe a moment of silence, the purpose of which is explicitly to pray.
Express their religious beliefs orally in class where appropriate.	Use the school PA system to recite their personal prayer.
Wear religious clothing or jewelry.	Disrupt the classroom or other school routines with their prayer.
Bring religious texts to school and read them openly when appropriate.	Be proselytized by school officials.
Take courses about religion—e.g., comparative religion; the Bible as literature.	Proselytize fellow students in a harassing manner.
Be excused from religiously objectionable lessons with parental approval.	Be forced to listen to a broadcast prayer at after-school functions such as football games.
Pray or invoke God in a graduation speech of their own composition.	
Receive public tax revenue vouchers to attend public or private schools, even religious schools.	



Coach Kennedy Leading Students in Prayer

The above consensus on religion in schools faces an uncertain future now that the Court is dominated by a conservative majority. For instance in ***Kennedy v. Bremerton School District* (2022)**, the Court ruled in favor of a high school football coach who prayed on the 50-yard line immediately after every game. Many of his players joined him, and the gatherings took on the character of a public school official leading students in prayer. One parent complained to the school that their son, an atheist, felt "compelled to participate" out of fear that "he wouldn't get to play as much if he didn't participate." Despite these facts, the Court's majority characterized the coach's actions as private religious expression and overturned the *Lemon* case, but didn't replace it with a clear standard for lower courts to follow. In another blockbuster case, the Court struck down Maine's long-standing tuition assistance program that funded parents in remote areas to send their children to public or private schools. The majority struck down the law because it disallowed tuition assistance for sectarian religious schools. By ruling in ***Carson v. Makin* (2022)** that Maine's program violated the Free Exercise Clause of the First Amendment, the majority effectively said that in states with such programs, taxpayer funds must go to support sectarian education at religious schools. (15). It makes for a difficult situation for states that do not want, for example, to fund religious schools that teach students to abhor homosexuality or that won't hire gay teachers and staff–practices that are, themselves, against state law.

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6.5: Chapter 66- The Individual and the Criminal Justice System

> *"The USA offers procedural rights at trial that are on par with international standards, but this is of little consolation to those who, facing the threat of overwhelming sentences upon conviction and forced into insincere plea deals, never benefit from the protection of these rights."*
>
> *—Fair Trials International (1)*

The power differential between individuals and government is starkly on display when people stand accused of committing a crime. Not only did the founders know this in principle, they were very familiar with the English criminal justice system's historic abuse of the American colonists. So, let's take some time to understand our constitutional protections, those protections' limitations, and subsequent abuses that have been visited upon people.

The Fourth Amendment

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*

Recall ***Mapp v. Ohio* (1961),** which involved the Fourth Amendment's provision that people be protected from unreasonable searches and seizures. In that case, the Supreme Court ruled that now states—as well as the federal government—are bound to apply the Fourth Amendment's search and seizure protections to people. This applies to the **exclusionary rule** as well, meaning that any evidence that state or federal authorities gather in violation of the Fourth Amendment must be excluded from the defendant's trial. The Fourth Amendment has been used to require authorities to get warrants before they do the following:

- Attach GPS tracking devices to a suspect's car. (2)
- Search a suspect's phone for incriminating information. (3)
- Access records that reveal the physical location of cellphones. (4)



March to End Racial Profiling in Stop and Frisk

On the other hand, federal courts have given authorities broad latitude to search people on the street. In ***Terry v. Ohio* (1968),** the Supreme Court ruled that police may stop and frisk people on the street if they have a **reasonable suspicion** that the person has committed a crime, is in the process of committing a crime, or is about to commit a crime. Reasonable suspicion is a lower standard than **probable cause**, which is the standard used when judges issue specific warrants or when police operate in what are known as exigent circumstances. The Court also ruled that even if police do not have reasonable suspicion to stop and frisk someone, if that person has an outstanding warrant, police can use anything they find in court. As lawyer Taru Taylor argues, the precedent set by *Terry v. Ohio* (1968) completely turned on its head the relationship between policing authorities and ordinary citizens, putting the latter in the same situation the colonists faced before the Revolution. "Ever since *Terry*," he argues, "cops have had the despotic discretion to search or seize any U.S. citizen based on a 'reasonable suspicion' that they are a criminal or are about to commit a crime." The Founders complained in the Declaration of Independence about the general warrants the British used to oppress Americans, but actions of the police backed by the amorphous "reasonable suspicion" standard is an even more oppressive law enforcement tool than general warrants ever were. (5)

Since *Mapp v. Ohio* was decided, the Supreme Court has placed many other limitations on the exclusionary rule including good faith exceptions, exceptions for evidence obtained by someone other than police, and exceptions for situations where the incriminating evidence likely would have been found anyway without an illegal search. During traffic stops, police are allowed to examine that which is in **plain view**—e.g., on your dashboard or sitting on the back seat—without reasonable suspicion or probable cause, but they would need probable cause to search further without your permission. Anything incriminating that is in plain view can be grounds for probable cause. They can ask you to step out of the car and can frisk you with reasonable suspicion, which presumably they already have if they legally stopped your vehicle. All people should know their rights when being stopped or interviewed by the police.

The Fifth and Sixth Amendments

> *"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."*
>
> *"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."*

The Fifth and Sixth Amendments have many protections for criminal defendants. When the Fifth Amendment says that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," we refer to that as the protection against double jeopardy. **Double jeopardy** "prohibits anyone from being prosecuted twice for substantially the same crime." (6) A notable exception to the double jeopardy protection concerns the **separate sovereigns doctrine**, which means that the federal government and the state governments are separate units under our federal system. Therefore, the state government and the federal government can prosecute you separately for the same crime. (7)

The Fifth Amendment also protects against self-incrimination: no person "shall be compelled in any criminal case to be a witness against himself." In a federal or state trial, defendants are not obligated to testify, nor are suspects required to say anything to police when they are detained or arrested. To ensure that people fully exercise their freedom from self-incrimination, the Supreme Court took action in ***Miranda v. Arizona* (1966)**. In a tight 5-4 decision, the majority threw out Ernesto Miranda's kidnap and rape conviction because he gave his confession without understanding that he had a right to remain silent and had a right to have a lawyer present at his interrogation. As a result, police must inform you of your **Miranda rights**: that you have a right to remain silent, that anything you say can be used in a case against you, that you have the right to have a lawyer present, and that if you cannot afford a lawyer one will be appointed for you.

The Fifth Amendment provides a person their due process before the government can deprive them of life, liberty, or property. The idea of due process goes back to the **Magna Carta of 1215**. This agreement, which was forced upon England's King John by the aristocracy said that "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land." (8) Thus, **due process** is "A fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. . . [and] a constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious." (9) In a lecture to the University of Pennsylvania Law School, Judge Henry Friendly put together a nice list of what procedural due process means:

1. An unbiased tribunal.
2. Notice of the proposed action and the grounds asserted for it.
3. Opportunity to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross-examine adverse witnesses.

7. A decision based exclusively on the evidence presented.
8. Opportunity to be represented by counsel.
9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision. (10)

The Fifth Amendment also provides for **grand juries**, which are panels of citizens who hear evidence and decide if there is sufficient evidence to proceed with a prosecution. At this time, the protection for a grand jury indictment before moving to trial operates at the federal level only. Note that this protection has not been incorporated into the Fourteenth Amendment or made a requirement for state criminal prosecutions.

The Sixth Amendment provides for the right to counsel. As we've seen, the Supreme Court in ***Gideon v. Wainwright*** **(1963)** incorporated the Sixth Amendment into the Fourteenth Amendment and required that states also provide counsel to indigent defendants. This is an important procedural guarantee, but one that often falls short in practice. As Andrew Cohen writes, "There is a vast gulf between the broad premise of the ruling and the grim practice of legal representation for the nation's poorest litigants." He further argues that *Gideon* essentially put an unfunded mandate on the states to provide and pay for lawyers for the 80 percent of defendants who can't afford to pay for their own counsel. (11) Public defenders and lawyers assigned to defendants are chronically overworked, often with caseloads three times higher than national standards. Moreover, nationwide only 2.5 percent of state and local criminal justice budgets go to defend indigents. (12) The result is that indigent defendants often don't get the defense they deserve, and too many settle for plea bargains for reduced sentences because they fear what might happen if they go to trial against the resources of federal or state prosecutor's offices. More than 90 percent of federal and state cases are settled by plea bargain. (13)

The Eighth Amendment

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Before *Timbs v. Indiana* (2019), people were not being protected by the Eighth Amendment's provision against excessive bail and fines. States and localities got into the practice of requiring both. Given that 40 percent of Americans can't come up with $400 to pay for an unexpected car repair so they can keep going to work, it's no surprise that many Americans can't afford cash bail or fines when they are charged with a crime or when they reluctantly admit guilt in a plea bargain. (14) Cherise Fanno Burdeen writes that "More than 60 percent of people locked up in America's jails have not yet been to trial, and as many as nine in ten of those people are stuck in jail because they can't afford to post bond." (15) Being stuck in jail because you can't pay cash bail makes it impossible to work. Being unable to afford steep fines after you've pled guilty to get a fine instead of jail time, makes for a never-ending engagement with the criminal justice system. Obviously, the burdens of America's criminal justice system fall heaviest on the poor. Finally, and fortunately, in *Timbs v. Indiana* (2019), the Supreme Court indicated in its 9-0 ruling that it does not intend to let states impose excessive fines.



The Florida Electric Chair in 1999

The Eighth Amendment's ban on cruel or unusual punishment is the focus of America's longstanding debate over **capital punishment**, which is when the government kills someone as punishment for a crime. We used to impose capital punishment for many offenses, including rape, counterfeiting, accomplice to murder, and piracy. Now, capital punishment is reserved for murder, although still a possibility for treason, espionage, and terrorism. The federal criminal justice system allows for capital punishment as does the criminal justice systems in twenty-eight of fifty states.

Due to the arbitrary and racially biased way that capital punishment was meted out across the United States, the Supreme Court invoked a moratorium on applying capital punishment when it decided ***Furman v. Georgia* (1972)**. Two of the justices—Thurgood Marshall and William Brennan—opined that the death penalty violated the Constitution's prohibition against cruel and unusual punishments, regardless of procedural issues. In any case, states that practiced capital punishment rewrote their statutes, and in ***Gregg v. Georgia* (1977),** the Court upheld capital punishment again, although justices Marshall and Brennan again argued that it was inherently cruel and unusual punishment that cannot be tolerated under the Eighth Amendment. According to the Death Penalty Information Center, since the Supreme Court re-allowed capital punishment in the *Gregg* case, over 1,500 people have been put to death and there still appears to be racial disparities in how the death penalty is applied. (16)

Qualified Immunity for Police

Congress passed the Ku Klux Klan Act of 1871 to protect newly freed slaves and void the Black Codes that Southern states were using to restrict the ability of Blacks to vote, move about their communities without being assaulted, enter into contracts, and practice a profession. It has this provision:

> *"Any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."*

This seems to be a clear statement that any person acting under law (like a law enforcement officer) would be liable if they violated the Constitutional rights of any person in the United States. In 1967, however, amidst a concern about rising crime rates, the Supreme Court invented the doctrine of "qualified immunity" for police officers. The original case—*Pierson v. Ray* (1967)—involved White and Black clergy who were arrested while they were trying to have lunch at a coffee shop in a segregated bus station in Jackson, Mississippi. When the clergy tried to sue the officers for violating their Constitutional rights—as stipulated in the Ku Klux Klan Act—the Supreme Court announced in its majority opinion that police had **qualified immunity** from such lawsuits, meaning that the police cannot be sued unless the plaintiffs can show that the officers should have known that they were violating clearly established law. Note that qualified immunity does not exist in the Constitution or in the Ku Klux Klan Act.

Originally, qualified immunity protected police if they were acting "in good faith," but over the years the Court has strengthened the doctrine to give police broad authority to violate Constitutional rights without much fear of liability. For example, in fatal shootings by police, officers are charged in less than 2 percent of cases and convicted in less than a third of the cases that are charged. Joanna Schwartz, who has studied the issue extensively, writes that "just as George Floyd's murder has come to represent all that is wrong with police violence and overreach, qualified immunity has come to represent all that is wrong with our system of police accountability." (17) Clearly, police need to have the authority to do their jobs, but many on the left and right of the political spectrum believe that the pendulum has swung too far in favor of immunity for police officers.

What if. . . ?

What if we restricted plea bargaining and equalized resources between prosecutors and public defenders? This is actually an old debate in the United States. State circuit court judge Ralph Adam Fine argued back in 1987 that plea bargaining was a double evil: "It encourages crime by weakening the credibility of the system on the one hand and, on the other, it tends to extort guilty pleas from the innocent." (17) Another problematic aspect of plea bargaining is that it is paired with cash bail or the threat of very high penalties, which really put defendants in a tough spot. As former state prosecutor Melba Pearson says, "If you are in jail because of a cash bail you can't pay, pleas can sound like a great alternative to losing your job, failing to pay rent, and a variety of other negative consequences." (18) The practice of **plea bargaining**—admitting guilt to obtain a reduced sentence—has, in fact, been abandoned in a few jurisdictions in the United States, but is growing around the world. (19)

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6.6: Chapter 67- Threats to Individual Freedom--Government Versus Corporations

> *"The personal-data privacy war is long over, and you lost."*
>
> *—Ian Bogost (1)*

> *"As a general rule, a police officer can't arrest you because you wore a hat supporting a particular political candidate. But your boss could fire you for the very same reason."*
>
> *—Tom Spiggle (2)*

As citizens of a republic, we have to be on guard against encroachments on our liberty. What are the sources of those potential threats? When we think about the institutions that affect our lives, only two stand out as significant threats to our liberty. That is, only two have a track record of undermining freedom and the power to enforce tyrannical policies: governments and corporations.

The Threat from Government



The Mochida Family Being Relocated Against Their Will to a Detention Center in 1942

Government has a long track record of violating liberty, and we can be very confident that future American governments will act to limit civil liberties. Governments will limit freedom of speech and the press; they will aggressively incarcerate people; they will inflict cruel and unusual punishments; they will seize property without due process or fair compensation. Government has done these things and, in all likelihood, will do these things in the future. We can also safely say that governments are more likely to do these things in times of war or other types of civil unrest or threat.

This textbook has focused on the national government. While it is clear that the federal government has historically committed some very serious civil-liberties violations, we should also understand that our state and local governments pose the more likely threat to our individual liberties. State and local governments largely enforce criminal law, regulate things like marches and demonstrations, make decisions regarding property use and eminent domain, control schools, and enforce morals legislation. It is important to know that while government at all levels can do tremendous damage to our civil liberties, we have important recourses available to us. Obviously, we can turn to the courts to right specific wrongs. We can elect new leaders and insist that they change laws that we find oppressive. In a democratic system—even an attenuated one—the government is our servant, so we can determine the level of freedom we want individuals to have. Do we want parents to be able to deny their children life-saving modern medicine because they have objections to it? Do we want people to be able to flout public health guidelines, even though doing so endangers everyone else and makes the need for those guidelines last longer? To what extent should government decide who can marry? Those are just a couple of the many questions we need to answer as we collectively determine our civil liberties and civil rights.

The Threat from Corporations

When we talk about civil liberties, we typically talk about threats from government action and underestimate the enormous threat posed by corporate power. Sohrab Ahmari put it this way: "The sense that tyranny can only come from the government risks obscuring another, more complicated reality, which is that private actors can tyrannize us." (3) Corporations, particularly those that are large and cross state and country boundaries, are able to dictate much of our lives on a take-it-or-leave-it basis. You want the factory to stay in the United States? You'd better be willing to take a pay or benefits cut. If the company office moves from a high-tax state to a low-tax state, you'll have to uproot your family and move if you want to stay employed. We take this kind of

corporate power for granted in the United States because workers are often in a poor bargaining position. Fifty years ago, one- third of workers belonged to a union; now only 7 percent of private-sector workers belong to a union. (4) The United States also doesn't structurally empower workers like some other countries do. Take Germany's **Mitbestimmungsrecht**—or codetermination—requirement, which dates back to the 1920s and says that "depending on the size of a German limited company, a third or even half of the members of its supervisory board are voted in by its employees." (5) This kind of power for workers has helped support German wages, working conditions, and the vitality of Germany's manufacturing sector.

Large American corporations are in a political situation where they can limit the liberties of their workers or customers, and the federal government has often encouraged this development. Consider these examples:

Privacy—Privacy is not a liberty enumerated in the Constitution, but the Supreme Court has relied on privacy arguments to, among other things, protect intimate family planning decisions. (6) But the very notion of privacy undermines the insatiable corporate need for our private information, and our political leaders have allowed this to happen. Shoshanna Zuboff describes our predicament as **surveillance capitalism**—"a new economic order that claims human experience as free raw material for hidden commercial practices of extraction, prediction, and sales." (7) Reflect on the fact that your labor is worth something to corporations—they must pay for it if they want to produce value—but almost all of the information about you is freely available to corporations, who buy and sell it between themselves, aggregate it, and compile it to expand their profits. It's odd that the National Rifle Association rails against gun licensing because they don't want government to have a list of gun owners, but fails, apparently, to consider that corporate America knows exactly who owns which guns. Under surveillance capitalism, we traded privacy for convenience and connection. There have been some attempts to claw back some control over our information, most notably in Europe. The European Union implemented a uniform General Data Protection Regulation in 2018 to give Europeans better privacy protections, but nothing similar has passed in the United States.

Free speech—We've talked about the boundaries of free speech protections in the First Amendment. We cherish our ability to speak freely about the issues of the day. We often fail to realize that those protections stop at the office or factory door. As attorney Tom Spiggle writes, "Despite what many employees think, your rights to freedom of speech are fairly limited at work, and it's often perfectly legal for an employer to take action against a worker for something they said or wrote." (8) This is especially true if you work for a private-sector employer. Employees can talk about harassment or fraud or other illegal activities that they see in the workplace, and they can talk about wages and working conditions, but employers can prevent them from talking about politics. As employment lawyer Daniel Schwartz puts it, "Companies have a right to manage their workplaces as they want. They can prefer one point of view over another if they want." (9)

Neo-feudalism—Almost all people below retirement age are dependent on wages from work they do for companies. Most of them are only one or two paychecks away from financial ruin. (10) Most working-age people are dependent on their job—or their spouse or parent's job—for health insurance. America's economy is characterized by regional booms and busts, and many locations around the country have become, in journalist Chris Hedges' memorable phrase, **sacrifice zones** for America's brand of exploitative capitalism—places where the project of endless exploitation of natural resources and human labor manifests itself in the form of agricultural fields where laborers endure near slave-like conditions to produce cheap food for American tables, fulfillment centers where low-wage workers and robots process cheap goods for American front porches, and abandoned industrial centers where jobs disappeared over the horizon to places with lower wages and fewer regulations. (11)



Amazon Workers Protesting Working Conditions and Corporate Surveillance in Shakopee, Minnesota

When we bring all these ideas together, it's difficult not to come to the same conclusion as a growing number of scholars, that America is increasingly marked by neo-feudalism. **Neo-feudalism** refers to the idea that our society resembles the feudalism that existed in the Medieval period in which most ordinary people had very limited freedom and in which economic, political, and legal structures dictated the aristocracy's privileged position. However, under neo-feudalism, the privileged position in our society is occupied by the wealthy corporate elite. The Supreme Court's jurisprudence, argues law professor Daniel Greenwood,

"atavistically recapitulates feudal doctrines limiting the sovereign's authority over the medieval corporations of Aristocracy, Church, guilds, universities, and cities, as if business corporations were fundamental units of our polity. . ." (12) Ordinary people in America don't like to think of themselves as serfs, but consider how controlled people are by corporations and financial institutions. Debt—student debt, home mortgages, car loans, credit card balances, and medical bills—combined with the wage-labor imperative , the reality of sacrifice zones, and the desperation to avoid having one's family fall into the lower classes keeps us in line. We are too busy and too dependent to engage in something like a general strike. We are too afraid to step too far out of line. We are propagandized by corporate media to think that our state of affairs is normal and unchangeable. We are too busy to understand what is really happening to us. The status quo in neo-feudal America is "marked by an economic crisis with no end in sight, by the slow but steady growth of a police state aimed at the lowest rungs of society, and a political circus which keeps us enraptured long enough that we don't question what's really going on." (13) We can be protected all we want from the predations of government against our civil liberties, but those protections are ultimately meaningless if we are modern-day serfs who owe all to our corporate lords.

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6.7: Chapter 68- Civil Rights Case Study--Race

> *"We claim exactly the same rights, privileges and immunities as are enjoyed by white men —we ask nothing more, and will be content with nothing less."*
>
> *—Declaration of the Colored Mass Convention in Mobile, Alabama in April 1867 (1)*

> *"In affirming that Black Lives Matter, we need not qualify our position. To love and desire freedom and justice for ourselves is a prerequisite for wanting the same for others."*
>
> *—Belief Statement of Black Lives Matter, retrieved in 2020. (2)*

African Americans are certainly not the only group of Americans to have experienced discrimination at the hands of the government, corporations, or their neighbors. Yet it is true that they have been the victims of broader, more systemic forms of discrimination over longer periods of time than other racial or ethnic groups in the United States. Further, the legal changes that resulted largely from the Black Civil Rights Movement have revolutionized life in the United States for all people. Therefore, we will use this window into American political history to illustrate key developments in civil rights.

Race and Civil Rights Before and After the Civil War

Most Americans are not taught in school how close the country came prior to the Civil War to institutionalizing a race-based (and probably gender-based) republic that very likely would have persisted until today. In his farewell address to Congress in December, 1860, Democratic President James Buchanan proposed to amend the Constitution to allow states to affirm the right to hold slaves, allow slavery in the territories, and recognize the rights of slave owners to recover runaways wherever they fled. Congressman Thomas R. Nelson of Tennessee proposed a Constitutional amendment to forbid anyone from voting "unless he is of the Caucasian race, and of pure, unmixed blood." Most significantly, Senator William H. Seward and Representative Thomas Corwin succeeded in getting both houses of Congress to pass by 2/3 vote an amendment—known as the Corwin Amendment—which said the following: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." Outgoing President Buchanan expressly supported this amendment, and incoming Republican President Abraham Lincoln had "no objection" to it. Maryland and Kentucky had already ratified the Corwin Amendment before South Carolinian militiamen fired on federal forces at Fort Sumter, beginning the Civil War. (3)

Prior to the end of the Civil War, most Blacks were slaves, and the legal position of free Blacks was tenuous. The Supreme Court's decision in ***Dred Scott v. Sanford (1857)*** is particularly instructive in this regard. Dred Scott, a slave from Missouri, sued his owner for freedom based on the fact that his owner had taken him to Illinois, a free state, and to the Wisconsin Territory, a free territory. Chief Justice Roger Taney ruled that Scott did not have standing to sue and summed up free Blacks' precarious position when he answered his own summation question: "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?" The Court answered a resounding "No," which was its way of saying that Blacks—slave or free—could not ever expect to become full and equal members of the American political community.

In 1861, eleven Southern states seceded from the Union to create a slave-owning independent republic. After a bloody Civil War in which 620,000 people were killed, the North defeated the South. In the wake of the North's victory in the Civil War, Congress passed three amendments to the Constitution that we'll refer to as the **Civil War Amendments**. Securing passage of these amendments was difficult. The Thirteenth Amendment abolished slavery, and only barely passed with the necessary two-thirds vote. The Fourteenth Amendment defined citizenship as belonging to all persons born or naturalized in the United States, but its most important component for this chapter is its **civil rights clause**, which mandated that all people receive the "equal protection of the laws." The Fifteenth Amendment provided that citizens shall not be denied voting rights based on "race, color, or previous condition of servitude." Many Democrats were apoplectic over passage of these amendments, arguing that they would lead to racial equality, social disorder, interracial marriage and even to the collapse of Western civilization. (4)

In order to give the civil rights clause practical effect, Congress passed several Civil Rights Acts during Reconstruction (1865-1877), including the **Civil Rights Act of 1875**. This law stipulated that people must be allowed full and equal access to public accommodations—public facilities as well as private businesses that serve the general public, like theaters, inns, restaurants, etc.—regardless of their race or color. This was the last civil rights bill to pass Congress for eighty-two years. When President Rutherford B. Hayes removed federal troops from the South in 1877, Whites moved quickly to reinstate a racial hierarchy resembling the one that had developed under slavery.

The majority of Southern Whites had no intention of allowing Blacks to vote, to be treated equally by the law, or to develop economic independence. In the years immediately after the Civil War, Southern states passed a series of laws that became known as **Black Codes**, which kept as many African American citizens in conditions of servitude as possible. Blacks were forbidden from self-employment, and thereby denied trades like blacksmithing, which they may have learned while they were slaves. More importantly, Black Codes required Blacks to sign "annual labor contracts with plantation, mill, or mine owners. If African Americans refused or could show no proof of gainful employment, they would be charged with vagrancy and put on the auction block, with their labor sold to the highest bidder. . . [If] they left the plantation, lumber camp, or mine, they would be jailed and auctioned off." (5) And, of course, Whites discriminated rampantly by not allowing Blacks to access basic commercial businesses.

Many court cases resulted directly from passing the 1875 Civil Rights Act, as Blacks continued to be refused service on account of their race at inns, hotels, railroads, and theaters around the country. In Tennessee, Sallie J. Robinson purchased a ticket to ride on the Memphis & Charleston Railroad but was removed by the conductor because she was Black. In Missouri, W. H. R. Agee was denied accommodation at the Nichols House Inn because he was Black. Similarly, Bird Gee was not allowed to eat at an inn in Topeka, Kansas because he was Black. In San Francisco, George M. Tyler was not allowed to attend a production at Maguire's Theatre because he was Black. (6) These four cases reached the Supreme Court in 1883 and were decided together as the ***Civil Rights Cases (1883)***. This was an important test of the meaning of civil rights and the Fourteenth Amendment's mandate that no state may deny any person the equal protection of the laws. In a devastating decision for those who believed in equality, eight of the nine Supreme Court justices ruled in favor of private business owners in these cases and overturned the 1875 Civil Rights Act as unconstitutional. How could the Court rule that this Act was unconstitutional—a law designed to guarantee the provisions of the Fourteenth Amendment? The Court ruled that while states must not discriminate, the owners of private businesses were free to discriminate against potential customers on the basis of race. Justice Bradley, writing for the majority, said that "Civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings."

There was one dissenter in the *Civil Rights Cases*—**Justice John Marshall Harlan**—who argued that the states were complicit in the so-called private discrimination of businessmen. He wrote, the "keeper of an inn is in the exercise of a quasi-public employment. The law gives him special privileges and he is charged with certain duties and responsibilities to the public. The public nature of his employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person." Unfortunately, Harlan was alone among the justices in being many decades ahead of his time. The decision in the *Civil Rights Cases* sent a huge message to businessmen that the United States Constitution would not stand in the way if they wanted to refuse service to Blacks. Many did just that—and this behavior was not limited to the South, nor was it only targeted at African Americans.

The Supreme Court sent an even more disastrous signal in the case ***Plessy v. Ferguson (1896)***. In 1890, the Louisiana legislature passed the Separate Car Act requiring that all trains operating in the state be segregated by race and forbidding people from "going into a coach or compartment to which by race he does not belong." Most train companies resented the costs of putting extra cars on their trains to meet the Separate Car Act requirements. Train companies and a New Orleans civil rights group known as the Committee of Citizens worked with New York lawyer Albion Tourgee to bring suit against the law. This suit was to be a test case, and the Committee needed someone to violate the law, to be punished, and have standing to sue. On June 7, 1892, **Homer Plessy** purchased a first-class ticket on the East Louisiana Railroad's train running from New Orleans to Covington, Louisiana, and took a seat in a car reserved for Whites only. Plessy, a married shoemaker whose heritage was African and French, has been referred to as one-eighth Black. Indeed, press accounts of the time indicate that the train conductor had to ask Plessy his race before he was arrested for being in the "wrong" car. The Committee of Citizens hoped that the Supreme Court would rule in favor of Plessy, for surely this was a violation of the civil rights clause of the Fourteenth Amendment: Here is a state law that mandated segregating train passenger according to race. But the Supreme Court upheld the law as constitutional, arguing that no violation of

the civil rights clause had taken place because the passengers were all treated equally, albeit in a segregated fashion. This reasoning became known as the **separate but equal doctrine** and was the rationale to officially sanction segregation for the next six decades. Justice Harlan was again the lone dissenter; he argued that, "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." His argument did not carry the day and the precedent set by *Plessy* allowed separate but equal to characterize American life. (7)

Categories of Racial Discrimination in the Twentieth Century

Discrimination against African Americans took many forms, not all of which can be covered here. However, you should be aware of the following five categories of discrimination:

Segregated Public Accommodations—Using as precedents the *Civil Rights Cases (1883)* and *Plessy v. Ferguson (1896)*, states and businessmen freely segregated and excluded Blacks as well as other racial and ethnic group members. Just about any form of public accommodation you can think of was segregated somewhere at some time in the United States—and again, this practice was not restricted to the South. Public accommodations such as trains, buses, drinking fountains, hospitals, cemeteries, parks, beaches, and swimming pools were segregated. Private business owners of gas stations, hotels, inns, theaters, restaurants, lunch counters, and the like were free to refuse service to African Americans and others.

One might be tempted to think of segregated public accommodations as the least objectionable form of discrimination. After all, it does not affect one's overt political equality the way that prohibitions against voting might. One would be wrong in such thinking. Clearly, the victims of segregated public accommodations did not feel this way, and the reasons are obvious. Segregated public accommodations placed an omnipresent badge of civic inferiority on its victims that shrank their universe of social, economic, and political possibilities. This was especially true given that segregation was backed up by actual or threatened violence. A great resource in helping us understand this perspective is *Remembering Jim Crow: African Americans Talk About Life in the Segregated South*. In that book, Ann Pointer, a resident of Macon County, Alabama, described the impact of not having access to public transportation:

"We could not ride the buses although we were paying taxes. But we couldn't ride those buses. Nothing rode the bus but the whites. And they would ride and throw trash, throw rocks and everything at us on the road and whoop and holler, 'nigger, nigger, nigger," all up and down the road. We weren't allowed to say one word to them or throw back or nothing, because if you throw back at them you was going to jail." (8)

Violating the rules and norms of segregated public accommodations was life-threatening for Blacks all across America, albeit with obvious regional and local differences. Traveling for business or family visits took on a very different character for African Americans, as they had to be careful about where they could safely go, where they could find a hotel or restaurant that would serve them, or where they could find a welcoming gas station. In 1937, **Victor H. Green**, a New York City postman, created the first ***Green Book,*** a reference guide to tell Blacks where they could safely go in the New York Metropolitan area. He updated and expanded the Green Books every year, encompassing more and more of the country. The first edition was fifteen pages long, and the final edition in 1967 was ninety-nine pages long. The book even listed private residences who would welcome Black travelers to stay in areas where there were no welcoming hotels. (9)



Sign Put up in 1942 Outside a New Housing Development in Detroit

Segregated Housing—There have been many forms of housing discrimination in American history. You should know about three of them. Many cities used **overt city ordinances** that divided the town into racial zones and mandated that residential property in "White" areas be purchased by Whites, while property in "Black" areas be purchased by people of color. In a case out of

Louisville, Kentucky, the Supreme Court ruled these kinds of city ordinances unconstitutional in 1917 (*Buchanan v. Warley*), but the practice continued for decades after that decision.

Another form of housing discrimination was **racially or religiously restrictive covenants**, which were agreements entered into between buyer and seller that restricted the future sale of the property to only certain kinds of people. The Court ruled against these kinds of covenants in 1948, when the Shelley family in St. Louis successfully challenged a racial covenant on their home (*Shelley v. Kraemer*), but it was very difficult to enforce the Court's ruling until the Fair Housing Act passed in 1968. Even though they are no longer enforceable in real estate transactions, these kinds of covenants are still on the books across the country because it's actually difficult for individual homeowners to get them removed. What did these covenants look like? Here are but two examples:

"…no part of said property nor any portion thereof shall be for said term of fifty years occupied by any person not of the Caucasian race, it being intended thereby to restrict the use of said property for said period of time against the occupancy of owners or tenants of any portion of said property for residence or other purpose by people of the Negro or Mongolian race." [Covenant initiated in the Greater Ville neighborhood of St. Louis, Missouri, in 1911]

"That neither said lots nor portions thereof or interest therein shall ever be leased, sold, devised, conveyed to or inherited or be otherwise acquired by or become property of any person other than of the Caucasian race." [Covenant initiated in the El Cerrito neighborhood of San Diego, California, in 1950] (10)

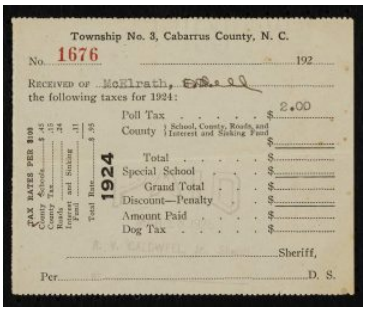
The third form of housing discrimination took the form of **redlining**, which was a practice once encouraged by the federal Home Owner's Loan Corporation in which minority neighborhoods were red lined, meaning that loans would be very difficult to get and/or expensive. This institutionalized discrimination in government-backed mortgages made it difficult for Black families in particular to build home equity, which is the primary way that most families build wealth. (11) These forms of housing discrimination were perpetuated by Whites who did not want to live in integrated neighborhoods and who often committed or threatened violence. The legacy of housing segregation is apparent all over the United States, and it is not an accident. As activist and author Tim Wise explains,

"*The so-called ghetto was created and not accidentally. It was designed as a virtual holding pen—a concentration camp were we to insist upon honest language—within which impoverished persons of color would be contained. It was created by generations of housing discrimination, which limited where its residents could live. It was created by decade after decade of white riots against black people whenever they would move into white neighborhoods. It was created by deindustrialization and the flight of good-paying manufacturing jobs overseas."* (12)

Wise is on to something that we need to remember. The world that we see today is always a legacy of the past, and often that past includes intentional decisions to construct the future that we occupy. In other words, the unequal and somewhat segregated living arrangements that we see today were in large part the result of conscious government policies and decisions that happened before we were born. Richard Rothstein, a Distinguished Fellow of the Economic Policy Institute, outlined this well in his book *The Color of Law: A Forgotten History of How Our Government Segregated America*. "Racial segregation in housing," Rothstein wrote, "was not merely a project of southerners in the former slaveholding Confederacy. It was a nation-wide project of the federal government in the twentieth century, designed and implemented by its most liberal leaders." (13) Rothstein documents in great detail the government policies designed to segregate America: The Federal Housing Administration's bankrolling of segregated housing developments and evading the Supreme Court's ruling striking down racially restrictive covenants; the use of government housing projects to concentrate Black residents while promoting single-family home ownership to Whites; the suppression of Black wages through the lack of federal action until the mid-1960s to enforce anti-discrimination in the workplace; the tacit support of federal agencies for redlining by banks. And, lest we forget, the profession of realtors went to considerable lengths to maintain the right of property owners to discriminate with respect to whom they would sell or rent housing. Famously, Ronald Reagan made the following statement in 1966 in defense of just this kind of discrimination: "If an individual wants to discriminate against Negroes or others in selling or renting his house, he has a right to do so." For much of the 20th Century, the real estate industry actively worked against free market principles in the American housing market and in so doing, "dramatically reshaped the country for all Americans" by constructing segregated neighborhoods north and south, east and west. (14)

Segregated Education—The separate but equal doctrine was applied to education with a vengeance and without any pretense of equality between Black schools and White schools. Almost all school districts in the South were segregated from the late nineteenth century into the 1960s. Some school districts outside of the South were segregated as well, including the schools in the nation's

capital. The first legal crack in segregated schools came from California and dealt with Latinx students. In 1946 the 9th Federal Circuit Court struck down separate "Mexican schools" in Orange County, with the Court saying that "A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage." (15) The NAACP Legal Defense Fund took up a number of school segregation cases in the 1950s, one of which was that of Linda Brown, who was denied admittance to her neighborhood school and instead had to take a bus to a segregated school. In ***Brown v. Board of Education of Topeka, Kansas (1954)***, the Supreme Court ruled 9-0 that segregated schools were inherently unequal, reversing the *Plessy* doctrine as it applied to education. Thus, *de jure*, by law, segregation is unconstitutional, but *de facto*, in fact, segregation is alive and well in America's schools. (16)


Township No. 3, Cabarrus County, N. C.

No. 1676 192

Received of McElrath, Odell $2.00

the following taxes for 1924:

Poll Tax . . . . . $ 2.00

County } School, County, Roads, and Interest and Sinking Fund . . . . . $

Total . . . . . $

Special School . . . . . $

Grand Total . . . . . $

Discount—Penalty . . . . . $

Amount Paid . . . . . $

Dog Tax . . . . . $

1924

TAX RATES PER $100

County Schools ..... $ .45

County Tax ..... .35

Roads ..... .24

Interest and Sinking ..... .11

Total Rate ..... $ .95

Sheriff,

Per D. S.

Poll Tax Receipt for Odell McElrath in 1924

Voter Discrimination—The Fifteenth Amendment guaranteed the right to vote regardless of race, but Southern white elites did not want African Americans to vote. Beginning after Reconstruction ended in 1877, southern Democrats regained control over state legislatures and undertook several measures to keep blacks from voting. One measure was extralegal and consisted of outright **intimidation**. Groups like the Ku Klux Klan lynched Blacks, shot those who were politically active, bombed their houses, got them fired from their jobs, burned crosses to frighten communities, and spied on civil rights organizations. In many southern states, **literacy tests** were used to keep African Americans from registering to vote. Potential voters were required to take an often-subjective "test" of their literacy, their knowledge of the federal or state constitution, or their knowledge of completely arcane bits of information. Literacy tests were combined in some cases with **good character clauses**, in which people needed to be certified as being of good character in order to register. **Grandfather clauses** automatically registered anyone–Whites–whose male ancestors were eligible to vote at some date before the Fifteenth Amendment passed. Southern states instituted **white primaries**, in which people of color were barred from voting. This was important because the South was solidly Democratic at the time, meaning that the primary race was often of greater significance than the general election in November. **Poll taxes** were also used to discourage Blacks from voting. Finally, Southern Whites used **racial gerrymandering** to design election districts that bisected African Americans populations, thereby diluting their numbers should they actually register to vote.

Affirmative Action for Whites—Most White Americans don't realize the extent to which they have benefited first from slavery and second from government policies that privileged Whites. It almost goes without saying that many Whites and White-owned companies benefited directly from the 300 years of labor theft that was slavery—although there is an argument to be made that many poor Southern Whites saw their wages artificially suppressed by slavery's existence. Ira Katznelson, Columbia University political science and history professor, has documented how twentieth-century government policies designed to help all Americans ended up being tailored in ways that disproportionately helped White Americans. This was accomplished primarily due to the powerful Southern Democratic voting bloc that resulted from the Solid South phenomenon. Southern Democrats dominated congressional committees and insisted on certain racist concessions when it came to policy making.

How did this work? Many of the New Deal programs were specifically designed to disadvantage most African Americans. For example, most Southern Blacks at the time were working as domestic maids or farm laborers. Southern politicians insisted that New Deal legislation that promoted labor unions, set minimum wages, set maximum hours, and established Social Security explicitly exclude maids and farm workers. As Florida Representative James Mark Wilcox put it, "You cannot put the Negro and the White man on the same basis and get away with it." (17) Social Security is a classic example: according to Katznelson, fully 65 percent of Blacks were initially excluded from the program because of concessions to Southern politicians. The same was true of the National Recovery Administration, the National Labor Relations Board, and the Fair Labor Standards Act. Even the GI Bill suffered from Southern meddling. Largely crafted by Representative John Rankin of Mississippi—an avowed racist—the law was written in a way that did not disturb segregation in the South. The GI Bill offered veterans educational grants, subsidized home

mortgages and business loans, assistance finding a job, and job training—but all of this was administered at the local rather than federal level. Banks could still red-line Blacks' mortgage applications, colleges could still deny Blacks entrance, and local jobs programs could still discriminate. Thus, the GI Bill was an undoubted boon to White veterans, but often an unfulfilled promise to Black veterans.

Has affirmative action for Whites ended? Mostly, although higher education is a sector that still practices a sneaky form of it. While the Supreme Court struck down the ability of colleges and universities to use race as one of many factors in making admissions decisions, legacy admissions and admissions for the children of donors and faculty at elite public and private schools still skews in favor of Whites. At Harvard, for example, fully 43 percent of White students were admitted using these kinds of preferences–and three-quarters of them would have been rejected had they not been the children of alumni, donors, or faculty, or had they not played particular sports like lacrosse or sailing. (18) Elite public universities also skew disproportionately White by recruiting the children of wealthy people who reside out of state. For example, "places like the University of Alabama give an effective 45 percent bump to the children of the top 1 percent," which happen to be predominantly White. (19)

Important Civil Rights Legislation

Beginning in 1957, the federal government passed several civil rights laws, three of which you need to know in any U.S. Government course. They are the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968.



President Lyndon Johnson Signing the Civil Rights Act of 1964

Civil Rights Act of 1964—Demanded by civil rights leaders for decades, proposed by President John F. Kennedy, and pushed through by President Lyndon Johnson after Kennedy's assassination, the Civil Rights Act of 1964 was a monumental political achievement. It was truly bi-partisan legislation, with a majority of congressional Republicans and Democrats supporting it. However, Southern Democrats and a few Republicans almost unanimously opposed it. Notably, Republican Senator Barry Goldwater opposed the Civil Rights Act. Because Goldwater was the Republican Party's nominee for president that year, it was an indication of the Republican turn against civil rights for decades to come. The Civil Rights Act of 1964 did the following:

- Outlawed discrimination in voter registration, but this section had poor enforcement language.
- Established that "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."
- Authorized the U.S. Attorney General to sue in cases where people were denied the equal protection of the laws, unequal access to public accommodations, or equal access to public schools and colleges.
- Banned discrimination in programs that receive federal assistance.
- Banned employment discrimination directed at "any individual because of his race, color, religion, sex or national origin." This includes hiring, firing, conditions of employment, and compensation.
- Created the Equal Employment Opportunity Commission (EEOC), which is empowered to make prosecution recommendations to the U. S. Attorney General regarding employment discrimination. (20)

Voting Rights Act of 1965—After the Civil Rights Act passed and after President Lyndon Johnson trounced Barry Goldwater in the 1964 election, Johnson vowed during his 1965 State of the Union address to "eliminate every remaining obstacle to the right and the opportunity to vote." The Voting Rights Act was designed to shore up a weakness of the Civil Rights Act—namely, that it was insufficiently aggressive in defending the right of all people to vote regardless of race. Passed later in 1965—again, over Southern opposition—the Voting Rights Act did the following:

- Established that "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of

race or color."

- Established that whenever the U. S. Attorney General was engaged in a proceeding against a state or district that was violating the right to vote, federal authorities were empowered to come in and take over the voting registration and election management from local authorities until the problems were rectified.
- Established that "no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State" that has used such tests or devices to disenfranchise people on the basis of race or color.
- Established a pre-clearance provision whereby states or political subdivisions of states who have engaged in racially motivated voter discrimination need to submit "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" to the Justice Department for approval.

Note that in ***Shelby County v. Holder*** **(2012),** the Supreme Court struck down the Voting Rights Act's important "pre-clearance" provision, allowing primarily Southern states to change their voting laws without having them approved ahead of time by the Justice Department. This opened the gates for many Republican-led state legislatures to pass without Justice Department review onerous voter I.D. laws that fell heaviest on the poor, the elderly, and people of color. Writing in dissent, Justice Ginsberg argued that "Throwing out preclearance because it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." (21)

Civil Rights Act of 1968—The Civil Rights Act of 1968 was primarily designed to address two issues that previous legislation had not—namely, applying the Bill of Rights protections on Native American reservations and equal access to housing. Thus, in popular parlance, the Civil Rights Act of 1968 encompasses the following two main pieces:

- **Indian Civil Rights Act**—This part of the Civil Rights Act of 1968 applied most of the Bill of Rights and Constitutional protections to Native Americans living under the various tribes' jurisdiction. It stipulated that no Indian tribe shall prohibit free exercise of religion, free speech, free press, or the right of people to assemble peaceably and petition for redress of grievances. Further, no Indian tribe can violate the Fourth Amendment's protections against unreasonable and warrantless searches and seizures. Indian tribes were forbidden from conducting unreasonable and warrantless searches and seizures, taking of private property without just compensation, violating fair trial procedures, and inflicting cruel and unusual punishments.
- **Fair Housing Act**—This part of the Civil Rights Act of 1968 outlawed housing discrimination. The Act made it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." Further, it made it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." Another interesting part of the law is that it made it unlawful "to represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."

These three laws set the framework for breaking down ***de jure*** **discrimination**—that is, discrimination written into laws and official policies at the federal, state, local, and company levels. What they did not do was eliminate ***de facto*** **discrimination**, which is discrimination in everyday life that is unsupported by law or policy. The issues that remain, according to civil rights leaders, are no less significant: dealing with the lasting impact of past *de jure* discrimination, discriminatory policing, social prejudice affecting how people interact in all sorts of settings, and unequal access to economic and educational opportunities. Some of these challenges can be addressed by public policy, while others are difficult to address via government action. For example, Gene Slater, an expert on housing discrimination, writes that "To this day, an estimated four million housing discrimination complaints each year go uninvestigated, and fair housing remains largely unenforced." (22)

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6.8: Chapter 69- Civil Rights Case Study--Sex

> *"The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her."*
>
> *—Seneca Falls Declaration (1)*

> *"The backlash against U.S. women is real. As the misconception of equality between the sexes becomes more ubiquitous, so does the attempt to restrict the boundaries of women's personal and political power. . . Let this dismissal of a woman's experience move you to anger. Turn that outrage into political power. Do not vote for them unless they work for us. Do not have sex with them, do not break bread with them, do not nurture them if they don't prioritize our freedom to control our bodies and our lives. I am not a post-feminism feminist. I am the Third Wave."*
>
> *—Rebecca Walker (2)*

The Condition of Women in the Early Nineteenth Century

Before we consider the women's movement in the United States, we should be clear about the conditions that women faced for much of American history. Let's take a snapshot of these conditions in the early part of the nineteenth century. Women could not vote or own property. Women were treated much like children were, in the sense that they could not sign legally binding contracts. Tradition and the laws of marriage held that men ruled over their wives and controlled whatever income they earned. Nor could women easily escape horrible marriages, as a divorce was extremely difficult to obtain. The so-called **Cult of True Womanhood** or the **Cult of Domesticity** held that women should be the moral cultivators of their children, should be devoted to their domestic duties, and should be morally pure, religiously pious, and submissive to men. Institutions of higher education would not admit women until Oberlin College became the first to do so in the 1830s. Even so, educational opportunities for women were limited until after World War Two. Women who worked out of the home were almost always relegated to low-paying factory work, or later, to low-paying office or classroom work. Moreover, they were banned by social custom, educational disadvantage, and professional discrimination from entering higher paying or prestigious professions like law, medicine, and business. Women were banned from religious leadership positions, and in some cases were forbidden even to speak in church. (3)

Overview of the Women's Movement

The women's movement has undergone three waves of activity. The **first wave of feminism** happened in the nineteenth century and early part of the twentieth century, and it focused on attaining the right to vote and other changes in the law. In the **second wave of feminism**, from the early 1960s to the early 1980s, activists worked to change the law, but also saw that *de facto* social discrimination was equally responsible for the oppression of women. The **third wave of feminism** began in the 1980s and appears to be a much more fragmented phenomenon. Third-wave feminists do seem to have in common a willingness to see and make connections between feminists and members of other oppressed groups. For instance, feminists share with many civil rights leaders and scholars their emphasis of **intersectionality**, a term that legal scholar and civil rights activist Kimberlé Crenshaw coined in 1989. Intersectionality refers to "the complex, cumulative way in which the effects of multiple forms of discrimination—such as racism, sexism, and classism—combine, overlap, or intersect, especially in the experiences of marginalized individuals or groups." (4) Crenshaw wrote, "Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated." (5) Third-wave feminism is also concerned about the backlash against women, male violence, and harassment.

Establishing Political Equality

The women's movement began in the late eighteenth century as women began to question the exclusion of half the human population from the principles espoused by natural rights philosophers—i.e., liberty, equality, and property. Perhaps most

famously, **Abigail Adams (1744-1826)** wrote her husband, John, in 1776 to "Remember the ladies" in the deliberations over independence from Britain, and also that "If particular care and attention is not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation." John Adams wrote back, with respect to giving more consideration of female interests in the laws of the new country, "I cannot but laugh." In 1792 England, **Mary Wollstonecraft (1759-1797)**—incidentally, mother of Mary Shelley, the author of *Frankenstein*—wrote the extremely influential book, *A Vindication of the Rights of Woman*, as an explicit attack on liberal theories that argued for liberty and equality only among men. She emphasized that women and men were both capable of developing their mental faculties through education, but that women were denied that opportunity. She wrote that, "to render . . . the social compact truly equitable . . . women must be allowed to found their virtue on knowledge, which is scarcely possible unless they be educated by the same pursuits as men. For they are now made so inferior by ignorance and low desires, as not to deserve to be ranked with them." (6)



Elizabeth Cady Stanton

The American feminist movement supported, and received support from, the abolition movement that developed in the 1830s and 40s. Abolitionist leaders such as Frederick Douglass and William Lloyd Garrison spoke out against the second-class status of women. Frederick Douglass, for instance, attended the Seneca Falls meeting that produced the **Seneca Falls Declaration** in 1848. That convention was the creation of **Lucretia Mott (1793-1880)** and **Elizabeth Cady Stanton (1815-1902)**, and the story is an interesting one. Eight years earlier, Mott and Stanton attended the World Anti-Slavery Convention in London as representatives of American abolitionist organizations, but the mostly male delegates refused to allow the female delegates seats. Due to that snubbing, the two women had to watch the proceedings from the balcony. That experience helped convince them that women, as well as slaves, were in need of emancipation. The **Seneca Falls Declaration** was modeled after the Declaration of Independence, asserting that, "all men and women are created equal," and leveled a series of charges against men—that they have denied women the right to vote, the right to own property, education, employment opportunity, and that women are held to a different moral standard than men. Other American feminists—some present at Seneca Falls and others not—were also abolitionists. These included Sarah and Angelina Grimke, Margaret Fuller, Lucy Stone, and Sojourner Truth.

After the Civil War, the Republican-dominated Congress passed the **Fifteenth Amendment** to the Constitution, which guaranteed the right to vote regardless of "race, color, or previous condition of servitude." There was some consideration of extending the right to vote to women, but most congressmen dismissed it out of hand. Feminists were outraged when the Fifteenth Amendment left women out, and they created two organizations to fight for the right to vote: The National Woman Suffrage Association and the American Woman Suffrage Association, which differed in their tactics. The two organizations merged in 1890 to form the **National American Woman Suffrage Association** (NAWSA). **Carrie Chapman Catt** (1859-1947), took over leadership of the Association from **Susan B. Anthony** (1820-1906). The struggle for women's suffrage was a long and strident one. Feminists marched in parades, held demonstrations, gave speeches, wrote editorials, chained themselves to the gates of the White House, and went on hunger strikes in prison. The suffragettes were often attacked by angry crowds and suffered daily insults and criticism. They did make progress, however. Some Western states like Wyoming, Utah, Colorado, and Idaho granted women the right to vote before 1900. Between 1906 and 1920, NAWSA membership grew from less than 20,000 to two million, and a whole series of states granted women the right to vote. The **Nineteenth Amendment** to the Constitution, granting the right to vote regardless of sex, passed Congress in 1919 and was ratified by Tennessee in 1920, just barely giving it enough states to put it into effect.

Other Frontiers for Women's Civil Rights

While passing the Nineteenth Amendment was the hallmark achievement of feminism in America, there have been numerous other successes as well. One partial success has been equality in the workplace. In 1890, 19 percent of women worked for pay outside of the home, typically as domestic servants, textile workers, food workers, and other low-paid factory workers. Where they held jobs similar to male workers, they were routinely paid less. Labor unions saw female workers as competitors and their presence in the workforce as suppressing male wages. In 1906, Samuel Gompers, president of the American Federation of Labor, said that "The wife as a wage-earner is a disadvantage economically considered, and socially is unnecessary." (7) Women formed their own unions, such as the Women's Trade Union League and the International Ladies Garment Workers Union. The first major female-led labor strike took place in 1909-1910 among low-paid garment workers in New York City. The strike collapsed when male garment workers went back to work in 1910. The next year, a massive fire broke out at the Triangle Shirtwaist Company. Because management had locked the fire escapes, 146 workers, mostly women, perished in the blaze. The **Triangle Shirtwaist Factory Fire** was a watershed in both the women's movement and the worker-safety movement.

The role of women in the workplace was transformed by the labor requirements of World War II. As men flooded into the armed services, millions of women worked in arms factories doing skilled jobs that had never before been opened to women. In addition, thousands of women served in the armed forces in capacities ranging from nurses to pilots. (8) When the war ended and women were again displaced by men in the workforce, many women thought that this was profoundly unfair. Women continued to face discrimination in professional fields such as medicine, law, sports, and business. For instance, both Sandra Day O'Connor and Ruth Bader Ginsberg—who later became Supreme Court justices—faced discrimination in the law profession in the 1950s when they graduated from law school.

Many people argue that the second wave of feminism was launched by the 1963 publication of **Betty Friedan's *The Feminine Mystique***, in which she argued that women—especially educated women—were unfulfilled by the social requirement of subsuming their identities under their domestic duties as wives and mothers. The **Civil Rights Act of 1964** explicitly outlawed employment discrimination, as we've mentioned in a previous chapter. This applied to sexual discrimination as well as racial and religious discrimination, and women have benefited greatly by having many professional doors opened. Discrimination persisted, however, in numerous ways. In 1976, the Supreme Court ruled that discrimination against pregnant women was not a form of sex discrimination that was forbidden by the Civil Rights Act of 1964 because not all women are pregnant. Congress responded in 1978 and passed the **Pregnancy Discrimination Act**, which banned discrimination "on the basis of pregnancy, childbirth, or related medical conditions" in medium and large sized companies. (9)

Alice Paul, of the National Women's Party, first proposed an **Equal Rights Amendment** to the Constitution in 1923. It read as follows: "Men and Women shall have equal rights throughout the United States and every place subject to its jurisdiction." The proposal languished for decades in the U.S. Congress, despite being reintroduced repeatedly. A later version did pass Congress. It read "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." The Equal Rights Amendment was submitted to the states, but it came three states short of the three-quarters it needed to ratify and the deadline ran out in 1982. In 2020, Virginia became the thirty-eighth state to ratify the Equal Rights Amendment, but in the meantime, some states had rescinded their support for the amendment. Democrats in the House of Representatives pushed through a measure to retroactively eliminate the ratification deadline, but as of this writing, Republicans in the Senate refused to take up the measure and the Trump administration did not support it either. (10) If supporters of the Equal Rights Amendment want to see it pass, they may have to start over with Congress resubmitting it to all the states and setting an indeterminate clock for ratification.

All three waves of the feminist movement in the United States have been interested in establishing equality with respect to sexual relations between men and women. In 1876, the New Jersey Supreme Court made a ruling very typical in American history in the case of *English v. English*. The court ruled that Abigail English was not entitled to divorce her husband, John, even though he subjected her to battery and rape when she refused to have sex with him. It wasn't until the 1960s that the feminist movement was successful in starting a serious discussion of marital rape, but as recently as 1975, every state had a marital exception for rape. It wasn't until 1993 that all states finally dropped marital exceptions for rape in their statutory language. (11)

Bodily autonomy and access to contraception are also significant issues for American feminists. **Margaret Sanger** (1879-1966)—a nurse in New York City who ministered in the 1910s to poorly housed, poorly paid women who wanted to regulate their family size—defied the law to educate women about contraception. In 1914, she distributed her pamphlet, *Family Limitation*, *which* led to an arrest warrant from which she fled to Europe to avoid prosecution. In 1916 after charges were dropped, she returned to continue her

work advocating for birth control into the 1950s. The birth-control movement was rejected by the medical establishment. Oral contraceptives were developed in the 1960s, and they revolutionized sexual relationships by giving women greater choices and control over whether and when to have children. States continued to try to limit access to birth control devices.



Pro-Choice Protester in Minnesota

When its membership reached a critical mass of progressives, the Supreme Court helped turn the tide in favor of greater reproductive freedom. The Court ruled in ***Griswold v. Connecticut*** **(1965)** that married couples had a right to privacy with respect to reproductive issues, thereby striking down a Connecticut law that forbade anyone from selling contraceptive devices or instructing anyone on their use. This finding of a right to privacy was then used in ***Roe v. Wade*** **(1973)**, which granted a fundamental right to terminate an unwanted pregnancy in the first trimester. The ruling granted progressively greater state power to regulate abortion in the second trimester, and even more state control in the third trimester. Most feminists defend the "right to choose" as essential to women taking their place alongside men in modern society and fear that a government that is strong enough to force a woman to carry a pregnancy to term against her will is strong enough to intrude itself into any sort of intimate medical or personal decision a woman or a man might want to make.

The resurgence of conservatism on the Court resulted in an about face for women's reproductive freedom. In *Planned Parenthood v. Casey* (1992), the Court reaffirmed the constitutional right to choose abortion before fetal viability–that is, until about the 23rd week of pregnancy–saying that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." However, the Court in *Casey* opened the door to restrictions on abortion before viability if they did not constitute an "undue burden" on women. Conservative state legislatures across the United States then imposed a wide variety of restrictions on access to abortion providers, making it virtually impossible in some states for poor women to access abortion. In 2021 the Court went so far as to uphold a Texas law that allows any person to sue any other person who provides or helps facilitate an abortion from six weeks into the pregnancy, which is so early that some women don't yet know they are pregnant. (12) Then the hammer fell in 2022 when, for the first time, the Court withdrew a right from Americans that it had previously recognized. In ***Dobbs v. Jackson Women's Health Organization*** **(2022)**, the conservatives reversed *Roe* and *Casey* and stated flatly that "the Constitution does not confer a right to an abortion" because it is not explicitly enumerated in the document and because the right to an abortion is not "rooted in the nation's history and tradition." Of course, the practice of abortion is deeply rooted in American (and world) history, and the fact that abortion was outlawed in the United States in the nineteenth century has something to do with the fact that women were forbidden from voting and being doctors at the time.

Third-wave feminism is broadening the base of the women's liberation movement, which has traditionally—with exceptions, of course—been anchored by white, middle or upper-class women. Third-wave feminism has been most forcefully articulated by women from ethnic minority groups, who have intimately felt oppressed on account of their gender as well as their race. In 1992, the same year as the Clarence Thomas confirmation hearings, activist and writer **Rebecca Walker** exemplified this phenomenon when she coined the term 'third wave' in her *Ms. Magazine* article, "Becoming the Third Wave." In addition, third-wave feminists have embraced the cause of lesbians and trans-gendered people. Another component of third-wave feminism consists of eco-

feminists, who understand ecological degradation as being linked to the women's oppression and the triumph of male-oriented exploitive behaviors. Philosopher Carol Hay summarizes the message of third-wave feminism:

"That sexism and racism and other forms of oppression like classism (discrimination against people of lower socioeconomic status) and ableism (discrimination against people with disabilities) and homophobia and transphobia are always interconnected, and as long as we continue to ignore these relationships we'll only ever advance the interests of some women at the expense of others." (13)



Black and Pink Feminist Symbol

One of the most difficult obstacles to feminism today is the sense that leaders of the past already "solved" women's problems. But feminist author Julie Zeilinger points out, "Unfortunately, sexism is alive and well—even if it may take a different form than concrete issues like being denied voting rights or limiting the ability of an unmarried woman to buy her own car." (14) Feminists today note that women are still subject to verbal harassment and physical violence at the hands of men; that they are portrayed in the media as men's playthings; that they are subject to moral double-standards not inflicted upon men; that many politicians seem to be on a crusade to control women's bodies; that their aspirations are often not supported by educators. This kind of treatment is referred to by feminist writer Laura Bates as **Everyday Sexism**, and it's very political in that it serves to make the public sphere—public streets, mass transit, workplaces, colleges and universities—hostile places for women. (15) With the *Dobbs* decision, bodily autonomy for American women is dependent on their state of residence and what personal resources they possess.

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6.9: Chapter 70- Civil Rights Case Study--Sexual Orientation

> *"You can have as many debates about gay marriage as you want, and over the last 22 years of campaigning for it, I've had my share. You can debate theology, and the divide between church and state, the issue of procreation, the red herring of polygamy, and on and on. But what it all really comes down to is the primary institution of love. The small percentage of people who are gay or lesbian were born, as all humans are, with the capacity to love and the need to be loved. These things, above everything, are what make life worth living. And unlike every other minority, almost all of us grew up among and part of the majority, in families where the highest form of that love was between our parents in marriage. To feel you will never know that, never feel that, is to experience a deep psychic wound that takes years to recover from."*
>
> *—Andrew Sullivan in 2011 (1)*

Background and Historical Development of Homosexuality as an Identity



Human Variety

Most Americans think of the gay rights movement as a recent phenomenon of the 1980s and 1990s, but it is actually somewhat older than that. Of course, homosexual behavior is as old as human civilization and evident across both tolerant and intolerant societies. Homosexuality as a form of personal identity—or even as a sexual orientation beyond one's voluntary control—is a much newer concept. While some scholars claim that a continuous gay subculture has existed in the West since as early as the twelfth century, everyone agrees that by the early 1700s, Europe possessed numerous established meeting places for homosexuals. John D'Emilio argues that modern capitalism transformed the family as an economic unit, and wage labor in a capitalist market opened a space for the development of what we call homosexuality today. He suggests that "Only when individuals began to make their living through wage labor, instead of as parts of an interdependent family unit, was it possible for homosexual desire to coalesce into a personal identity—an identity based on the ability to remain outside the heterosexual family and to construct a personal life based on attraction to one's own sex. By the end of the [nineteenth] century, a class of men and women existed who recognized their erotic interest in their own sex, saw it as a trait that set them apart from the majority, and sought others like themselves." (2)

The American colonists followed the precedent of their English cousins and outlawed **sodomy**, by which they meant all forms of nonprocreative sex, whether by individuals, heterosexual couples, or homosexual couples. Over time, however, laws against sodomy tended to be used more often against homosexual activity, and specifically anti-gay laws also went into effect. Rhode Island forbade sex between women in 1647, as did New Haven in 1655, and Massachusetts forbade cross-dressing in 1696. The laws governing sexual behavior were put in place to enforce a hetero-normative, marriage-and-family-centric worldview. But as Dartmouth College professor Michael Bronski wrote, puritanical societies of colonial America were "extraordinarily intolerant" at the same time that they were "often surprisingly lax." While the laws were quite strict and enforced with imprisonment, the lash, and capital punishment in celebrated cases, there does seem to be quite a bit of evidence that people could privately engage in homosexual behavior—even when others knew about or suspected it was happening—so long as it did not rile the public. This was probably easier to pull off in cities than it was in small towns. (3)

By the latter part of the nineteenth and early part of the twentieth centuries, just as the medical profession deemed same-sex attraction a disorder, some homosexuals came to see themselves as positively defined by their sexual orientation. Many others

repressed or hid their identities from their families, their employers, and from themselves. It is primarily for this reason that the historical incidence of homosexuality is almost certainly underrepresented. For those who embraced their sexual orientation, it was important for them to meet and develop relationships with other gay men and women. By the 1910s and 1920s, gay and lesbian bars, bathhouses, cafés, restaurants, and music halls were flourishing in most large American cities such as New York, Chicago, Boston, San Francisco, St. Louis, and Los Angeles. Other homosexuals formed private social clubs or cruised notorious pick-up areas in major cities. They faced prosecution, social ostracism, and employment discrimination if they were caught. (4)

In England, celebrated playwright **Oscar Wilde** (1854-1900) was convicted and imprisoned in 1895 for "gross indecency with other male persons" and for corrupting young men. The trial made famous this euphemism for homosexuality: "The love that dares not speak its name." Wilde eloquently defended his behavior—"There is nothing unnatural about it," he said on the stand. Oscar Wilde's trial and conviction "provided the stamp of legitimacy for the suppression of any public mention of same-sex love and served as a warning to its adherents." (5)

The Early Gay Rights Movement

Given this context, it is easy to see that it was difficult for anyone to start an organized gay liberation movement. One of the first organizations dedicated to promoting the equality of gays and lesbians was the **Scientific-Humanitarian Committee** founded in 1897 by Magnus Hirschfeld in Berlin. This committee dedicated itself to removing **Paragraph 175** from Germany's legal code, which penalized male homosexuality: "A man who fornicates with another man or lets himself be so abused will be punished with imprisonment." (6) Hirschfeld also directed the **Institute for Sexual Research** in Berlin. In surveys conducted in 1912 among 17,160 people, the Institute documented that the rate of homosexuality was 2.29 percent. (7) Other homosexual groups and gay-themed journals were started in Germany in the early part of the twentieth century, all of which flourished during the Weimar Republic in the 1920s. Finally, after much lobbying, the Reichstag approved a reform bill in 1929 that no longer penalized homosexuality. All these developments were reversed when the Nazis came to power in 1933. On May 6, 1933, the Nazis ransacked the Institute for Sexual Research and burned its library of 10,000 books on sex and gender. The Nazis went on to persecute homosexuals throughout Germany, a task made easier because local German police stations kept "pink lists" of gay men in each community. In 1936, Heinrich Himmler, head of the dreaded SS, created the Reich Central Office for the Combating of Homosexuality and Abortion. Around 100,000 German homosexuals—almost all gay men—were arrested, many were sent to prisons, and thousands of them perished in concentration camps. (8)

The nascent American gay liberation movement learned lessons from the European experience and attempted unsuccessfully to jumpstart change in American society. Members of the German Scientific-Humanitarian Committee lectured in New York early in the twentieth century. The **Society for Human Rights**, formed by **Henry Gerber** (1892-1972) in Chicago in 1924, was the first gay rights group in America. The Society set out to publish a journal, make connections with European gay rights groups, and publicly make the case that sodomy laws should be repealed, but its leaders were quickly arrested and prosecuted by Chicago police. The cost of defending himself at three separate trials bankrupted Henry Gerber, even though the charges were ultimately dismissed. He lost his job at the Postal Service, and the Society didn't survive its leaders' prosecution. Gerber quietly spent the rest of his life helping gay men develop a sense of community and connection. Meanwhile in New York, the **Veterans Benevolent Association** formed in 1945 and attempted to secure G. I. Bill benefits for homosexual veterans who had been dishonorably discharged. It did not succeed. (9)

Persecution of homosexuals ramped up during the McCarthy period—i.e., late 1940s and the 1950s—as the federal government looked for national security risks by investigating the private lives of its employees. Between 1950 and 1953, between 40 and 60 homosexuals a month were driven out of their government positions. (10) State and local governments persecuted homosexuals as well by continually raiding gay establishments and hangouts, prosecuting people either for being gay or for homosexual behavior, and removing homosexuals from government positions.



Phyllis Lyon, 79, left, and Del Martin, 83, right, at Their Marriage Ceremony

The modern gay rights movement was born in the midst of this persecution. In 1947 under the pseudonym Lisa Ben, which is an anagram of "lesbian," **Edythe Eyde** wrote *Vice Versa: America's Gayest Magazine*, America's first regular homosexual publication. (11) In 1951 a group led by **Harry Hay (1912-2002)** founded the **Mattachine Society**, which was dedicated to changing the public's mind about the "deviancy" of homosexuals. Founded in Los Angeles, the group took its name from Mattacino, an Italian theatrical jester character who spoke the truth to the king from behind a mask. Similar societies were created in large cities across the country. In its mission statement, the Mattachine Society pledged to unify "homosexuals isolated from their own kind," to educate homosexuals and heterosexuals toward "an ethical homosexual culture," and to assist "our people who are victimized daily." (12) The Society published a homophile magazine called *One*, which was initially banned by the Post Office. The Supreme Court ruled in 1958 that the ban violated the Mattachine Society's first amendment rights. The Society was very influential in the gay rights movement in the 1960s but became eclipsed in the 1970s by more militant groups. It finally disbanded in 1987. The first postwar lesbian organization was the **Daughters of Bilitis**, founded in 1955 in San Francisco by **Del Martin** and **Phyllis Lyon**. It, too, created a magazine—in this case called *The Ladder*. Active throughout the 1950s and 1960s, the Daughters of Bilitis survived until it was broken apart in the 1970s by internal factionalism. In 1957 **Frank Kameny** was fired from his government position with the Army Map Service because he was gay. He sued the government, and his case became the first civil rights case on the issue of sexual orientation to reach the Supreme Court. He lost, but did not give up the fight. In 1965 he organized the first gay rights demonstration in front of the White House. He received a formal apology from the U.S. government in 2009 for his unjust dismissal from federal service.

From Compton's Cafeteria to Don't Ask Don't Tell

In August of 1966, a group of trans women, fed up with the regular abuse they took at the hands of police, sparked a riot at Gene Compton's Cafeteria in the Tenderloin District of San Francisco. As described by Sam Levin in *The Guardian*, "the night ended with overturned tables, a destroyed police car, a newsstand set on fire, and the women hauled off in officer's paddy wagons." (13) The most well-known event in the history of the American gay liberation movement is without a doubt the **Stonewall Rebellion**. The Stonewall Inn was a gay bar in the Greenwich Village section of New York City. Eight police officers raided the establishment after midnight on June 28, 1969. This was not an unusual occurrence, but on that night the police met considerable resistance from Stonewall patrons and others in the neighborhood. More police arrived, beating protesters—who, in turn, were throwing bottles and rocks. Eventually, hundreds of police officers were battling a couple thousand protesters. The rioting lasted three nights. This was the first time that large numbers of homosexuals resisted police action, and it energized an already-forming nationwide revitalization of the gay-liberation movement. Activists founded new groups such as the Gay Liberation Front and the Gay Activists Alliance, and employed traditional political tactics such as marches, demonstrations, strikes, boycotts, lobbying, campaigning, and fund-raising.

Aside from making political demands to decriminalize homosexuality and to end discrimination against homosexuals, gay rights groups targeted the medical establishment's century-old stance that homosexuality was an illness. That line became untenable as research into the nature of homosexuality increasingly suggested that problems suffered by gays and lesbians were less a result of their sexual orientation and more a result of homophobia, discrimination, alienation from families, and social marginalization. As early as 1948, with the publication of **Alfred Kinsey's** *Sexual Behavior in the Human Male*, the medical community knew that 4 percent of men were exclusively homosexual throughout their lives. Then, in 1953, Kinsey published *Sexual Behavior in the Human Female*, which documented that 1 percent of women were exclusively homosexual throughout their lives. The National Association of Mental Health passed a resolution in 1970 calling to decriminalize homosexuality. In 1972, the National Association of Social Workers decided to reject the notion that homosexuality was an illness. By 1975, both the American Psychological Association and the American Psychiatric Association had voted to remove homosexuality from their lists of pathologies.

The 1970s and 80s also saw changes in the political sphere. In 1974, **Elaine Noble** became the first openly lesbian woman elected to public office. She won a seat in the Massachusetts state House of Representatives. In an interview, Noble said that her first campaign was "ugly," with gunshots through her windows, and harassment of people visiting her house and campaign office. Once, while in office, feces were left in her desk. She won re-election in 1976. (14) In 1978, **Harvey Milk** took office as the first openly gay man elected to public office, having been elected in November of 1977 to be on the San Francisco Board of Supervisors. Ten days after the election he recorded three tapes that he gave to friends and his lawyer, to be listened to in the event of his assassination. He said, "I fully realize that a person who stands for what I stand for—a gay activist—becomes the target or potential target for a person who is insecure, terrified, afraid, or very disturbed themselves." He sponsored a bill banning discrimination in San Francisco on the basis of sexual orientation, and Mayor George Moscone signed it into law. On November 27, 1978, Dan White, a former member of the Board of Supervisors who had recently resigned his position and then asked to be reinstated, assassinated Mayor Moscone and Harvey Milk with a .38 revolver. (15)

In 1994 President Bill Clinton's administration instituted a Don't Ask, Don't Tell policy in the U.S. military. The practice of drumming people out of the military for their sexual orientation was as old as the republic. The **Don't Ask, Don't Tell** policy essentially allowed homosexual men and women to serve in the military as long as they remained closeted—which was the *don't tell* part of the policy. The military would not actively look for gays and lesbians in the ranks—the *don't ask* part of the policy—but it would not tolerate them if they were discovered. In 2010, Democrats in the House of Representatives amended the Defense Authorization Act to end Don't Ask, Don't Tell and allow gays and lesbians to serve openly in the military, but Republicans led by Senator John McCain successfully filibustered it in the Senate. Later that year, a standalone bill ending Don't Ask, Don't Tell finally passed both chambers and was signed by President Barack Obama.

Marriage Equality and the Equality Act

A high-profile issue with respect to the gay liberation movement was marriage equality. (16) The marriage equality issue came to a legal battle pitting civil rights leaders against two prominent attempts to stop the cultural shift in favor of marriage equality: The Defense of Marriage Act and California's Proposition 8. In 1996, Congress passed what it called the **Defense of Marriage Act (DOMA)**, which defined marriage for federal purposes to exclude same-sex marriage and also permitted states to refuse to recognize same-sex marriages performed in other states. At the time, no state allowed same-sex marriages, but it soon became legal in some places either as a result of court decisions or changes in state law. Challenges to DOMA and California's Proposition 8 worked their way up to the Supreme Court, and in 2013, the Supreme Court issued rulings on both.

In ***United States v. Windsor (2013)***, the Court invalidated those portions of DOMA that denied federal benefits to same-sex marriage partners. *The New York Times* summarized the case this way:

The case before the justices concerned two New York City women, Edith Windsor and Thea Clara Spyer, who married in 2007 in Canada. Ms. Spyer died in 2009, and Ms. Windsor inherited her property. The federal law did not allow the Internal Revenue Service to treat Ms. Windsor as a surviving spouse, and she faced a tax bill of about $360,000, which a spouse in an opposite-sex marriage would not have had to pay. (17)

In a 5-4 decision, the progressive justices pulled Justice Anthony Kennedy onto their side, and the Court ruled in favor of Ms. Windsor. The Defense of Marriage Act's provisions regarding the federal definition were declared unconstitutional.

The second case centered on California's **Proposition 8**, which was a ballot initiative that passed with 52 percent of the vote in 2008 to amend the California state constitution to forbid gay marriage. The proposition was upheld by state courts but challenged in federal courts as well. In 2010, a federal district court ruled that Proposition 8 was an unconstitutional violation of the Fourteenth Amendment's due process and equal protection clauses. The state of California refused to participate in the appeal and the case–*Hollingsworth v. Perry (2013)*—was appealed to the Supreme Court by the original private proponents of Proposition 8. However, the Court ruled on technical grounds that the private proponents of Prop 8 did not have standing to bring the appeal, and that decision left in place the lower federal court's ruling that Prop 8 is unconstitutional. Both *Hollingsworth v. Perry (2013)* and *United States v. Windsor (2013)* were decided by narrow 5-4 decisions.



Supreme Court Decides Obergefell v. Hodges

The legal fallout from the Windsor case was swift. In Utah, a federal judge named Robert Shelby struck down a state referendum that had defined marriage as one man and one woman, writing, "Applying the law as it is required to do, the court holds that Utah's prohibition on same-sex marriage conflicts with the United States Constitution's guarantees of equal protection and due process under the law. The State's current laws deny its gay and lesbian citizens their fundamental right to marry and, in so doing, demean the dignity of these same-sex couples for no rational reason. Accordingly, the court finds that these laws are unconstitutional." (18) A test case arose almost immediately. James Obergefell and John Arthur married in Maryland right after the Windsor case was decided, and then sued the state of Ohio, their state of residence, when it refused to recognize their union. By the time the case reached the Supreme Court in 2015, it had been joined with three other similar cases from different jurisdictions around the country. The Court ruled 5-4 in ***Obergefell v. Hodges* (2015)** that state prohibitions against same-sex marriages were unconstitutional, as was the portion of the Defense of Marriage Act that allowed states to refuse to recognize gay marriages performed in other states.

In 2020, the Supreme Court ruled that the 1964 Civil Rights Act's prohibition of workplace discrimination based on "sex" covered discrimination against members of the LGBTQ community as well. (19) In 2022 Congress passed the **Respect for Marriage Act**, which required that states must recognize same-sex marriages across state lines and also made clear that same-sex couples have the same federal benefits as any married couple. However, it did not require states to allow gay marriages in their own statutes—and so they could go back to not allowing such marriages if the Supreme Court overturned its own precedent in Obergefell. The Respect for Marriage Act also specifically allowed religious organizations to refuse goods and services to gay marriages without losing their tax exempt status. Lest one think that the United States has come to accept equal and fair treatment for all people regardless of their sexual orientation or their adherence (or not) to gender binaries, one is always reminded that legal and social commitments to LGBTQ equality remain under assault. Indeed, the Human Rights Campaign named 2021 as the worst year in recent history for LGBTQ rights as conservatives enacted a "record-shattering number of anti-LGBTQ measures into law." (20)

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CHAPTER OVERVIEW

7: Crime and Criminal Justice

Social Problems in the News

"Wilson St. Residents Stunned by Shooting," the headline said. A shooting of a toddler in Chattanooga, TN, left a neighbor afraid. At 9:45 p.m. on a Friday night, someone walked up to an apartment and fired a gun through a window. One bullet struck the toddler in the leg, and another bullet struck a 20-year-old male with him in the hand. A neighbor across the hallway heard the shots and later told a reporter, "It scared me, my heart was beating, my hands were shaking. I was nervous and scared, is the baby going to survive. I was stuck on my bed and I was like what am I supposed to do, go see who is at my door or if I open it I might get shot at. I'm worrying about the baby, that's all I'm worrying about." Because the 20-year-old victim was a known gang member, police suspected that the incident was related to a drive-by gang shooting that occurred earlier in the evening.

Source: Boatwright, 2011Boatwright, M. (2011, March 5). Wilson St. residents stunned by shooting. *WRCB-TV*. Retrieved from http://www.wrcbtv.com/Global/story.asp?S=14194540.

As this poignant account reminds us, many people across the nation live in fear of crime, and you may know several people, perhaps including yourself, who have been victims of a crime. The study of crime bears directly on this book's theme of continuity and change: Crime seems to have always been with us, yet sound social science research points to many programs and policies with great promise for reducing crime if only our nation would undertake them. We begin with some conceptual issues in understanding crime before turning to the types of crime, explanations for crime, and some aspects of the criminal justice system.

7.1: The Problem of Crime
7.2: Types of Crime
7.3: Who Commits Crime?
7.4: Explaining Crime
7.5: The Criminal Justice System
7.6: Reducing Crime
7.7: Property Crimes
7.8: Crimes Against the Person
7.9: Dangerous Objects and Substances
7.10: Inchoate Offenses
7.11: Group Criminality
7.12: Affirmative Defenses

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7.1: The Problem of Crime

Learning Objectives

- Understand the extent of public concern about crime.
- Explain how the news media contribute to myths about crime.
- Describe how crime in the United States is measured.

Put most simply, **crime** is behavior that is prohibited by the criminal law because it is considered especially harmful or offensive. This simple definition, however, raises many questions:

- Who decides what is offensive or harmful?
- Are some harmful behaviors not considered crimes, and are some crimes not that harmful?
- Are some people more likely than others to be considered criminals because of their gender, race and ethnicity, social class, age, or other aspect of their social backgrounds?

These questions lie at the heart of the sociological study of deviance, of which crime is a special type. **Deviance** is behavior that violates social norms and arouses strong social disapproval. This definition reflects the common sociological view that deviance is not a quality of a behavior itself but rather the result of what other people think about the behavior. This view is reflected in an often-cited quote from sociologist Howard S. Becker (1963, p. 9),Becker, H. S. (1963). *Outsiders: Studies in the sociology of deviance*. New York, NY: Free Press. who wrote several decades ago that “deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules or sanctions to an ‘offender.’ The deviant is one to whom that label has been successfully applied; deviant behavior is behavior that people so label.”

This definition reminds us that some harmful behaviors, such as white-collar crime, may not be considered deviant and fail to result in severe legal punishment, perhaps because wealthy individuals perform them. It also reminds us that some less harmful behaviors, such as prostitution, may be considered very deviant because the public deems the behavior immoral and because poor people engage in them. As these possibilities suggest, the application of a criminal label to an offender is *problematic*: People arrested and/or convicted of a crime may not have engaged in a very harmful behavior or even in the behavior of which they are suspected, and people with no criminal record have in fact engaged in harmful and even criminal behavior.

Public Concern about Crime

The American public is clearly concerned about crime. Two-thirds of the public said in a 2011 Gallup poll that crime had risen from the previous year. More than a third, 38 percent, said they would be “afraid to walk alone at night” within one mile of their residence; this figure translates to more than 86 million adults. In the same poll, 47 percent (or about 114 million adults) said they worry about their homes being burglarized, and 44 percent said they worry about thefts of or from their motor vehicles. Corresponding figures for other crimes were: experiencing identity theft, 67 percent; getting mugged, 34 percent; getting attacked while driving your car, 19 percent; being sexually assaulted, 22 percent (including 37 percent of women); and getting murdered, 20 percent (among the lowest figures in this list, but one that still amounts to 42 million adults worrying about being murdered).

Although the public is concerned about crime, at least some of this concern might exceed what the facts about crime would justify. For example, although most of the public, as we just noted, thinks the crime rate has been rising, this rate has actually been declining since the early 1990s. And although one-fifth of the public worries about getting murdered, homicides comprise less than one-tenth of 1 percent of all violent and property crime (*street crime*); only about 7 of every 100,000 Americans, or 0.007 percent, are murdered every year; homicide does not rank among the top ten causes of death (which include heart disease and cancer); and the number of homicides is much lower than the number of deaths from harmful behavior by corporations (such as pollution or unsafe products and workplaces). Crime is indeed a real problem, but public concern about crime may be higher than the facts warrant.

Media Myths

To the extent this is true, news media coverage of crime may be partly responsible (Robinson, 2011).Robinson, M. B. (2011). *Media coverage of crime and criminal justice*. Durham, NC: Carolina Academic Press. For example, if the television news and

newspapers suddenly have several stories about a few sensational crimes, public concern about crime may jump, even though crime in general has not risen at all. Similarly, the news media have increased their crime coverage even when crime is falling, as happened during the early 1990s when the major US television networks more than doubled their nightly news stories about crime even though crime had been declining (Freeman, 1994).Freeman, M. (1994, March 14). Networks doubled crime coverage in '93, despite flat violence levels in US society. *Mediaweek*, *4*, p. 4.

The news media, in fact, distort the amount and nature of crime in several ways (Surette, 2011).Surette, R. (2011). *Media, crime, and criminal justice: Images, realities, and policies* (4th ed.). Belmont, CA: Wadsworth. First, they overdramatize crime by reporting it in many news stories. Crime dominates news coverage in many newspapers and television newscasts, and, as just noted, the media may devote much coverage to a few sensational crimes and create the false impression that a "crime wave" is occurring when the crime rate may even be declining.

Second, the media devote particularly heavy coverage to violent crime, reflecting the common saying that "if it bleeds, it leads." For example, more than 25 percent of the crime stories on evening newscasts and in newspapers concern homicide, even though homicide comprises less than 1 percent of all crime (Feld, 2003).Feld, B. C. (2003). The politics of race and juvenile justice: The "due process revolution" and the conservative reaction. *Justice Quarterly, 20*, 765–800. Similarly, the vast majority of crime stories feature violent crime, even though violent crime comprises only about 12–14 percent of all street crimes combined. Media attention to violent crime thus gives the public the false impression that most crime is violent when in fact most crime involves a theft of some sort (*property crime*).

Third, the media tend to highlight crimes committed by African Americans or other people of color and crimes with white victims. A greater percentage of crime stories involve people of color as offenders than is true in arrest statistics. A greater percentage of crime stories also involve whites as victims than is actually true, and newspaper stories of white-victim crimes are longer than those of black-victim crimes. Crimes in which African Americans are the offenders and whites are the victims also receive disproportionate media coverage even though most crimes involve offenders and victims of the same race. In all these ways, the news media exaggerate the extent to which people of color commit crimes and the extent to which whites are victims of crimes.

Fourth, the media also tend to highlight crimes committed by youths. In one study of thousands of local newscast stories, about two-thirds of the stories about violence depicted youthful offenders, even though teenagers commit only about 14–16 percent of violent crime (Jackson, 1997).Jackson, D. Z. (1997, September 10). No wonder we're afraid of youths. *The Boston Globe*, p. A15. In a related problem, media stories involving teenagers are much more likely to show them committing crime or other antisocial acts than committing good deeds or other positive behavior. In these ways, the news media convey a false impression that leads the public to believe both that youths commit much of our violent crime and that youth violence has been rising even though it has actually declined since the early 1990s.

Measuring Crime

It is surprisingly difficult to know how much crime occurs. Crime is not like the weather, when we all can see whether it is raining, snowing, or sunny. Usually when crime occurs, only the criminal and the victim, and sometimes an occasional witness, know about it. We thus have an incomplete picture of the crime problem, but because of various data sources we still have a pretty good understanding of how much crime exists and of who is most likely to commit it and be victimized by it.

The government's primary source of crime data is the **Uniform Crime Reports (UCR)**, published annually by the Federal Bureau of Investigation. The FBI gathers its data from police departments around the country who tell the FBI about crimes that have come to their attention. The police also tell the FBI whether someone is arrested for the crime and, if so, the person's age, gender, and race. The FBI gathers all these UCR data and reports them in an annual volume called *Crime in the United States* (Federal Bureau of Investigation, 2011).Federal Bureau of Investigation. (2011). *Crime in the United States, 2010*. Washington, DC: Author.

Most UCR data concern the so-called **Part I Crimes**, eight felonies that the FBI considers the most serious. Four of these are violent crimes—homicide, rape, aggravated assault, and robbery—and four are property crimes—burglary, larceny (e.g., shoplifting, pick-pocketing, purse-snatching), motor vehicle theft, and arson.

According to the FBI, 1,246,248 violent crimes and 9,082,887 property crimes occurred in 2010, for a total of about 10.3 million. This is the nation's official crime count, and by any standard it is a lot of crime. However, this number is much lower than it should be because *more than half of all crime victims do not report their crimes to the police*, and the police thus do not know about them.

These unreported crimes represent “hidden” crimes or, as they are often called, the **dark figure of crime**. Thus the true crime problem is much greater than suggested by the UCR.

This underreporting of crime represents a major problem for the UCR’s validity. Several other problems exist. First, the UCR excludes white-collar crimes and thus diverts attention away from their harm. Second, police practices affect the number of crimes listed in the UCR. For example, the police do not record every report they hear from a citizen as a crime. Sometimes they do not have the time to do so, and sometimes they do not believe the citizen. If they do not record the report, the FBI does not count it as a crime. If the police start recording more reports or fail to record even more reports, the official crime rate will rise or fall, respectively, even though the actual number of crimes has not changed. This fact has led to crime-reporting scandals during the past two decades, as police departments in several major cities failed to record many crimes or downgraded others (e.g., calling a rape a simple assault) in an apparent effort to make it appear as if the crime rate were falling (Hart, 2004).Hart, A. (2004, *February 21*). Report finds Atlanta police cut figures on crimes. *New York Times*, p. A1. In a third problem, if crime victims become more or less likely to report their crimes to the police (e.g., the advent of the 911 emergency number may have increased calls to the police), the official crime rate will again change, even if the actual number of crimes has not.

To get a more accurate picture of crime, the federal government began in the early 1970s to administer a survey, now called the **National Crime Victimization Survey (NCVS)**, to tens of thousands of randomly selected US households. People in the households are asked whether they or their residence has been the victim of several different types of crimes in the past half year. Their responses are then extrapolated to the entire US population to yield fairly accurate estimates of the actual number of crimes occurring in the nation. These estimates are thought to be more accurate than the UCR’s figures, even if it is true that victims sometimes might not want to tell NCVS interviewers what happened to them (Catalano, 2006).Catalano, S. M. (2006). *The measurement of crime: Victim reporting and police recording*. New York, NY: LFB Scholarly.

Table 8.1 lists the number of street crimes as reported by the UCR and estimated by NCVS. Note that these two crime sources do not measure exactly the crimes. For example, the NCVS excludes commercial crimes such as shoplifting, while the UCR includes them. The NCVS also includes simple assaults (where someone receives only a minor injury), while the UCR excludes them. These differences notwithstanding, we can still see that the NCVS estimates about 1.8 times as many crimes as the UCR reports to us. The *dark figure* of crime is large indeed.

Table 8.1 Number of Crimes: Uniform Crime Reports (UCR) and National Crime Victimization Survey (NCVS), 2010

	UCR	NCVS
Violent crime	1,246,248	3,817,380
Property crime	9,082,887	14,908,330
Total	10,329,135	18,725,710

Source: Maguire, K. (Ed.). (2011). *Sourcebook of criminal justice statistics*. Retrieved from http://www.albany.edu/sourcebook/toc_3.html.

A third source of crime information is the **self-report survey**. Here subjects, usually adolescents, indicate on an anonymous questionnaire whether and how often they committed various offenses in, say, the past year. Typically, they also answer questions about their family relationships, school performance, and other aspects of their backgrounds. Self-report studies have yielded valuable information about delinquency and explanations of crime. Like the NCVS, they underscore how much crime is committed that does not come to the attention of the police.

Key Takeaways

- Much of the American public is concerned about crime, and many people worry about becoming a victim of various types of crime.
- The news media overdramatize the nature and amount of crime, and they give more attention to crimes involving African Americans and Latinos as offenders and whites as victims.

- The nation’s major source of crime data is the Uniform Crime Reports (UCR). However, many people do not report their crimes to the police, and police practices affect the number of “official” crimes reported by the UCR.

For Your Review

1. Why do you think so many Americans are afraid of crime even though the crime rate has greatly declined since the early 1990s?
2. Why is it difficult to measure crime accurately? Why is the measurement of crime by the FBI inaccurate?

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7.2: Types of Crime

Learning Objectives

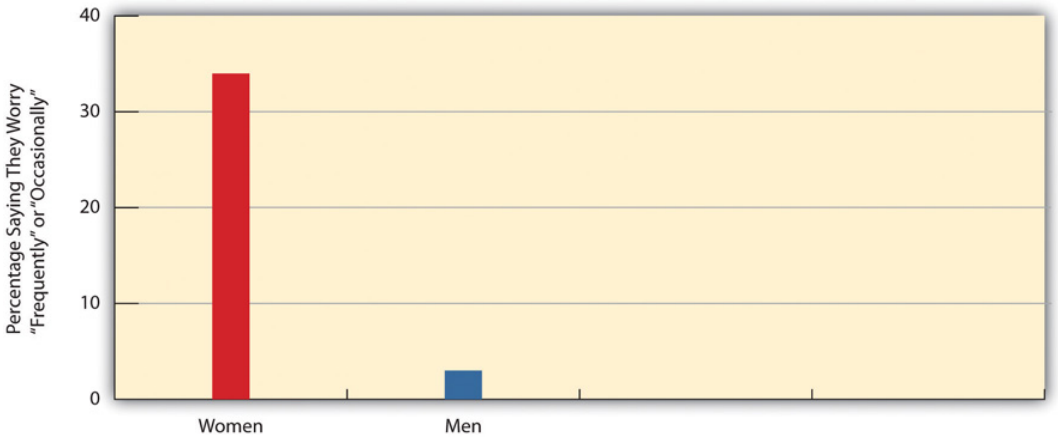
1. Describe the major aspects of homicide.
2. Discuss evidence indicating that white-collar crime is more serious than street crime.
3. Explain the major issues raised by the concept of consensual crime.

Many types of crime exist. Criminologists commonly group crimes into several major categories: (1) violent crime; (2) property crime; (3) white-collar crime; (4) organized crime; and (5) consensual or victimless crime. Within each category, many more specific crimes exist. For example, violent crime includes homicide, aggravated and simple assault, rape and sexual assault, and robbery, while property crime includes burglary, larceny, motor vehicle theft, and arson. Because a full discussion of the many types of crime would take several chapters or even an entire book or more, we highlight here the most important dimensions of the major categories of crime and the issues they raise for public safety and crime control.

Violent Crime

Even if, as our earlier discussion indicated, the news media exaggerate the problem of violent crime, it remains true that violent crime plagues many communities around the country and is the type of crime that most concerns Americans. The news story that began this chapter reminds us that violent crime is all too real for too many people; it traps some people inside their homes and makes others afraid to let their children play outside or even to walk to school. Rape and sexual assault are a common concern for many women and leads them to be more fearful of being victimized than men: In the 2011 Gallup poll mentioned earlier, 37 percent of women said they worried about being sexually assaulted, compared to only 6 percent of men (see Figure 8.1).

Figure 8.1 Gender and Worry about Being Sexually Assaulted (Percentage Saying They Worry “Frequently” or “Occasionally”)



Source: Data from Maguire, K. (Ed.). (2011). Sourcebook of criminal justice statistics. Retrieved from http://www.albany.edu/sourcebook.

Research on violent crime tends to focus on homicide and on rape and sexual assault. Homicide, of course, is considered the most serious crime because it involves the taking of a human life. As well, homicide data are considered more accurate than those for other crimes because most homicides come to the attention of the police and are more likely than other crimes to lead to an arrest. For its part, the focus on rape and sexual assault reflects the contemporary women’s movement’s interest in these related crimes beginning in the 1970s and the corresponding interest of criminologists, both female and male, in the criminal victimization of women.

Certain aspects of homicide are worth noting. First, although some homicides are premeditated, most in fact are relatively spontaneous and the result of intense emotions like anger, hatred, or jealousy (Fox, Levin, & Quinet, 2012).Fox, J. A., Levin, J., & Quinet, K. (2012). *The will to kill: Making sense of senseless murder*. Upper Saddle River, NJ: Prentice Hall. Two people may begin arguing for any number of reasons, and things escalate. A fight may then ensue that results in a fatal injury, but one of the

antagonists may also pick up a weapon and use it. About 25–50 percent of all homicides are victim-precipitated, meaning that the eventual victim is the one who starts the argument or the first one to escalate it once it has begun.

Second, and related to the first aspect, most homicide offenders and victims knew each other before the homicide occurred. Indeed, about three-fourths of all homicides involve nonstrangers, and only one-fourth involve strangers. Intimate partners (spouses, ex-spouses, and current and former partners) and other relatives commit almost 30 percent of all homicides (Messner, Deane, & Beaulieu, 2002).Messner, S. F., Deane, G., & Beaulieu, M. (2002). A log-multiplicative association model for allocating homicides with unknown victim-offender relationships. *Criminology, 40*, 457–479. Thus although fear of a deadly attack by a stranger dominates the American consciousness, we in fact are much more likely on average to be killed by someone we know than by someone we do not know.

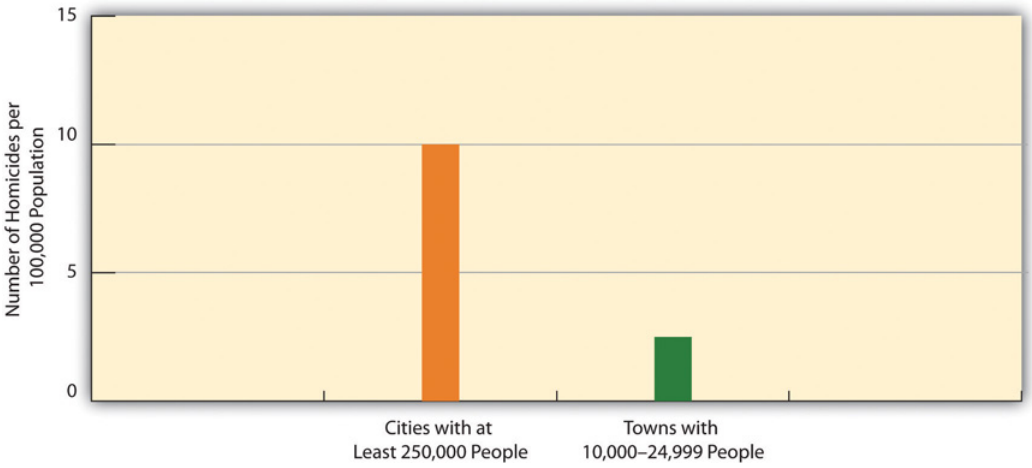
Third, about two-thirds of homicides involve firearms. To be a bit more precise, just over half involve a handgun, and the remaining firearm-related homicides involve a shotgun, rifle, or another undetermined firearm. Combining these first three aspects, then, the most typical homicide involves nonstrangers who have an argument that escalates and then results in the use of deadly force when one of the antagonists uses a handgun.

Fourth, most homicides (as most violent crime in general) are **intraracial**, meaning that they occur within the same race; the offender *and* victim are of the same race. For single offender/single victim homicides where the race of both parties is known, about 90 percent of African American victims are killed by African American offenders, and about 83 percent of white victims are killed by white offenders (Federal Bureau of Investigation, 2011).Federal Bureau of Investigation. (2011). *Crime in the United States, 2010*. Washington, DC: Federal Author. Although whites fear victimization by African Americans more than by whites, whites in fact are much more likely to be killed by other whites than by African Americans. While African Americans do commit about half of all homicides, most of their victims are also African American.

Fifth, males commit about 90 percent of all homicides and females commit only 10 percent. As we discuss in Section 3.1, males are much more likely than women to commit most forms of crime, and this is especially true for homicide and other violent crime.

Sixth, the homicide rate is much higher in large cities than in small towns. In 2010, the homicide rate (number of homicides per 100,000 population) in cities with a population at or over 250,000 was 10.0 percent, compared to only 2.5 percent in towns with a population between 10,000 and 24,999 (see Figure 8.2). Thus the risk for homicide is four times greater in large cities than in small towns. While most people in large cities certainly do *not* die from homicide, where we live still makes a difference in our chances of being victimized by homicide and other crime.

Figure 8.2 Population Size and Homicide Rate, 2010



Source: Data from Federal Bureau of Investigation. (2011). Crime in the United States, 2010. Washington, DC: Author.

Finally, the homicide rate rose in the late 1980s and peaked during the early 1990s before declining sharply until the early 2000s and then leveling off and declining a bit further since then. Although debate continues over why the homicide rate declined during the 1990s, many criminologists attribute the decline to a strong economy, an ebbing of gang wars over drug trafficking, and a decline of people in the 15–25 age group that commits a disproportionate amount of crime (Blumstein & Wallman,

2006).Blumstein, A., & Wallman, J. (Eds.). (2006). *The crime drop in America* (2nd ed.). Cambridge: Cambridge University Press. Some observers believe rising imprisonment rates also made a difference, and we return to this issue later in this chapter.

Rape and sexual assault were included in Chapter 4's discussion of violence against women as a serious manifestation of gender inequality. As that chapter noted, it is estimated that one-third of women on the planet have been raped or sexually assaulted, beaten, or physically abused in some other way (Heise, Ellseberg, & Gottemoeller, 1999).Heise, L., Ellseberg, M., & Gottemoeller, M. (1999). Ending violence against women. *Population Reports*, *27*(4), 1–44. While it is tempting to conclude that such violence is much more common in poor nations than in a wealthy nation like the United States, we saw in Chapter 4 that violence against women is common in this nation as well. Like homicide, about three-fourths of all rapes and sexual assaults involve individuals who know each other, not strangers.

Property Crime

As noted earlier, the major property crimes are burglary, larceny, motor vehicle theft, and arson. These crimes are quite common in the United States and other nations and, as Table 8.1 indicated, millions occur annually in this country. Many Americans have installed burglar alarms and other security measures in their homes and similar devices in their cars and SUVs. While property crime by definition does not involve physical harm, it still makes us concerned, in part because it touches so many of us. Although property crime has in fact declined along with violent crime since the early 1990s, it still is considered a major component of the crime problem, because it is so common and produces losses of billions of dollars annually.

Much property crime can be understood in terms of the roles and social networks of property criminals. In this regard, many scholars distinguish between *amateur theft* and *professional theft*. Most property offenders are amateur offenders: They are young and unskilled in the ways of crime, and the amount they gain from any single theft is relatively small. They also do not plan their crimes and instead commit them when they see an opportunity for quick illegal gain. In contrast, professional property offenders tend to be older and quite skilled in the ways of crime, and the amount they gain from any single theft is relatively large. Not surprisingly, they often plan their crimes well in advance. The so-called *cat burglar*, someone who scales tall buildings to steal jewels, expensive artwork, or large sums of money, is perhaps the prototypical example of the professional property criminals. Many professional thieves learn how to do their crimes from other professional thieves, and in this sense they are mentored by the latter just as students are mentored by professors, and young workers by older workers.

White-Collar Crime

If you were asked to picture a criminal in your mind, what image would you be likely to think of first: a scruffy young male with a scowl or sneer on his face, or a handsome, middle-aged man dressed in a three-piece business suit? No doubt the former image would come to mind first, if only because violent crime and property crime dominate newspaper headlines and television newscasts and because many of us have been victims of violent or property crime. Yet white-collar crime is arguably much more harmful than street crime, both in terms of economic loss and of physical injury, illness, and even death.

What exactly is **white-collar crime**? The most famous definition comes from Edwin Sutherland (1949, p. 9),Sutherland, E. H. (1949). *White collar crime*. New York, NY: Holt, Rinehart, and Winston. a sociologist who coined the term in the 1940s and defined it as "a crime committed by a person of respectability and high social status in the course of his occupation." Sutherland examined the behavior of the seventy largest US corporations and found that they had violated the law hundreds of times among them. Several had engaged in crimes during either World War I or II; they provided defective weapons and spoiled food to US troops and even sold weapons to Germany and other nations the United States was fighting.

Although white-collar crime as studied today includes auto shop repair fraud and employee theft by cashiers, bookkeepers, and other employees of relatively low status, most research follows Sutherland's definition in focusing on crime committed by people of "respectability and high social status." Thus much of the study of white-collar crime today focuses on fraud by physicians, attorneys, and other professionals and on illegal behavior by executives of corporations designed to protect or improve corporate profits (*corporate crime*).

In the study of professional fraud, health-care fraud stands out for its extent and cost (Rosoff, Pontell, & Tillman, 2010).Rosoff, S. M., Pontell, H. N., & Tillman, R. (2010). *Profit without honor: White collar crime and the looting of America* (5th ed.). Upper Saddle River, NJ: Prentice Hall. Health-care fraud is thought to amount to more than $100 billion per year, compared to less than $20 billion for all property crime combined. For example, some physicians bill Medicare and private insurance for services that

patients do not really need and may never receive. Medical supply companies sometimes furnish substandard equipment. To compensate for the economic loss it incurs, health-care fraud drives up medical expenses and insurance costs. In this sense, it steals from the public even though no one ever breaks into your house or robs you at gunpoint.

Although health-care and other professional fraud are serious, corporate crime dwarfs all other forms of white-collar crime in the economic loss it incurs and in the death, injury, and illness it causes. Corporate financial crime involves such activities as fraud, price fixing, and false advertising. The Enron scandal in 2001 involved an energy corporation whose chief executives exaggerated profits. After their fraud and Enron's more dire financial state were finally revealed, the company's stock plummeted and it finally went bankrupt. Its thousands of workers lost their jobs and pensions, and investors in its stock lost billions of dollars. Several other major corporations engaged in (or strongly suspected of doing so) accounting fraud during the late 1990s and early 2000s, but Enron was merely the most notorious example of widespread scandal that marked this period.

While corporate financial crime and corruption have cost the nation untold billions of dollars in this and earlier decades, **corporate violence**—actions by corporations that kill or maim people or leave them ill—is even more scandalous. The victims of corporate violence include corporate employees, consumers of corporate goods, and the public as a whole. Annual deaths from corporate violence exceed the number of deaths from homicide, and illness and injury from corporate violence affect an untold number of people every year.

Employees of corporations suffer from unsafe workplaces in which workers are exposed to hazardous conditions and chemicals because their companies fail to take adequate measures to reduce or eliminate this exposure. Such exposure may result in illness, and exposure over many years can result in death. According to a recent estimate, more than 50,000 people die each year from workplace exposure (American Federation of Labor and Congress of Industrial Organizations [AFL-CIO], 2010),American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). (2010). *Death on the job: The toll of neglect*. Washington, DC: Author. a figure about three times greater than the number of annual homicides. About 1,500 coal miners die each year from black lung disease, which results from the breathing of coal dust; many and perhaps most of these deaths would be preventable if coal mining companies took adequate safety measures (G. Harris, 1998).Harris, G. (1998, April 19). Despite laws, hundreds are killed by black lung. *The Courier-Journal (Louisville, KY)*, p. A1. In another example, the asbestos industry learned during the 1930s that exposure to asbestos could cause fatal lung disease and cancer. Despite this knowledge, asbestos companies hid evidence of this hazard for more than three decades: They allowed their workers to continue to work with asbestos and marketed asbestos as a fire retardant that was widely installed in schools and other buildings. More than 200,000 asbestos workers and members of the public either have already died or are expected to die from asbestos exposure; most or all of these deaths could have been prevented if the asbestos industry had acted responsibly when it first discovered it was manufacturing a dangerous product (Lilienfeld, 1991).Lilienfeld, D. E. (1991). The silence: The asbestos industry and early occupational cancer research—a case study. *American Journal of Public Health*, *81*, 791–800.

Unsafe products also kill or maim consumers. One of the most notorious examples of deaths from an unsafe product involved the Ford Pinto, a car first sold in the early 1970s that was vulnerable to fire and explosion when hit from behind in a minor rear-end collision (Cullen, Maakestad, & Cavender, 2006).Cullen, F. T., Maakestad, W. J., & Cavender, G. (2006). *Corporate crime under attack: The fight to criminalize business violence*. Cincinnati, OH: Anderson. Ford knew before the Pinto went on the market that its gas tank was unusually vulnerable in a rear-end collision and determined it would take about $11 per car to fix the problem. It then did a cost-benefit analysis to determine whether it would cost more to fix the problem or instead to settle lawsuits after Pinto drivers and passengers died or were burned and injured in rear-end collisions. This analysis indicated that Ford would save about $87 million if it did *not* fix the problem and instead paid out compensation after Pinto drivers and passengers died or got burned. Because Ford made this decision, about five hundred people eventually died in Pinto rear-end collisions and many others were burned.

The toll of white-collar crime, both financial and violent, is difficult to estimate, but by all accounts it exceeds the economic loss and death and injury from all street crime combined. White-collar crime is thought to involve an annual economic loss of more than $700 billion annually from corporate fraud, professional fraud, employee theft, and tax evasion and an annual toll of at least 100,000 deaths from workplace-related illness or injury, unsafe products, and preventable environmental pollution. These figures compare to an economic loss of less than $20 billion from property crime and a death toll of about 17,000 from homicide (Barkan, 2012).Barkan, S. E. (2012). *Criminology: A sociological understanding* (5th ed.). Upper Saddle River, NJ: Prentice Hall. By any measure, the toll of white-collar crime dwarfs the toll of street crime, even though the latter worries us much more than white-

collar crime. Despite the harm that white-collar crime causes, the typical corporate criminal receives much more lenient punishment, if any, than the typical street criminal (Rosoff et al., 2010).Rosoff, S. M., Pontell, H. N., & Tillman, R. (2010). *Profit without honor: White collar crime and the looting of America* (5th ed.). Upper Saddle River, NJ: Prentice Hall.

Organized Crime

Organized crime refers to criminal activity by groups or organizations whose major purpose for existing is to commit such crime. When we hear the term "organized crime," we almost automatically think of the so-called Mafia, vividly portrayed in the *Godfather* movies and other films, that comprises several highly organized and hierarchical Italian American "families." Although Italian Americans have certainly been involved in organized crime in the United States, so have Irish Americans, Jews, African Americans, and other ethnicities over the years. The emphasis on Italian domination of organized crime overlooks these other involvements and diverts attention from the actual roots of organized crime.

What are these roots? Simply put, organized crime exists and even thrives because it provides goods and/or services that the public demands. Organized crime flourished during the 1920s because it was all too ready and willing to provide an illegal product, alcohol, that the pubic continued to demand even after Prohibition began. Today, organized crime earns its considerable money from products and services such as illegal drugs, prostitution, pornography, loan sharking, and gambling. It also began long ago to branch out into legal activities such as trash hauling and the vending industry.

Government efforts against organized crime since the 1920s have focused on arrest, prosecution, and other law-enforcement strategies. Organized crime has certainly continued despite these efforts. This fact leads some scholars to emphasize the need to reduce public demand for the goods and services that organized crime provides. However, other scholars say that reducing this demand is probably a futile or mostly futile task, and they instead urge consideration of legalizing at least some of the illegal products and services (e.g., drugs and prostitution) that organized crime provides. Doing so, they argue, would weaken the influence of organized crime.

Consensual Crime

Consensual crime (also called *victimless crime*) refers to behaviors in which people engage voluntarily and willingly even though these behaviors violate the law. Illegal drug use, discussed in Chapter 7, is a major form of consensual crime; other forms include prostitution, gambling, and pornography. People who use illegal drugs, who hire themselves out as prostitutes or employ the services of a prostitute, who gamble illegally, and who use pornography are all doing so because they want to. These behaviors are not entirely victimless, as illegal drug users, for example, may harm themselves and others, and that is why the term *consensual crime* is often preferred over *victimless crime*. As just discussed, organized crime provides some of the illegal products and services that compose consensual crime, but these products and services certainly come from sources other than organized crime.

This issue aside, the existence of consensual crime raises two related questions that we first encountered in Chapter 7. First, to what degree should the government ban behaviors that people willingly commit and that generally do not have unwilling victims? Second, do government attempts to ban such behaviors do more good than harm or more harm than good? Chapter 7's discussion of these questions focused on illegal drugs, and in particular on the problems caused by laws against certain drugs, but similar problems arise from laws against other types of consensual crime. For example, laws against prostitution enable pimps to control prostitutes and help ensure the transmission of sexual diseases because condoms are not regularly used.

Critics of consensual crime laws say we are now in a new prohibition and that our laws against illegal drugs, prostitution, and certain forms of gambling are causing the same problems now that the ban on alcohol did during the 1920s and, more generally, cause more harm than good. Proponents of these laws respond that the laws are still necessary as an expression of society's moral values and as a means, however imperfect, of reducing involvement in harmful behaviors.

Key Takeaway

- Most homicides are committed for relatively emotional, spontaneous reasons and between people who knew each other beforehand.
- White-collar crime involves more death, injury, and economic loss than street crime, but the punishment of white-collar crime is relatively weak.

- Consensual crime raises two related issues: (a) To what extent should the government prohibit people from engaging in behavior in which there are no unwilling victims, and (b) do laws against consensual crime do more good than harm or more harm than good?

For Your Review

1. If homicide is a relatively emotional, spontaneous crime, what does that imply for efforts to use harsh legal punishment, including the death penalty, to deter people from committing homicide?
2. Do you think consensual crimes should be made legal? Why or why not?

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7.3: Who Commits Crime?

Learning Objectives

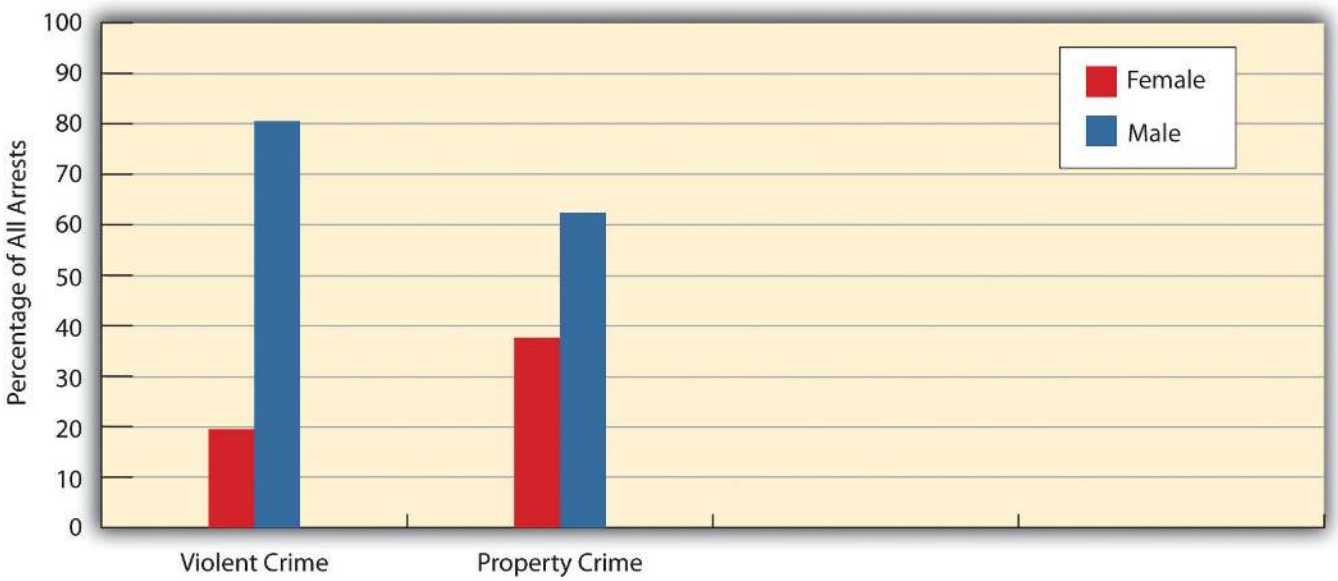
1. Explain why males commit more crime than females.
2. Discuss whether social class differences exist in crime rates.
3. Discuss whether racial/ethnic differences exist in crime rates.

While people from all walks of life commit street crime, some people are still more likely than others to break the law because of their social backgrounds. These social backgrounds include their gender, age, social class, urban/rural residence, and race and ethnicity. Despite their inaccuracies, the three data sources discussed in the first section of this chapter all provide a similar picture of what kinds of people, in terms of their social backgrounds, are more or less likely to commit street crime. We briefly discuss each background in turn.

Gender

Simply put, males commit much more crime than females. In UCR data, men comprise about 81 percent of all arrests for violent crime and about 63 percent of all arrests for property crime. (See Figure 8.3.) In the NCVS, victims report that males commit most of the violent crimes they experienced, and self-report studies find that males far outpace females in the commission of serious street offenses. When it comes to breaking the law, crime is a man's world.

Figure 8.3 Gender and Arrest (Percentage of All Arrests)



Source: Data from Federal Bureau of Investigation. (2011). Crime in the United States, 2010. Washington, DC: Author.

The key question is why such a large gender difference exists. Some scholars attribute this difference to biological differences between the sexes, but most criminologists attribute it to sociological factors. One of these is gender role socialization: Despite greater recognition of gender roles, we continue to raise our boys to be assertive and aggressive, while we raise our girls to be gentle and nurturing (Lindsey, 2011).Lindsey, L. L. (2011). *Gender roles: A sociological perspective* (5th ed.). Upper Saddle River, NJ: Prentice Hall. Such gender socialization has many effects, and one of these is a large gender difference in criminal behavior. A second factor is opportunity. Studies find that parents watch their daughters more closely than they watch their sons, who are allowed to stay out later at night and thus have more opportunity to break the law.

Age

Age also makes a difference in criminal behavior: Offending rates are highest in the late teens and early twenties and decline thereafter. Accordingly, people in the 15–24 age range account for about 40 percent of all arrests even though they comprise only about 14 percent of the population.

Several factors again seem to account for this pattern (Shoemaker, 2010).Shoemaker, D. J. (2010). *Theories of delinquency: An examination of explanations of delinquent behavior* (6th ed.). New York, NY: Oxford University Press. First, peer relationships matter more during this time of one's life than later, and peers are also more likely during this period than later to be offenders themselves. For both reasons, our peer relationships during our teens and early twenties are more likely than those in our later years to draw us into crime. Second, adolescents and young adults are more likely than older adults to lack full-time jobs; for this reason, they are more likely to need money and thus to commit offenses to obtain money and other possessions. Third, as we age out of our early twenties, our ties to conventional society increase: Many people marry, have children, and begin full-time employment, though not necessarily in that order. These events and bonds increase our stakes in conformity, to use some social science jargon, and thus reduce our desire to break the law (Laub, Sampson, & Sweeten, 2006).Laub, J. H., Sampson, R. J., & Sweeten, G. A. (2006). Assessing Sampson and Laub's life-course theory of crime. In F. T. Cullen (Ed.), *Taking stock: The status of criminological theory* (Vol. 15, pp. 313–333). New Brunswick, NJ: Transaction.

Social Class

Findings on social class differences in crime are less clear than they are for gender or age differences. Arrests statistics and much research indicate that poor people are much more likely than wealthier people to commit street crime. However, some scholars attribute the greater arrests of poor people to social class bias against them. Despite this possibility, most criminologists would probably agree that social class differences in criminal offending are "unmistakable" (Harris & Shaw, 2000, p. 138).Harris, A. R., & Shaw, J. A. W. (2000). Looking for patterns: Race, class, and crime. In J. F.Sheley (Ed.), *Criminology: A contemporary handbook* (3rd ed., pp. 129–163). Belmont, CA: Wadsworth. Reflecting this conclusion, one sociologist has even noted, with tongue only partly in cheek, that social scientists know they should not "stroll the streets at night in certain parts of town or even to park there" and that areas of cities that frighten them are "not upper-income neighborhoods" (Stark, 1987, p. 894).Stark, R. (1987). Deviant places: A theory of the ecology of crime. *Criminology, 25*, 893–911. Thus social class does seem to be associated with street crime, with poor individuals doing more than their fair share.

Explanations of this relationship center on the effects of poverty, which, as the next section will discuss further, is said to produce anger, frustration, and economic need and to be associated with a need for respect and with poor parenting skills and other problems that make children more likely to commit antisocial behavior when they reach adolescence and beyond. These effects combine to lead poor people to be more likely than wealthier people to commit street crime, even if it is true that most poor people do not commit street crime at all.

Although the poor are more likely than the wealthy to commit street crime, it is also true that the wealthy are much more likely than the poor to commit white-collar crime, which, as argued earlier, can be much more harmful than street crime. If we consider both street crime and white-collar crime, then there does not appear to be a social class-crime relationship, since the poor have higher rates of the former and the wealthy have higher rates of the latter.

Urban versus Rural Residence

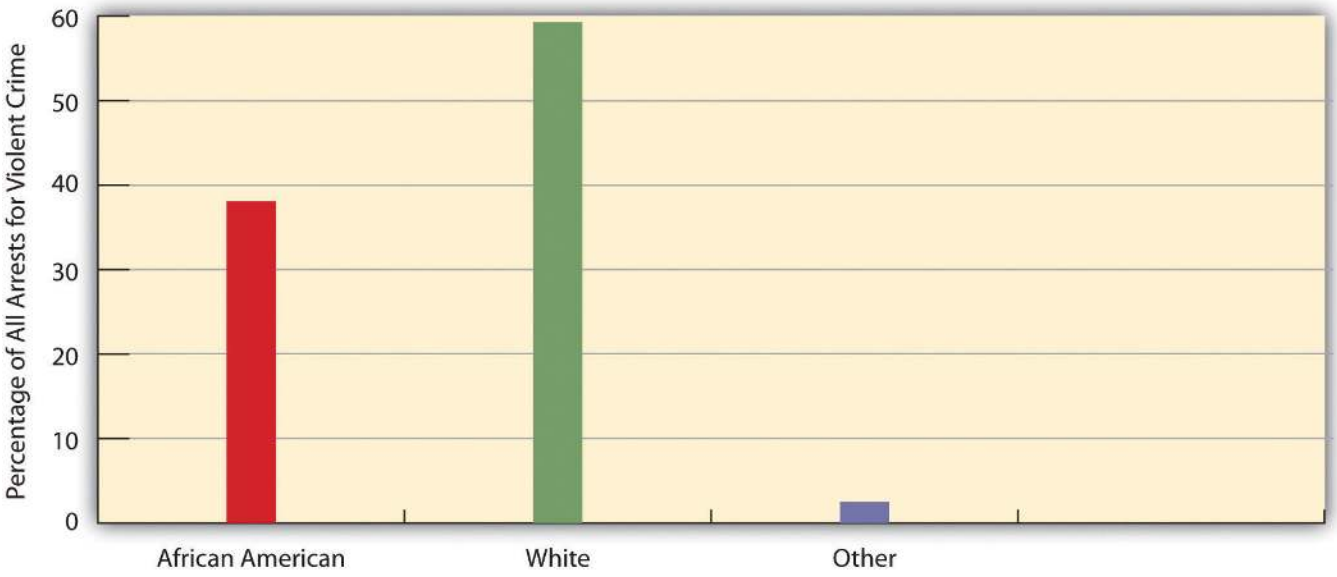
Where we live also makes a difference for our likelihood of committing crime. We saw earlier that big cities have a much higher homicide rate than small towns. This trend exists for violent crime and property crime more generally. Urban areas have high crime rates in part because they are poor, but poverty by itself does not completely explain the urban-rural difference in crime, since many rural areas are poor as well. A key factor that explains the higher crime rates of urban areas is their greater population density (Stark 1987).Stark, R. (1987). Deviant places: A theory of the ecology of crime. *Criminology, 25*, 893–911. When many people live close together, they come into contact with one another more often. This fact means that teenagers and young adults have more peers to influence them to commit crime, and it also means that potential criminals have more targets (people and homes) for their criminal activity. Urban areas also have many bars, convenience stores, and other businesses that can become targets for potential criminals, and bars, taverns, and other settings for drinking can obviously become settings where tempers flare and violence ensues.

Race and Ethnicity

In discussing who commits crime, any discussion of race and ethnicity is bound to arouse controversy because of the possibility of racial and ethnic stereotyping. But if we can say that men and younger people have relatively high crime rates without necessarily sounding biased against individuals who are male or younger, then it should be possible to acknowledge that certain racial and ethnic groups have higher crime rates without sounding biased against them.

Keeping this in mind, race and ethnicity do seem to be related to criminal offending. In particular, much research finds that African Americans and Latinos have higher rates of street crime than non-Latino whites. For example, although African Americans comprise about 13 percent of the US population, they account for about 39 percent of all arrests for violent crime (see Figure 8.4).

Figure 8.4 Race and Arrest for Violent Crime (Percentage of All Violent Crime Arrests)



Source: Data from Federal Bureau of Investigation. (2011). Crime in the United States, 2010. Washington, DC: Author.

Latinos also have higher crime rates than non-Latino whites, but lower rates than those for African Americans. Although racial and ethnic bias by the criminal justice system may account for some of these racial/ethnic differences in offending, most criminologists agree that such differences do in fact exist for serious street crimes (Walker, Spohn, & DeLone, 2012).Walker, S., Spohn, C., & DeLone, M. (2012). *The color of justice: Race, ethnicity, and crime in America* (5th ed.). Belmont, CA: Wadsworth.

Why do these differences exist? A racist explanation would attribute them to biological inferiority of the groups, African Americans and Latinos, with the relatively high rates of offending. Such explanations were popular several generations ago but fortunately lost favor as time passed and attitudes changed. Today, scholars attribute racial/ethnic differences in offending to several sociological factors (Unnever & Gabbidon, 2011).Unnever, J. D., & Gabbidon, S. L. (2011). *A theory of African American offending: Race, racism, and crime*. New York, NY: Routledge. First, African Americans and Latinos are much poorer than whites on the average, and poverty contributes to higher crime rates. Second, they are also more likely to live in urban areas, which, as we have seen, also contribute to higher crime rates. Third, the racial and ethnic discrimination they experience leads to anger and frustration that in turn can promote criminal behavior. Although there is less research on Native Americans' criminality, they, too, appear to have higher crime rates than whites because of their much greater poverty and experience of racial discrimination (McCarthy & Hagan, 2003).McCarthy, B., & Hagan, J. (2003). Sanction effects, violence, and native North American street youth. In D. F. Hawkins (Ed.), *Violent crime: Assessing race and ethnic differences* (pp. 117–137). Cambridge: Cambridge University Press.

In appreciating racial/ethnic differences in street crime rates, it is important to keep in mind that whites commit most white-collar crime, and especially corporate crime, as it is white people who lead and manage our many corporations. Just as social class affects the type of crime that people do, so do race and ethnicity. Wealthy, white people commit much crime, but it is white-collar crime they tend to commit, not street crime.

Key Takeaways

- Males commit more street crime than females, in part because of gender role socialization that helps make males more assertive and aggressive.
- Young people commit a disproportionate amount of street crime, in part because of the influence of their peers and their lack of stakes in conformity.
- The disproportionate involvement of African Americans and Latinos in street crime arises largely from their poverty and urban residence.

For Your Review

1. If we say that males commit more crime than females, does that imply that we are prejudiced against males? Why or why not?
2. Write a brief essay that outlines social class and racial/ethnic differences in street crime and explains the reasons for these differences.

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7.4: Explaining Crime

Learning Objectives

1. Understand social structure theories of crime.
2. Explain the social bonding theory of crime.
3. Describe the general assumptions of conflict theories of crime.

If we want to be able to reduce crime, we must first understand why it occurs. Sociologists generally discount explanations rooted in the individual biology or psychology of criminal offenders. While a few offenders may suffer from biological defects or psychological problems that lead them to commit crime, most do not. Further, biological and psychological explanations cannot adequately explain the social patterning of crime discussed earlier: why higher crime rates are associated with certain locations and social backgrounds. For example, if California has a higher crime rate than Maine, and the United States has a higher crime rate than Canada, it would sound silly to say that Californians and Americans have more biological and psychological problems than Mainers and Canadians, respectively. Biological and psychological explanations also cannot easily explain why crime rates rise and fall, nor do they lend themselves to practical solutions for reducing crime.

In contrast, sociological explanations do help understand the social patterning of crime and changes in crime rates, and they also lend themselves to possible solutions for reducing crime. A brief discussion of these explanations follows, and a summary appears in Table 8.2.

Table 8.2 Sociological Explanations of Crime

Major perspective	Related explanation	Summary of explanation
Functional (social structure theories)	Social disorganization	Certain social characteristics of urban neighborhoods contribute to high crime rates. These characteristics include poverty, dilapidation, population density, and population turnover.
	Anomie	According to Robert Merton, crime by the poor results from a gap between the cultural emphasis on economic success and the inability to achieve such success through the legitimate means of working.
Interactionist (social process theories)	Differential association	Edwin H. Sutherland argued that criminal behavior is learned by interacting with close friends who teach us how to commit various crimes and also the values, motives, and rationalizations we need to adopt in order to justify breaking the law.
	Social bonding	Travis Hirschi wrote that delinquency results from weak bonds to conventional social institutions, such as families and schools.
	Labeling	Deviance and crime result from being officially labeled; arrest and imprisonment increase the likelihood of reoffending.
Conflict (conflict theories)	Group conflict	Criminal law is shaped by the conflict among the various social groups in society that exist because of differences in race and ethnicity, social class, religion, and other factors.
	Radical	The wealthy try to use the law and criminal justice system to reinforce their power and to keep the poor and people of color at the bottom of society.
	Feminist	Gender plays an important role in the following areas: (1) the reasons girls and women commit crime; (2) the reasons female crime is lower than male crime; (3) the victimization of girls and women by rape, sexual assault, and domestic violence; and (4) the experience of women professionals and offenders in the criminal justice system.

The Functional Perspective: Social Structure Theories

Social structure theories all stress that crime results from the breakdown of society's norms and social organization and in this sense fall under the functional perspective outlined in Chapter 1. They trace the roots of crime to problems in the society itself rather than to biological or psychological problems inside individuals. By doing so, they suggest the need to address society's social structure in order to reduce crime. Several social structure theories exist.

Social Disorganization Theory

A popular explanation is **social disorganization theory**. This approach originated primarily in the work of Clifford R. Shaw and Henry D. McKay (1942),Shaw, C. R., & McKay, H. D. (1942). *Juvenile delinquency and urban areas*. Chicago, IL: University of Chicago Press. two social scientists at the University of Chicago who studied that city's delinquency rates during the first three decades of the twentieth century. During this time, the ethnic composition of Chicago changed considerably, as the city's inner zones were first occupied by English, German, and Irish immigrants, and then by Eastern European immigrants, and then by African Americans who moved there from southern states. Shaw and McKay found that the inner zones of Chicago consistently had the highest delinquency rates regardless of which ethnic group lived there, and they also found that the ethnic groups' delinquency rates declined as they moved to outer areas of Chicago. To explain these related patterns, Shaw and McKay reasoned that the inner zones of Chicago suffered from *social disorganization*: A weakening of social institutions such as the family, school, and religion that in turn weakens the strength of social bonds and norms and the effectiveness of socialization. Research today confirms that crime rates are highest in neighborhoods with several kinds of structural problems, including high rates of residential mobility, population density, poverty, and single-parent families (Mazerolle, Wickes, & McBroom, 2010).Mazerolle, L., Wickes, R., & McBroom, J. (2010). Community variations in violence: The role of social ties and collective efficacy in comparative context. *Journal of Research in Crime and Delinquency, 47*(1), 3–30.

Anomie Theory

Another popular explanation is **anomie theory**, first formulated by Robert K. Merton (1938)Merton, R. K. (1938). Social structure and anomie. *American Sociological Review, 3*, 672–682. in a classic article. Writing just after the Great Depression, Merton focused on the effects of poverty in a nation like the United States that places so much emphasis on economic success. With this strong cultural value, wrote Merton, the poor who do not achieve the American dream feel especially frustrated. They have several ways or adaptations of responding to their situation (see Table 8.3).

Table 8.3 Anomie Theory

	Goal of economic success	
	Accept	*Reject*
Value of working		
Accept	Conformity	Ritualism
Reject	Innovation	Retreatism

First, said Merton, they may continue to accept the goal of economic success and also the value of working at a job to achieve such success; Merton labeled this adaptation *conformity*. Second, they may continue to favor economic success but reject the value of working and instead use new, illegitimate means, for example theft, of gaining money and possessions; Merton labeled this adaptation *innovation*. Third, they may abandon hope of economic success but continue to work anyway because work has become a habit. Merton labeled this adaptation *ritualism*. Finally, they may reject both the goal of economic success and the means of working to achieve such success and withdraw from society either by turning to drugs or by becoming hobos; Merton labeled this adaptation *retreatism*. He also listed a fifth adaptation, which he called *rebellion*, to characterize a response in which people reject economic success and working and work to bring about a new society with new values and a new economic system.

Merton's theory was very influential for many years but eventually lost popularity, partly because many crimes, such as assault and rape, are not committed for the economic motive that his theory assumed, and partly because many people use drugs and alcohol without dropping out of society, as his retreatism category assumed. In recent years, however, scholars have rediscovered and adapted his theory, and it has regained favor as new attention is being paid to the frustration resulting from poverty and other strains in one's life that in turn may produce criminal behavior (Miller, Schreck, & Tewksbury, 2011).Miller, J. M., Schreck, C. J., & Tewksbury, R. (2011). *Criminological theory: A brief introduction* (3rd ed.). Upper Saddle River, NJ: Prentice Hall.

The Interactionist Perspective: Social Process Theories

Social process theories all stress that crime results from the social interaction of individuals with other people, particularly their friends and family, and thus fall under the interactionist perspective outlined in Chapter 1. They trace the roots of crime to the influence that our friends and family have on us and to the meanings and perceptions we derive from their views and expectations. By doing so, they indicate the need to address the peer and family context as a promising way to reduce crime.

Differential Association Theory

One of the most famous criminological theories is **differential association theory**, first formulated at about the same time as Merton's anomie theory by Edwin H. Sutherland and published in its final form in an edition of a criminology text he wrote (Sutherland, 1947).Sutherland, E. H. (1947). *Principles of criminology* (4th ed.). Philadelphia, PA: J. P. Lippincott. Sutherland rejected the idea, fashionable at the time, that crime had strong biological roots and instead said it grew out of interaction with others. Specifically, he wrote that adolescents and other individuals learn that it is acceptable to commit crime and also how to commit crime from their interaction with their close friends. Adolescents become delinquent if they acquire more and stronger attitudes in favor of breaking the law than attitudes opposed to breaking the law. As Sutherland put it, "A person becomes delinquent because of an excess of definitions favorable to the violation of law over definitions unfavorable to the violation of law." Crime and delinquency, then, result from a very normal social process, social interaction. Adolescents are more or less at risk for delinquency partly depending on who their friends are and what their friends do or don't do.

Many scholars today consider peer influences to be among the most important contributors to delinquency and other misbehavior (Akers & Sellers, 2009).Akers, R. L., & Sellers, C. S. (2009). *Criminological theories: Introduction, evaluation, and application* (5th ed.). New York, NY: Oxford University Press. One problem with differential association theory is that it does not explain behavior, like rape, that is usually committed by a lone offender and that is generally the result of attitudes learned from one's close friends.

Social Bonding Theory

In a 1969 book, *Causes of Delinquency*, Travis Hirschi (1969)Hirschi, T. (1969). *Causes of delinquency*. Berkeley, CA: University of California Press. asked not what prompts people to commit crime, but rather what *keeps them from* committing crime. This question was prompted by his view that human nature is basically selfish and that it is society's task to tame this selfishness. He wrote that an adolescent's bonds to society, and specifically the bonds to family and school, help keep the adolescent from breaking the law.

Hirschi identified several types of social bonds, but generally thought that the closer adolescents feel to their family and teachers, the more they value their parents' beliefs and school values, and the more time they spend with their families and on school activities, the less likely they are to be delinquent. Turning that around, they are more likely to be delinquent if they feel more distant from their parents and teachers, if they place less value on their family's and school's values, and if they spend less time with these two very important social institutions in their lives.

Hirschi's **social bonding theory** attracted immediate attention and is one of the most popular and influential theories in criminology today. It highlighted the importance of families and schools for delinquency and stimulated much research on their influence. Much of this research has focused on the relationship between parents and children. When this relationship is warm and harmonious and when children respect their parents' values and parents treat their children firmly but fairly, children are less likely to commit antisocial behavior during childhood and delinquency during adolescence. Schools also matter: Students who do well in school and are very involved in extracurricular activities are less likely than other students to engage in delinquency (Bohm & Vogel, 2011).Bohm, R. M., & Vogel, B. (2011). *A primer on crime and delinquency theory* (3rd ed.). Belmont, CA: Wadsworth.

Children and Our Future

Saving Children from a Life of Crime

Millions of children around the nation live in circumstances that put them at risk for a childhood, adolescence, and adulthood filled with antisocial behavior, delinquency, and crime, respectively. Although most of these children in fact will not suffer this fate, many of their peers will experience these outcomes. These circumstances thus must be addressed to save these children

from a life of crime. As social scientists Brandon C. Welsh and David P. Farrington observe, “Convincing research evidence exists to support a policy of saving children from a life of crime by intervening early in childhood to tackle key risk factors.”

What are these risk factors? They include being born to a teenaged, single mother; living in poverty or near poverty; attending poor, dilapidated schools; and living in high-crime urban areas. As should be evident, these risk factors are all related, as most children born to teenaged, single mothers live in poverty or near poverty, and many such children live in high-crime urban areas.

What can be done to help save such children from a life of crime? Ideally, our nation would lift them and their families entirely out of poverty with employment and social payment policies. Although this sort of national policy will not occur in the foreseeable future, a growing amount of rigorous social science evaluation evidence points to several effective programs and policies that can still help at-risk children. These include (1) at the individual level, certain types of preschool programs and social skills training programs; (2) at the family level, home visiting by trained professionals and parenting training programs; and (3) at the school and community levels, certain types of after-school and community-mentoring programs in which local adults spend time with children at risk for delinquency and other problems.

As Welsh and Farrington note, “Early prevention is by no means a panacea. But it does represent an integral part of any plan to reduce the nation’s crime rate.” They add that several other Western democracies have national agencies devoted to improving behavioral and other outcomes among those nations’ children, and they call for the United States to establish a similar national agency, the National Council on Early Prevention, as part of a nationwide strategy to prevent delinquency and other antisocial behaviors among American youth.

Sources: Piquero, Farrington, Welsh, Tremblay, & Jennings, 2009; Welsh & Farrington, 2007Piquero, A. R., Farrington, D. P., Welsh, B. C., Tremblay, R., & Jennings, W. (2009). Effects of early family/parent training programs on antisocial behavior and delinquency. *Journal of Experimental Criminology 5*, 83–120; Welsh, B. C., & Farrington, D. P. (2007). Save children from a life of crime. *Criminology & Public Policy*, *6*(4), 871–879.

Another social institution, religion, has also been the subject of research. An increasing number of studies are finding that religious involvement seemingly helps keep adolescents from using alcohol and other drugs (see Chapter 7), from engaging in frequent sexual activity, and from engaging in delinquency generally (Desmond, Soper, & Purpura, 2009).Desmond, S. A., Soper, S. E., & Purpura, D. J. (2009). Religiosity, moral beliefs, and delinquency: Does the effect of religiosity on delinquency depend on moral beliefs? *Sociological Spectrum*, *29*, 51–71. Fewer studies of religiosity and criminality during adulthood exist, but one investigation found an association between greater religiosity and fewer sexual partners among never-married adults (Barkan, 2006).Barkan, S. E. (2006). Religiosity and premarital sex during adulthood. *Journal for the Scientific Study of Religion*, *45*, 407–417.

Labeling Theory

Our criminal justice system is based on the idea that the prospect of quick arrest and harsh punishment should deter criminal behavior. **Labeling theory** has the opposite idea, as it assumes that labeling someone as a criminal or deviant, which arrest and imprisonment certainly do, makes the person more likely to continue to offend. This result occurs, argues the theory, because the labeling process gives someone a negative self-image, reduces the potential for employment, and makes it difficult to have friendships with law-abiding individuals.

Suppose, for example, that you were just released from prison after serving a five-year term for armed robbery. When you apply for a job and list your prison term on the application, how likely are you to get hired? If you are at a bar and meet someone who interests you and then tell the person where you were for the previous five years, what are the chances that the conversation will continue? Faced with bleak job prospects and a dearth of people who want to spend time with you, what are your alternatives? Might you not succumb to the temptation to hang out with other offenders and even to commit new crime yourself?

Although research findings are not unanimous, several studies do find that arrest and imprisonment increase future offending, as labeling theory assumes (Nagin, Cullen, & Jonson, 2009).Nagin, D. S., Cullen, F. T., & Jonson, C. L. (2009). Imprisonment and reoffending. *Crime and Justice: A Review of Research*, *38*, 115–200. To the extent this undesired consequence occurs, efforts to stem juvenile and adult crime through harsher punishment may sometimes have the opposite result from their intention.

The Conflict Perspective

Several related theories fall under the conflict perspective outlined in Chapter 1. Although they all have something to say about why people commit crime, their major focus is on the use and misuse of the criminal law and criminal justice system to deal with crime. Three branches of the conflict perspective exist in the study of crime and criminal justice.

The first branch is called **group conflict theory**, which assumes that criminal law is shaped by the conflict among the various social groups in society that exist because of differences in race and ethnicity, social class, religion, and other factors. Given that these groups compete for power and influence, the groups with more power and influence try to pass laws that ban behaviors in which subordinate groups tend to engage, and they try to use the criminal justice system to suppress subordinate group members. A widely cited historical example of this view is Prohibition, which was the result of years of effort by temperance advocates, most of them from white, Anglo-Saxon, rural, and Protestant backgrounds, to ban the manufacture, sale, and use of alcohol. Although these advocates thought alcohol use was a sin and incurred great social costs, their hostility toward alcohol was also motivated by their hostility toward the types of people back then who tended to use alcohol: poor, urban, Catholic immigrants. Temperance advocates' use of legal means to ban alcohol was, in effect, a "symbolic crusade" against people toward whom these advocates held prejudicial attitudes (Gusfield, 1963).Gusfield, J. R. (1963). *Symbolic crusade: Status politics and the American temperance movement*. Urbana, IL: University of Illinois Press.

The second branch of the conflict perspective is called **radical theory**. Radical theory makes the same general assumptions as group conflict theory about the use of criminal law and criminal justice, but with one key difference: It highlights the importance of (economic) social class more than the importance of religion, ethnicity, and other social group characteristics. In this way, radical theory evokes the basic views of Karl Marx on the exploitation and oppression of the poor and working class by the ruling class (Lynch & Michalowski, 2006).Lynch, M. J., & Michalowski, R. J. (2006). *Primer in radical criminology: Critical perspectives on crime, power and identity* (4th ed.). Monsey, NY: Criminal Justice Press.

An early but still influential radical explanation of crime was presented by Dutch criminologist Willem Bonger (1916).Bonger, W. (1916). *Criminality and economic conditions* (H. P. Horton, Trans.). Boston, MA: Little, Brown. Bonger blamed the high US crime rate on its economic system, capitalism. As an economic system, he said, capitalism emphasizes the pursuit of profit. Yet, if someone gains profit, someone else is losing it. This emphasis on self-gain, he said, creates an egoistic culture in which people look out for themselves and are ready and even willing to act in a way that disadvantages other people. Amid such a culture, he said, crime is an inevitable outcome. Bonger thought crime would be lower in socialist societies because they place more emphasis on the welfare of one's group than on individual success.

Feminist approaches comprise the third branch of the conflict perspective on the study of crime and criminal justice. Several such approaches exist, but they generally focus on at least one of four areas: (1) the reasons girls and women commit crime; (2) the reasons female crime is lower than male crime; (3) the victimization of girls and women by rape, sexual assault, and domestic violence; and (4) the experience of women professionals and offenders in the criminal justice system.

Regarding the first area, the research generally finds that girls and women commit crime for the same reasons that boys and men commit crime: poverty, parental upbringing, and so forth. But it also finds that both women and men "do gender" when they commit crime. That is, they commit crime according to gender roles, at least to some extent. Thus one study found that women robbers tend to rob other women and not to use a gun when they do so (J. Miller & Brunson, 2000).Miller, J., & Brunson, R. K. (2000). Gender dynamics in youth gangs: A comparison of males' and females' accounts. *Justice Quarterly, 17*, 419–448.

In addressing the second area, on why female crime is less common than male crime, scholars often cite two reasons discussed earlier: gender role socialization and gender-based differences in parental supervision. One additional reason derives from social bonding theory: Girls feel closer to their parents than boys do, and thus are less delinquent (Lanctôt & Blanc, 2002).Lanctôt, N., & Blanc, M. L. (2002). Explaining deviance by adolescent females. *Crime and Justice: A Review of Research, 29*, 113–202.

We have already commented on the victimization of women from rape, sexual assault, and domestic violence, but the study of this topic began with work by feminist criminologists during the 1970s. Since that time, innumerable works have addressed this type of victimization, which is also thought to contribute to girls' delinquency and, more generally, female drug and alcohol abuse (Chesney-Lind & Jones, 2010).Chesney-Lind, M., & Jones, N. (Eds.). (2010). *Fighting for girls: New perspectives on gender and violence*. Albany, NY: State University of New York Press.

The final area for feminist work addresses women professionals and offenders in the criminal justice system. This body of research certainly goes beyond the scope of this book, but it documents the many blatant and subtle forms of discrimination that women face as police, attorneys, judges, prison guards, and other professionals (Muraskin, 2012).Muraskin, R. (Ed.). (2012). *Women and justice: It's a crime* (5th ed.). Upper Saddle River, NJ: Prentice Hall. A primary task of research on women offenders is to determine how they fare in the criminal justice system compared to male offenders. Studies tend to find that females receive somewhat more lenient treatment than males for serious offenses and somewhat harsher treatment for minor offenses, although some studies conclude that gender does not make too much of a difference one way or the other (Chesney-Lind & Pasko, 2004).Chesney-Lind, M., & Pasko, L. (2004). *The female offender: Girls, women, and crime* (2nd ed.). Thousand Oaks, CA: Sage Publications.

Key Takeaways

- Social structure theories stress that crime results from economic and other problems in how society is structured and from poverty and other problems in neighborhoods.
- Interactionist theories stress that crime results from our interaction with family members, peers, and other people, and from labeling by the criminal justice system.
- Conflict theories stress that social groups with power and influence try to use the law and criminal justice system to maintain their power and to keep other groups at the bottom of society.

For Your Review

1. What are any two criminogenic (crime-causing) social or physical characteristics of urban neighborhoods?
2. According to labeling theory, why are arrest and imprisonment sometimes counterproductive?

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7.5: The Criminal Justice System

Learning Objectives

1. Describe what is meant by the "working personality" of the police.
2. Discuss the quality of legal representation of criminal defendants.
3. Explain whether incarceration reduces crime in an effective and cost-efficient manner.

The criminal justice system in a democracy like the United States faces two major tasks: (1) keeping the public safe by apprehending criminals and, ideally, reducing crime; and (2) doing so while protecting individual freedom from the abuse of power by law enforcement agents and other government officials. Having a criminal justice system that protects individual rights and liberties is a key feature that distinguishes a democracy from a dictatorship.

How well does the US criminal justice system work in both respects? How well does it control and reduce crime, and how well does it observe individual rights and not treat people differently based on their social class, race and ethnicity, gender, and other social characteristics? What are other problems in our criminal justice system? Once again, whole books have been written about these topics, and we have space here to discuss only some of this rich literature.

Police

The police are our first line of defense against crime and criminals and for that reason are often called "the thin blue line." Police officers realize that their lives may be in danger at any time, and they also often interact with suspects and other citizens whose hostility toward the police is quite evident. For these reasons, officers typically develop a *working personality* that, in response to the danger and hostility police face, tends to be authoritarian and suspicious (Skolnick, 1994).Skolnick, J. H. (1994). *Justice without trial: Law enforcement in democratic society* (3rd ed.). New York, NY: Macmillan. Indeed, it is not too far-fetched to say that police-citizen relations are characterized by mutual hostility and suspicion (Dempsey & Forst, 2012).Dempsey, J. S., & Forst, L. S. (2012). *An introduction to policing* (6th ed.). Belmont, CA: Cengage Learning.

Two aspects of police behavior are especially relevant for a textbook on social problems. The first is police *corruption*. No one knows for sure how much police corruption occurs, but low-level corruption (e.g., accepting small bribes and stealing things from stores while on patrol) is thought to be fairly common, while high-level corruption (e.g., accepting large bribes and confiscating and then selling illegal drugs) is thought to be far from rare. In one study involving trained researchers who rode around in police cars, more than one-fifth of the officers being observed committed some corruption (Reiss, 1980).Reiss, A. J., Jr. (1980). Officer violations of the law. In R. J. Lundman (Ed.), *Police behavior: A sociological perspective* (pp. 253–272). New York, NY: Oxford University Press. Several notorious police scandals have called attention to rampant corruption amid some police forces. One scandal more than three decades ago involved New York City officer Frank Serpico, whose story was later documented in a best-selling book (Maas, 1973)Maas, P. (1973). *Serpico*. New York, NY: Viking Press. and in a tension-filled film starring Al Pacino. After Serpico reported high-level corruption to his superiors, other officers plotted to have him murdered and almost succeeded. A more recent scandal involved the so-called Rampart Division in Los Angeles and involved dozens of officers who beat and shot suspects, stole drugs and money, and lied at the trials of the people they arrested (Glover & Lait, 2000).Glover, S., & Lait, M. (2000, February 10). Police in secret group broke law routinely, transcripts say. *The Los Angeles Times*, p. A1.

The other relevant behavior is *police brutality* or, to use a less provocative term, the *use of undue* (also called *unjustified* or *excessive*) force by police. Police, of course, are permitted and even expected to use physical force when necessary to subdue suspects. Given the context of police work noted earlier (feelings of danger and suspicion) and the strong emotions at work in any encounter between police and suspects, it is inevitable that some police will go beyond the bounds of appropriate force and commit brutality. An important question is how much police brutality occurs. In a recent national survey, about 1 percent of US residents who had had an encounter with the police in 2008 believed that excessive force was used against them (Eith & Durose, 2011).Eith, C., & Durose, M. R. (2011). *Contacts between police and the public, 2008*. Washington, DC: Bureau of Justice Statistics. This is a low figure in percentage terms, but still translates to 417,000 people who may have been victims of police brutality in one year.

How well do the police prevent crime? To answer this question, let us be clear what it is asking. The relevant question is not whether having the police we do have keeps us safer than having no police at all. Rather, the relevant question is whether hiring

more police or making some specific change in police practice would lower the crime rate. The evidence on this issue is complex, but certain conclusions are in order.

First, simply adding more officers to a city's existing police force will probably not reduce crime, or will reduce it only to a very small degree and at great expense (Walker, 2011).Walker, S. (2011). *Sense and nonsense about crime, drugs, and communities: A policy guide* (7th ed.). Belmont, CA: Wadsworth. Several reasons may explain why additional police produce small or no reductions in crime. Much violence takes place indoors or in other locations far from police purview, and practical increases in police numbers still would not yield numbers high enough to guarantee a police presence in every public location where crime might happen. Because criminals typically think they can commit a crime with impunity if no police are around, the hiring of additional police is not likely to deter them.

Additional police may not matter, but how police are deployed *does* matter. In this regard, a second conclusion from the policing and crime literature is that *directed patrol* involving the consistent deployment of large numbers of police in high-crime areas ("hot spots") can reduce crime significantly (Mastrofski, Weisburd, & Braga, 2010).Mastrofski, S. D., Weisburd, D., & Braga, A. A. (2010). Rethinking policing: The policy implications of hot spots of crime. In N. A. Frost, J. D. Freilich & T. R. Clear (Eds.), *Contemporary issues in criminal justice policy* (pp. 251–264). Belmont, CA: Wadsworth. *Crackdowns*—in which the police flood a high crime and drug neighborhood, make a lot of arrests, and then leave—have at most a short-term effect, with crime and drug use eventually returning to their previous levels or simply becoming displaced to other neighborhoods.

Criminal Courts

In the US legal system, suspects and defendants enjoy certain rights and protections guaranteed by the Constitution and Bill of Rights and provided in various Supreme Court rulings since these documents were written some 220 years ago. Although these rights and protections do exist and again help distinguish our democratic government from authoritarian regimes, in reality the criminal courts often fail to achieve the high standards by which they should be judged. *Justice Denied* (Downie, 1972)Downie, L., Jr. (1972). *Justice denied: The case for reform of the courts*. Baltimore, MD: Penguin Books. and *Injustice for All* (Strick, 1978)Strick, A. (1978). *Injustice for all*. New York, NY: Penguin. were the titles of two popular critiques of the courts written about four decades ago, and these titles continue to apply to the criminal courts today.

A basic problem is the lack of adequate counsel for the poor. Wealthy defendants can afford the best attorneys and get what they pay for: excellent legal defense. An oft-cited example here is O. J. Simpson, the former football star and television and film celebrity who was arrested and tried during the mid-1990s for allegedly killing his ex-wife and one of her friends (Barkan, 1996).Barkan, S. E. (1996). The social science significance of the O. J. Simpson case. In G. Barak (Ed.), *Representing O. J.: Murder, criminal justice and mass culture* (pp. 36–42). Albany, NY: Harrow and Heston. Simpson hired a "dream team" of nationally famous attorneys and other experts, including private investigators, to defend him at an eventual cost of some $10 million. A jury acquitted him, but a poor defendant in similar circumstances almost undoubtedly would have been found guilty and perhaps received a death sentence.

Almost all criminal defendants are poor or near poor. Although they enjoy the right to free legal counsel, in practice they receive ineffective counsel or virtually no counsel at all. The poor are defended by public defenders or by court-appointed private counsel, and either type of attorney simply has far too many cases in any time period to handle adequately. Many poor defendants see their attorneys for the first time just moments before a hearing before the judge. Because of their heavy caseloads, the defense attorneys do not have the time to consider the complexities of any one case, and most defendants end up pleading guilty.

A 2006 report by a New York state judicial commission reflected these problems (Hakim, 2006, p. B1).Hakim, D. (2006, June 29). Judge urges state control of legal aid for the poor. *New York Times*, p. B1. The report concluded that "local governments were falling well short of constitutional requirements in providing legal representation to the poor," according to a news story. Some New York attorneys, the report found, had an average yearly caseload of 1,000 misdemeanors and 175 felonies. The report also found that many poor defendants in 1,300 towns and villages throughout the state received no legal representation at all. The judge who headed the commission called the situation "a serious crisis."

Another problem is **plea bargaining**, in which a defendant agrees to plead guilty, usually in return for a reduced sentence. Under our system of justice, criminal defendants are entitled to a trial by jury if they want one. In reality, however, most defendants plead guilty, and criminal trials are very rare: Fewer than 3 percent of felony cases go to trial. Prosecutors favor plea bargains because

they help ensure convictions while saving the time and expense of jury trials, while defendants favor plea bargains because they help ensure a lower sentence than they might receive if they exercised their right to have a jury trial and then were found guilty. However, this practice in effect means that defendants are punished if they do exercise their right to have a trial. Critics of this aspect say that defendants are being coerced into pleading guilty even when they have a good chance of winning a not guilty verdict if their case went to trial (Oppel, 2011).Oppel, R. A., Jr. (2011, September 26). Sentencing shift gives new leverage to prosecutors. *New York Times*, p. A1.

The Problem of Prisons

The United States now houses more than 1.5 million people in state and federal prisons and more than 750,000 in local jails. This total of about 2.3 million people behind bars is about double the 1990 number and yields an incarceration rate that is by far the highest rate of any Western democracy. This high rate is troubling, and so is the racial composition of American prisoners. More than 60 percent of all state and federal prisoners are African American or Latino, even though these two groups comprise only about 30 percent of the national population. As Chapter 7 noted, African Americans and Latinos have been arrested and imprisoned for drug offenses far out of proportion to their actual use of illegal drugs. This racial/ethnic disparity has contributed to what law professor Michelle Alexander (2010)Alexander, M. (2010). *The new Jim Crow: Mass incarceration in the age of colorblindness*. New York, NY: New Press. terms the “new Jim Crow” of mass incarceration. Reflecting her concern, about one of every three young African American males are under correctional supervision (in jail or prison or on probation or parole).

The corrections system costs the nation more than $75 billion annually. What does the expenditure of this huge sum accomplish? It would be reassuring to know that the high US incarceration rate keeps the nation safe and even helps reduce the crime rate, and it is certainly true that the crime rate would be much higher if we had no prisons at all. However, many criminologists think the surge in imprisonment during the last few decades has not helped reduce the crime rate at all or at least in a cost-efficient manner (Durlauf & Nagin, 2011).Durlauf, S. N., & Nagin, D. S. (2011). Imprisonment and crime: Can both be reduced? *Criminology & Public Policy, 10*, 13–54. Greater crime declines would be produced, many criminologists say, if equivalent funds were instead spent on crime prevention programs instead of on incarceration (Welsh & Farrington, 2007),Welsh, B. C., & Farrington, D. P. (Eds.). (2007). *Preventing Crime: What works for children, offenders, victims and places*. New York, NY: Springer. a point returned to in Section 8.6.

Criminologists also worry that prison may be a breeding ground for crime because rehabilitation programs such as vocational training and drug and alcohol counseling are lacking and because prison conditions are substandard. They note that more than 700,000 inmates are released from prison every year and come back into their communities ill equipped to resume a normal life. There they face a lack of job opportunities (how many employers want to hire an ex-con?) and a lack of friendships with law-abiding individuals, as our earlier discussion of labeling theory indicated. Partly for these reasons, imprisonment ironically may increase the likelihood of future offending (Durlauf & Nagin, 2011).Durlauf, S. N., & Nagin, D. S. (2011). Imprisonment and crime: Can both be reduced? *Criminology & Public Policy, 10*, 13–54.

Living conditions behind bars merit further discussion. A common belief of Americans is that many prisons and jails are like country clubs, with exercise rooms and expensive video and audio equipment abounding. However, this belief is a myth. Although some minimum-security federal prisons may have clean, adequate facilities, state prisons and local jails are typically squalid places. As one critique summarized the situation, “Behind the walls, prisoners are likely to find cramped living conditions, poor ventilation, poor plumbing, substandard heating and cooling, unsanitary conditions, limited private possessions, restricted visitation rights, constant noise, and a complete lack of privacy” (Kappeler & Potter, 2005, p. 293).Kappeler, V. E., & Potter, G. W. (2005). *The mythology of crime and criminal justice* (4th ed.). Prospect Heights, IL: Waveland Press.

Some Americans probably feel that criminals deserve to live amid overcrowding and squalid living conditions, while many Americans are probably at least not very bothered by this situation. But this situation increases the odds that inmates will leave prison and jail as *more* of a threat to public safety than when they were first incarcerated. Treating inmates humanely would be an important step toward successful reentry into mainstream society.

People Making a Difference

Making a Difference in the Lives of Ex-Cons

The text notes that more than 600,000 inmates are released from prison every year. Many of them are burdened with drug, alcohol, and other problems and face bleak prospects for employment, friendships, and stable lives, in general. Since 1967, The Fortune Society has been making a difference in the lives of ex-convicts in and near New York City.

The Fortune Society's website (http://www.fortunesociety.org) describes the group's mission: "The Fortune Society is a nonprofit social service and advocacy, founded in 1967, whose mission is to support successful reentry from prison and promote alternatives to incarceration, thus strengthening the fabric of our communities." About 70 percent of its more than 190 employees are ex-prisoners and/or have histories of substance abuse or homelessness. It is fair to say that The Fortune Society was working on prisoner reentry long before scholars discovered the problem in the late 1990s and early 2000s.

The group's president, JoAnne Page, described its halfway house where inmates stay for up to two months after their release from prisons: "This is what we do. We bring people home safely. There's a point when the crime happened. The sentence was served, and the rehabilitation must begin. We look at a human being as much more than the worst they ever did." Recalling that many of her relatives died in the Holocaust, Page added, "What my family experience did was to make me want to be somebody who fights institutions that damage people and who makes the world a little safer. Prisons are savage institutions."

In addition to its halfway house, the Fortune Society provides many other services for inmates, ex-inmates, and offenders who are put on probation in lieu of incarceration. It regularly offers drug and alcohol counseling, family services, adult education and career development programs, and classes in anger management, parenting skills, and health care. One of its most novel programs is Miss Betty's Practical Cooking and Nutrition Class, an eight-week course for ex-inmates who are young fathers. While a first reaction might be to scoff at such a class, a Fortune counselor pointed to its benefits after conceding her own immediate reaction. "When I found out about the cooking classes, I thought, 'So they're going to learn to cook, so what?' What's that going to do? But it's building self-esteem. For most of these guys, they're in a city, they've grown up on Kool-Aid and a bag of chips. This is building structure. They're at the point where they have really accomplished something…They're learning manners. You really can change patterns."

One ex-convict that Fortune helped was 22-year-old Candice Ellison, who spent more than two years in prison for assault. After not finding a job despite applying to several dozen jobs over a six-month span, she turned in desperation to The Fortune Society for help. Fortune bought her interview clothes and advised her on how to talk about her prison record with potential employers. Commending the help she received, she noted, "Some of my high school friends say it's not that hard to get a job, but for people like me with a criminal background, it's like 20 times harder."

The Fortune Society has received national recognition for its efforts. Two federal agencies, the Department of Justice and the Department of Housing and Urban Development, have featured The Fortune Society as a model program for helping ex-inmates. The Urban Institute featured this model in a video it developed about prisoner reentry programs. And in 2005, the American Society of Criminology presented the Society its President's Award for "Distinguished Contributions to the Cause of Justice." These and other examples of the national recognition won by The Fortune Society indicate that for more than four decades it has indeed been making a difference.

Sources: Bellafante, 2005; Greenhouse, 2011; Richardson, 2004Bellafante, G. (2005, March 9). Recipe for a second chance. *New York Times*, p. F1; Greenhouse, S. (2011, January 25). States help ex-inmates find jobs. *New York Times*, p. B1; Richardson, L. (2004, *July 13*). Defending the despised, and loving to do so. *New York Times*, p. B2.

Focus on the Death Penalty

The death penalty is perhaps the most controversial issue in the criminal justice system today. The United States is the only Western democracy that sentences common criminals to death, as other democracies decided decades ago that civilized nations should not execute anyone, even if the person took a human life. About two-thirds of Americans in national surveys favor the death penalty, with their reasons including the need for retribution ("an eye for an eye"), deterrence of potential murderers, and lower expenditure of public funds compared to a lifetime sentence. Social science evidence is irrelevant to the retribution argument, which is a matter for philosophy and theology, but it is relevant to many other aspects of the death debate. Taken together, the evidence on all these aspects yields a powerful case *against* the death penalty (Death Penalty Information Center, 2011).Death Penalty Information Center. (2011). *Facts about the death penalty*. Washington, DC: Author. Retrieved from http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

First, capital punishment does not deter homicide: Almost all studies on this issue fail to find a deterrent effect. An important reason for this stems from the nature of homicide. As discussed earlier, it is a relatively spontaneous, emotional crime. Most people who murder do not sit down beforehand to calculate their chances of being arrested, convicted, and executed. Instead they lash out. Premeditated murders do exist, but the people who commit them do not think they will get caught and so, once again, are not deterred by the potential for execution.

Second, the death penalty is racially discriminatory. While some studies find that African Americans are more likely than whites who commit similar homicides to receive the death penalty, the clearest evidence for racial discrimination involves the race of the victim: Homicides with white victims are more likely than those with African American victims to result in a death sentence (Paternoster & Brame, 2008).Paternoster, R., & Brame, R. (2008). Reassessing race disparities in Maryland capital cases. *Criminology, 46*, 971–1007. Although this difference is not intended, it suggests that the criminal justice system values white lives more than African American lives.

Third, many people have been mistakenly convicted of capital offenses, raising the possibility of *wrongful executions*. Sometimes defendants are convicted out of honest errors, and sometimes they are convicted because the police and/or prosecution fabricated evidence or engaged in other legal misconduct. Whatever their source, wrongful convictions of capital offenses raise the ugly possibility that a defendant will be executed even though he was actually innocent of any capital crime. During the past four decades, more than 130 people have been released from death row after DNA or other evidence cast serious doubt on their guilt. In March 2011, Illinois abolished capital punishment, partly because of concern over the possibility of wrongful executions. As the Illinois governor summarized his reasons for signing the legislative bill to abolish the death penalty, “Since our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment, I have concluded that the proper course of action is to abolish it” (Schwartz & Fitzsimmons, 2011:A18).Schwartz, J., & Fitzsimmons, E. G. (2011, March 10). Illinois governor signs capital punishment ban. *New York Times*, p. A18.

Fourth, executions are expensive. Keeping a murderer in prison for life costs about $1 million in current dollars (say 40 years at $25,000 per year), while the average death sentence costs the state about $2 million to $3 million in legal expenses.

This diverse body of evidence leads most criminologists to oppose the death penalty. In 1989, the American Society of Criminology adopted this official policy position on capital punishment: “Be it resolved that because social science research has demonstrated the death penalty to be racist in application and social science research has found no consistent evidence of crime deterrence through execution, The American Society of Criminology publicly condemns this form of punishment, and urges its members to use their professional skills in legislatures and courts to seek a speedy abolition of this form of punishment.”

Key Takeaways

- Partly because the police often fear for their lives, they tend to have a “working personality” that is authoritarian and suspicious. Police corruption and use of undue force remain significant problems in many police departments.
- Although criminal defendants have the right to counsel, the legal representation of such defendants, most of whom are poor or near poor, is very inadequate.
- Prisons are squalid places, and incarceration has not been shown to reduce crime in an effective or cost-efficient manner.
- Most criminologists agree that capital punishment does not deter homicide, and they worry about racial discrimination in the use of the death penalty and about the possibility of wrongful executions.

For Your Review

1. Have you ever had an encounter with a police officer? If so, how would you describe the officer’s personality? Was it similar to what is described in the text?
2. The text argues that improvement in prison conditions would help reduce the probability of reoffending after inmates leave prison. Do you agree or disagree with this statement? Explain your answer.

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7.6: Reducing Crime

Learning Objectives

1. Describe five strategies that criminologists have proposed to reduce crime.

During the last few decades, the United States has used a **get-tough approach** to fight crime. This approach has involved longer prison terms and the building of many more prisons and jails. As noted earlier, scholars doubt that this surge in imprisonment has achieved significant crime reduction at an affordable cost, and they worry that it may be leading to greater problems in the future as hundreds of thousands of prison inmates are released back into their communities every year.

Many of these scholars favor an approach to crime borrowed from the field of public health. In the areas of health and medicine, a **public health approach** tries to treat people who are already ill, but it especially focuses on preventing disease and illness before they begin. While physicians try to help people who already have cancer, medical researchers constantly search for the causes of cancer so that they can try to prevent it before it affects anyone. This model is increasingly being applied to criminal behavior, and criminologists have advanced several ideas that, if implemented with sufficient funds and serious purpose, hold great potential for achieving significant, cost-effective reductions in crime (Barlow & Decker, 2010; Frost, Freilich, & Clear, 2010; Lab, 2010).Barlow, H. D., & Decker, S. H. (Eds.). (2010). *Criminology and public policy: Putting theory to work*. Philadelphia, PA: Temple Univeristy Press; Frost, N. A., Freilich, J. D., & Clear, T. R. (Eds.). (2010). *Contemporary issues in criminal justice policy: Policy proposals from the American society of criminology conference*. Belmont, CA: Wadsworth; Lab, S. P. (2010). *Crime prevention: Approaches, practices and evaluations* (7th ed.). Cincinnati, OH: Anderson. Many of their strategies rest on the huge body of theory and research on the factors underlying crime in the United States, which we had space only to touch on earlier, while other proposals call for criminal justice reforms. We highlight some of these many strategies here.

Applying Social Research

"Three Strikes" Laws Strike Out

The *get-tough* approach highlighted in the text has involved, among other things, mandatory minimum sentencing, in which judges are required to give convicted offenders a minimum prison term, often several years long, rather than a shorter sentence or probation.

Beginning in the 1990s, one of the most publicized types of mandatory sentencing has been the "three strikes and you're out" policy that mandates an extremely long sentence—at least twenty-five years—and sometimes life imprisonment for offenders convicted of a third (or, in some states, a second) felony. The intent of these laws, enacted by about half the states and the federal government, is to reduce crime by keeping dangerous offenders behind bars for many years and by deterring potential offenders from committing crime (*general deterrence*). Sufficient time since the first three strikes laws were passed has elapsed to enable criminologists to assess whether they have, in fact, reduced crime.

Studies of this issue find that three strikes laws do not reduce serious crime and, in fact, may even *increase* the number of homicides. Several studies have focused on California, where tens of thousands of offenders have been sentenced under the state's three strikes law passed in 1994. Almost all these studies conclude that California's law did not reduce subsequent crime or did so by only a negligible amount. A few studies also have examined nationwide samples of city and state crime rates in the states that adopted three strikes laws and in the states that did not do so. These studies also fail to find that three strikes laws have reduced crime. As one of these studies, by three criminologists from the University of Alabama at Birmingham, concludes, "Consistent with other studies, ours finds no credible statistical evidence that passage of three strikes laws reduces crime by deterring potential criminals or incapacitating repeat offenders." The national studies even find that three strikes laws have *increased* the number of homicides. This latter finding is certainly an unintended consequence of these laws and may stem from decisions by felons facing a third strike to kill witnesses so as to avoid life imprisonment.

In retrospect, it is not very surprising that three strikes laws do not work as intended. Many criminals simply do not think they will get caught and thus are not likely to be deterred by increased penalties. Many are also under the influence of drugs and/or alcohol at the time of their offense, making it even less likely they will worry about being caught. In addition, many three strikes offenders tend to be older (because they are being sentenced for their third felony, not just their first) and thus are

already “aging out” beyond the high-crime age group, 15–25. Thus three strikes laws target offenders whose criminality is already declining because they are getting older.

In addition to the increase in homicides, research has identified other problems produced by three strikes laws. Because three strikes defendants do not want a life term, some choose a jury trial instead of pleading guilty. Jury trials are expensive and slow compared to guilty pleas and thus cost the prosecution both money and time. In another problem, the additional years that three strikes offenders spend in prison are costing the states millions of dollars in yearly imprisonment costs and in health-care costs as these offenders reach their elderly years.

As should be clear, the body of three strikes research has important policy implications, as noted by the University of Alabama at Birmingham scholars: “(P)olicy makers should reconsider the costs and benefits associated with three strikes laws” (p. 235).Kovandzic, T. V., Sloan, J. J., III, & Vieraitis, L. M. (2004). “Striking out” as crime reduction policy: The impact of “three strikes” laws on crime rates in US cities. *Justice Quarterly, 21*, 207–239. Three strikes laws do not lower crime and in fact increase homicides, and they have forced the states to spend large sums of money on courts and prisons. The three strikes research strongly suggests that three strikes laws should be eliminated.

Sources: Kovandzic, Sloan, & Vieraitis, 2004; Walker, 2011Kovandzic, T. V., Sloan, J. J., III, & Vieraitis, L. M. (2004). “Striking out” as crime reduction policy: The impact of “three strikes” laws on crime rates in US cities. *Justice Quarterly, 21*, 207–239; Walker, S. (2011). *Sense and nonsense about crime, drugs, and communities: A policy guide* (7th ed.). Belmont, CA: Wadsworth.

A first strategy involves serious national efforts to reduce poverty and to improve neighborhood living conditions. It is true that most poor people do not commit crime, but it is also true that most street crime is committed by the poor or near poor for reasons discussed earlier. Efforts that create decent-paying jobs for the poor, enhance their vocational and educational opportunities, and improve their neighborhood living conditions should all help reduce poverty and its attendant problems and thus to reduce crime (Currie, 2011).Currie, E. (2011). On the pitfalls of spurious prudence. *Criminology & Public Policy, 10*, 109–114.

A second strategy involves changes in how American parents raise their boys. To the extent that the large gender difference in serious crime stems from male socialization patterns, changes in male socialization should help reduce crime (Collier, 2004).Collier, R. (2004). Masculinities and crime: Rethinking the “man question”? In C. Sumner (Ed.), *The Blackwell companion to criminology* (pp. 285–308). Oxford, United Kingdom: Blackwell. This will certainly not happen any time soon, but if American parents can begin to raise their boys to be less aggressive and less dominating, they will help reduce the nation’s crime rate. As two feminist criminologists have noted, “A large price is paid for structures of male domination and for the very qualities that drive men to be successful, to control others, and to wield uncompromising power.…Gender differences in crime suggest that crime may not be so normal after all. Such differences challenge us to see that in the lives of women, men have a great deal more to learn” (Daly & Chesney-Lind, 1988, p. 527).Daly, K., & Chesney-Lind, M. (1988). Feminism and criminology. *Justice Quarterly, 5*, 497–538.

Lessons from Other Societies

Preventing Crime and Treating Prisoners in Western Europe

The text suggests the get-tough approach that the United States has been using to reduce crime has not worked in a cost-effective manner and has led to other problems, including a flood of inmates returning to their communities every year. In fighting crime, the United States has much to learn from Western Europe. In contrast to the US get-tough approach, Western European nations tend to use a public health model that comprises two components. The first is a focus on crime prevention that uses early childhood intervention programs and other preventive measures to address the roots of crime and other childhood and family problems. The second is a criminal justice policy that involves sentencing defendants and treating prisoners in a manner more likely to rehabilitate offenders and reduce their repeat offending than the more punitive approach in the United States.

The overall Western European approach to offenders is guided by the belief that imprisonment should be reserved for the most dangerous violent offenders, and that probation, community service, and other forms of community corrections should be used for other offenders. Because violent offenders comprise only a small proportion of all offenders, the Western European approach saves a great deal of money while still protecting public safety.

The experience of Denmark and the Netherlands is illustrative. Like the United States, Denmark had to deal with rapidly growing crime rates during the 1960s. Whereas the United States responded with the get-tough approach involving longer and more certain prison terms and the construction of more and more prisons, Denmark took the opposite approach: It adopted shorter prison terms for violent offenders and used the funds saved from the reduced prison costs to expand community corrections for property offenders. Finland and the Netherlands have also adopted a similar approach that favors community corrections and relatively short prison terms for violent offenders over the get-tough approach the United States adopted.

All these nations save great sums of money in prison costs and other criminal justice expenses because they chose not to adopt the US get-tough approach, yet their rates of serious violent crime lag behind the US rates. Although these nations obviously differ from the United States, the advantages of their approach should be kept in mind as the United States evaluates its get-tough policies. There may be much to learn from their less punitive approach to crime: While the United States got tough, perhaps they got sensible.

Sources: Dammer & Albanese, 2011; Waller & Welsh, 2007Dammer, H. R., & Albanese, J. S. (2011). *Comparative criminal justice systems* (4th ed.). Belmont, CA: Wadsworth; Waller, I., & Welsh, B. C. (2007). Reducing crime by harnessing international best practices. In D. S. Eitzen (Ed.), *Solutions to social problems: Lessons from other societies* (pp. 208–216). Boston, MA: Allyn & Bacon.

A third and very important strategy involves expansion of early childhood intervention (ECI) programs and nutrition services for poor mothers and their children, as the Note 8.28 "Children and Our Future" box discussed earlier. ECI programs generally involve visits by social workers, nurses, or other professionals to young, poor mothers shortly after they give birth, as these mother's children are often at high risk for later behavioral problems (Welsh & Farrington, 2007).Welsh, B. C., & Farrington, D. P. (2007). Save children from a life of crime. *Criminology & Public Policy, 6*(4), 871–879. These visits may be daily or weekly and last for several months, and they involve parenting instruction and training in other life skills. These programs have been shown to be very successful in reducing childhood and adolescent misbehavior in a cost-effective manner (Greenwood, 2006).Greenwood, P. W. (2006). *Changing lives: Delinquency prevention as crime-control policy*. Chicago, IL: University of Chicago Press. In the same vein, nutrition services would also reduce the risk of neurological impairment among newborns and young children and thus their likelihood of developing later behavioral problems.

A fourth strategy calls for a national effort to improve the nation's schools and schooling. This effort would involve replacing large, older, and dilapidated schoolhouses with smaller, nicer, and better equipped ones. For many reasons, this effort should help improve student academic achievement and school commitment and thus lower delinquent and later criminal behavior.

A final set of strategies involves changes in the criminal justice system that should help reduce repeat offending and save much money that could be used to fund the ECI programs and other efforts just outlined. Placing nonviolent property and drug offenders in community corrections (e.g., probation, daytime supervision) would reduce the number of prison and jail inmates by hundreds of thousands annually without endangering Americans' safety and save billions of dollars in prison costs (Jacobson, 2006).Jacobson, M. (2006). Reversing the punitive turn: The Limits and promise of current research. *Criminology & Public Policy, 5*, 277–284. These funds could also be used to improve prison and jail vocational and educational programming and drug and alcohol services, all of which are seriously underfunded. If properly funded, such programs and services hold great promise for rehabilitating many inmates (Cullen, 2007).Cullen, F. T. (2007). Make rehabilitation corrections' guiding paradigm. *Criminology & Public Policy, 6*(4), 717–727. Elimination of the death penalty would also save much money while also eliminating the possibility of wrongful executions.

This is not a complete list of strategies, but it does suggest the kinds of efforts that would help address the roots of crime and, in the long run, help to reduce it. Although the United States may not be interested in pursuing this crime-prevention approach, strategies like the ones just mentioned would in the long run be more likely than our current get-tough approach to create a safer society and at the same time save us billions of dollars annually.

Note that none of these proposals addresses white-collar crime, which should not be neglected in a discussion of reducing the nation's crime problem. One reason white-collar crime is so common is that the laws against it are weakly enforced; more consistent enforcement of these laws should help reduce white-collar crime, as would the greater use of imprisonment for convicted white-collar criminals (Rosoff et al., 2010).Rosoff, S. M., Pontell, H. N., & Tillman, R. (2010). *Profit without honor: White collar crime and the looting of America* (5th ed.). Upper Saddle River, NJ: Prentice Hall.

Key Takeaways

- The get-tough approach has not been shown to reduce crime in an effective and cost-efficient manner. A sociological explanation of crime thus suggests the need to focus more resources on the social roots of crime in order to prevent crime from happening in the first place.
- Strategies suggested by criminologists to reduce crime include (a) reducing poverty and improving neighborhood living conditions, (b) changing male socialization patterns, (c) expanding early childhood intervention programs, (d) improving schools and schooling, and (e) reducing the use of incarceration for drug and property offenders.

For Your Review

1. The text notes that social science research has not shown the get-tough approach to be effective or cost-efficient. If this is true, why do you think this approach has been so popular in the United States since the 1970s?
2. Of the five strategies outlined in the text to reduce crime, which one strategy do you think would be most effective if it were implemented with adequate funding? Explain your answer.

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7.7: Property Crimes

Introduction

The first four chapters of this book have offered an overview of how criminal law works. They have examined a human practice in which written texts are used to express, guide, authorize, or constrain decisions to classify and condemn certain acts, and certain people, as criminal. Our coverage of the basic structure and operation of criminal law has not, so far, focused on any single type of criminal offense. This chapter and the next two do focus on specific categories of offenses. Before discussing property crimes and the reasons to study them, it may help to take note of the criminal offenses that were charged in the cases you've read so far:

- *Commonwealth v. Mochan*: misdemeanor injury to public morality (harassing telephone calls)
- *Commonwealth v. Copenhaver*: driving while intoxicated and drug offenses (after traffic stop for expired registration)
- *Morissette v. United States*: knowing conversion of government property (a kind of theft)
- *State v. Alvarado*: possessing contraband in prison
- *Lambert v. California*: failure to register as felon
- *People v. Kellogg*: public intoxication
- *City of Chicago v. Morales*: gang loitering
- *Inmates of Attica v. Rockefeller*: [no charges; this was a civil lawsuit seeking to compel prosecutors to charge prison officials with assault, homicide, and civil rights violations]
- *State v. Cissell*: failure to pay child support
- *United States v. Armstrong*: drug offenses
- In re *Winship*: juvenile equivalent of larceny (theft)
- *Owens v. Maryland*: driving while intoxicated
- *Bordenkircher v. Hayes*: check forgery
- *Yates v. United States*: concealing a tangible object related to government investigation

The cases listed above were selected to illustrate the process of criminalization, enforcement, and adjudication; they were not selected on the basis of the types of crimes that were charged. All the same, these cases have offered a useful sampling of activities that are frequently classified as criminal: the possession or distribution of drugs; taking property; risky activities (drunk driving); regulatory violations (failure to register); and, in just one of the above cases, physical violence. Most states organize their criminal codes into categories defined by the type of prohibited conduct: Offenses Against Property; Offenses Against the Person; Offenses Against Public Administration; Offenses Against Public Order; Offenses Against Public Health, Safety, and Morals; and so on. States do not always use the same labels or classify particular offenses under the same headings, but you will see some common patterns if you browse the tables of contents of a few state criminal codes, which is easy to do:

- Kansas: https://www.ksrevisor.org/statutes/ksa_ch21.html
- New York: https://www.nysenate.gov/legislation/laws/PEN/P3
- Ohio: https://codes.ohio.gov/ohio-revised-code/title-29
- Pennsylvania: https://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/18/18.HTM
- Texas: https://statutes.capitol.texas.gov/?link=PE

Most states post their codes online, so you can probably find yours easily even if it is not listed above. Browsing penal codes can help you gain a sense of the usual structure and content of codes, but it should also reinforce this point: you should not think of learning criminal law as simply a matter of learning the definitions of offenses. If someone wants to know the exact definition of burglary in Texas (to take one example), they can find it online relatively easily. As a lawyer, the value you bring to your clients will not come from your ability to recite the elements of any given statute, or even from your ability to describe typical patterns of burglary definitions—though it is indeed useful to be familiar with those patterns. Rather, your services as a lawyer will be valuable if you understand how the criminal system works and how to help your clients navigate through it. You will need to understand the key decisions to be made and the texts that will matter to those decisions, and you will need to be able to make persuasive arguments to the relevant decisionmakers. With that in mind, this chapter has two broad goals: it seeks to teach the basic components and usual definitions of property crimes, and it aims to use this category of offenses to expand and reinforce your broader understanding of how criminal law works.

Property crimes are, roughly, crimes that involve some sort of misappropriation or misuse of property. That is only a rough description, we should emphasize. Many offense definitions include both a misappropriation of property and some other core element, such as the infliction or threat of physical harm to a person. Robbery (usually defined as theft by use or threat of force) is a clear example, and robbery is often classified as a violent crime or a "crime against the person" rather than a property crime. Arson is also sometimes classified as a violent crime, or placed in a separate category of "crimes against the habitation." For our purposes, though, "property crimes" is a useful label for an array of offenses that involve misappropriation or misuse of property. Robbery and arson are addressed in this chapter, rather than the next chapter on crimes against the person, because they both are based in part on concerns about property. But both robbery and arson could be – and often are – classified as "violent crimes" or crimes against the person. The next chapter explores in more detail the classification of crimes as violent.

Property crime is the focus here; what is property? That question is more difficult than it may first appear, and you're likely to tackle it in a separate course focused on property law. For now, recognize that property includes not just land, money, and objects but also, sometimes, information or other intangibles. Happily, most of the cases we consider in this chapter concern relatively easily recognizable forms of property, such as a car, a purse, or money. Recognize also that ideas about property and ownership change over time. American law once treated certain persons – enslaved persons – as themselves a form of property, and criminal law was used to enforce the property rights of slaveholders. Today, to use someone else's labor and then refuse to pay for it could itself be the crime of "wage theft." It should also be noted that the very existence of the United States as an independent, sovereign nation is premised on the claim that European settlers eventually became the legitimate owners of the land they occupied, notwithstanding the fact that indigenous peoples had previously lived on and used that land. This chapter will not delve deeply into these important issues or radical critiques of property itself (such as Proudhon's quip that "property is theft!"). Instead, for the most part this chapter will take for granted the determinations about what is property, and who is an owner, that have been made outside of criminal law. We will focus on the ways in which criminal law is used to enforce those determinations. But it is worth remembering that these determinations about property and owners are human judgments rather than natural truths. The idea that it is wrong to take property from an owner may seem natural and intuitive, but what constitutes property and who qualifies as an owner are political and legal questions.

Similarly, it is worth noting that there are deep moral and political questions about the distribution of property, and again criminal law operates mainly to enforce whatever answers to those questions have been reached in other arenas. Some fields of law or policy, such as tax law or social welfare spending programs, may openly embrace redistributive aims. The criminal law of property, in contrast, mostly aims to preserve existing distributions of property. Put differently, redistribution through self-help is disfavored by criminal law, as you'll see in this chapter.

As we will see, the criminalization of property offenses may be motivated by any of several different goals. A legislature may wish to protect owners' rights in possession and control of the things they own. But property crimes also often seem designed to protect somewhat more abstract interests in trust, security, or "civil order." Again, the interests that criminal law has seemingly sought to protect have evolved over time. In cases in this chapter, you will find both appeals to the past and efforts to break from it. In particular, you'll see the continuing influence of common law concepts even in a world of statutes, as courts often trace the development and evolution of property crimes in order to make sense of a modern-day statute.

Property crimes are a significant source of criminal convictions (about one-quarter of all felony convictions) and of prison sentences (about one-fifth of all prison sentences). In state prisons, where most incarcerated persons are held, property crimes are the second-most frequent source of a prison sentence, after offenses classified as "violent." Drug crimes, discussed in more detail in Chapter Seven, are the third most frequent type of conviction among persons held in state prison. (In the federal system, property crimes are not quite as important as a source of incarceration; violent offenses, drug offenses, and "public order" offenses all generate more federal prison sentences.) For more granular details on property crimes as a source of imprisonment in comparison to other types of crime, you can consult the Prison Policy Initiative's "Whole Pie" chart, referenced earlier in this book and available at https://www.prisonpolicy.org/reports/pie2020.html.

There's one other reason that property crimes are important: for better or worse, they're a particular favorite of the people who write multiple choice questions for the Multistate Bar Exam (MBE). The MBE often features several questions about larceny, embezzlement, burglary, and other property offenses, usually assuming common law definitions of those offenses rather than providing a specific statutory definition. You may wish to wait until you're actively preparing for a bar exam to memorize the

MBE's definitions of property offenses. But learning the basic contours of various property offenses now, including traditional common law definitions of those offenses, will certainly make bar preparation easier when that time comes.

By the end of this chapter, you should be able to analyze and apply statutory or common law definitions of a number of property crimes: larceny, embezzlement, "theft" more generally, burglary, trespass, robbery, and arson. You should be familiar with interpretive questions that arise frequently in relation to these offenses. And, as always, you should see how criminalization, enforcement, and adjudication decisions interact with one another. Look for ways in which changes to the criminalization of property offenses have shaped the enforcement and adjudication of these offenses.

Common Law to Consolidation: Larceny and Beyond

California Penal Code § 211. Robbery

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

California Penal Code § 484. Theft defined

a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. …

California Penal Code § 487. Grand theft defined

Grand theft is theft committed in any of the following cases:

a) When the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars ($950)…

The PEOPLE

v.

Demetrius Lamont WILLIAMS

Supreme Court of California
305 P.3d 1241

Aug. 26, 2013

KENNARD, J.

… On July 4, 2009, defendant Demetrius Lamont Williams entered a Walmart department store in Palmdale. Using either a MasterCard or a Visa payment card, which was re-encoded with a third party's credit card information, defendant bought a $200 Walmart gift card from a recently hired cashier, who was filling in for a cashier on a break. Defendant then tried to buy three more gift cards from the same cashier. At that point, the regular cashier came back and, after learning of the previous transaction, told defendant of Walmart's policy prohibiting the use of credit cards for purchases of gift cards. Defendant was permitted to keep the $200 gift card he had initially bought.

Defendant then went to a different cash register and again presented a re-encoded payment card to buy another $200 gift card. The transaction was observed by a Walmart security guard who, accompanied by another guard, asked defendant for the receipt and payment card used. Defendant complied. When told that the payment card's last four digits did not match those on the receipt, defendant produced two other re-encoded payment cards, but their numbers did not match those on the receipt either.

Defendant began walking toward the exit, followed by the two security guards. When defendant was told to stop, he produced yet another re-encoded payment card, but this card's last four digits also did not match those on the receipt. As defendant continued walking toward the exit, he pushed one of the guards, dropped some receipts, and started running away. After a brief struggle inside

the store, the guards wrestled defendant to the ground and handcuffed him. Recovered from defendant's possession were four payment cards issued by MasterCard and Visa. Also retrieved from defendant were several gift cards from Walmart and elsewhere.

Defendant was charged with four counts of second degree robbery (§ 211), one count of second degree burglary (§ 459), one count of fraudulent use of an access card (§ 484g), one count of grand theft (§ 487, subd. (a)), and three counts of forgery (§ 484i, subd. (b)), a total of 10 counts… Regarding the grand theft count, the court instructed the jury on grand theft by false pretenses. The jury found defendant guilty as charged, and the trial court sentenced him to a total prison term of 23 years eight months. The Court of Appeal reversed defendant's forgery convictions for insufficient evidence and [stayed] imposition of the burglary sentence… [but affirmed] defendant's robbery convictions.

As he did in the Court of Appeal, defendant here argues his robbery convictions should be reversed because robbery requires theft by larceny, whereas the theft he committed was by false pretenses. We agree.

II

Robbery is "the *felonious taking* of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." The term "felonious taking" originated in the common law and was later adopted in California's robbery statute. At issue here is the meaning of "felonious taking." Can that element of robbery be satisfied only by the crime of theft by larceny, as defendant argues? Or can it also be committed through theft by false pretenses, as the Attorney General contends?

To help us ascertain the meaning that the Legislature intended when it used the words "felonious taking" in California's robbery statute, we need to examine that statute's common law roots.

A. Crime of Larceny

California statutorily defines the crime of theft by larceny as the felonious stealing, taking, carrying, leading, or driving away of the personal property of another. That statutory definition reflects its English common law roots.

Unlike statutory law, whose authority rests upon an express declaration by a legislative body, the common law "consists of those principles and forms which grow out of the customs and habits of a people," enshrined in law by virtue of judicial decisions. Much of the law developed in English courts was later applied in England's American colonies and then, after independence, in this nation's states. As used in this opinion, the term "common law" denotes a "body of judge-made law … developed originally in England." And, as used here, the term "common law crime" means a "crime that [was] punishable under the common law, rather than by force of statute."

The common law defined larceny as the taking and carrying away of someone else's personal property, by trespass, with the intent to permanently deprive the owner of possession. Larceny was considered to be an offense less serious than robbery because of robbery's additional requirement of personal violence against, or intimidation of, the victim. Not that the distinction made any difference to the accused: Under the common law, robbery and larceny were felonies, and all felonies were punishable by death.

… By [the late 18th century], English society and its judiciary had become troubled by that excessively harsh punishment for theft crimes. This concern led the English courts to limit the scope of larceny. For instance, it was held not to be larceny—and not a crime at all—if someone in lawful possession of another's property misappropriated it for personal use (the later offense of embezzlement), or if someone acquired title to another's property by fraud (the later offense of false pretenses). These limitations to the law of larceny made sense in light of that crime's original purpose of preventing breaches of the peace; because embezzlement and false pretenses lacked larceny's requirement of a "trespass in the taking," they were viewed as less likely to result in violence.

Although common law larceny was in some ways narrowed to limit punishment by death, the scope of larceny was in other ways broadened to provide greater protection of private property. For instance, in 1799 an English court decision introduced the concept of "larceny by trick." Larceny by trick … involves taking possession of another's property by fraud.

[Again,] larceny requires a *trespassory* taking, which is a taking without the property owner's consent. Although a trespassory taking is not immediately evident when larceny occurs "by trick" because of the crime's fraudulent nature, English courts held that a property owner who is fraudulently induced to transfer possession of the property to another does not do so with free and genuine consent, so "the one who thus fraudulently obtains possession commits a trespass…."

The reasoning supporting larceny by trick's inclusion within the crime of larceny—that fraud vitiates the property owner's consent to the taking—was not extended, however, to cases involving the fraudulent transfer of title. Under the common law, if title was transferred, there was no trespass and hence no larceny. The theory was that once title to property was voluntarily transferred by its owner to another, the recipient owned the property and therefore could not be said to be trespassing upon it. … These subtle limitations on the common law crime of larceny spurred the British Parliament in the 18th century to create the separate statutory offenses of theft by false pretenses and embezzlement….

B. Crimes of Theft by False Pretenses and Embezzlement

… Britain's 18th century division of theft into the three separate crimes of larceny, false pretenses, and embezzlement made its way into the early criminal laws of the American states. That import has been widely criticized in this nation's legal community because of the seemingly arbitrary distinctions between the three offenses and the burden these distinctions have posed for prosecutors….

For instance, it was difficult at times to determine whether a defendant had acquired title to the property, or merely possession, a distinction separating theft by false pretenses from larceny by trick. It was similarly difficult at times to determine whether a defendant, clearly guilty of some theft offense, had committed embezzlement or larceny, as an 1867 Massachusetts case illustrates. There, a defendant was first indicted for larceny and acquitted; later, on the same facts, he was indicted for embezzlement and convicted; and thereafter, on appeal, his conviction was set aside on the ground that his offense was larceny, not embezzlement. *Com. v. O'Malley*, 97 Mass. 584 (1867).

In the early 20th century, many state legislatures, recognizing the burdens imposed on prosecutors by the separation of the three crimes of larceny, false pretenses, and embezzlement, consolidated those offenses into a single crime, usually called "theft." The California Legislature did so in 1927, by statutory amendment. In a 1954 decision, this court explained: "The purpose of the consolidation was to remove the technicalities that existed in the pleading and proof of these crimes at common law. Indictments and informations charging the crime of 'theft' can now simply allege an 'unlawful taking.' [Citations.] Juries need no longer be concerned with the technical differences between the several types of theft, and can return a general verdict of guilty if they find that an 'unlawful taking' has been proved [Citations.]. The elements of the several types of theft included within section 484 have not been changed, however, and a judgment of conviction of theft, based on a general verdict of guilty, can be sustained only if the evidence discloses the elements of one of the consolidated offenses." *People v. Ashley* (1954).

As we pointed out in *Ashley*, the California Legislature's consolidation of larceny, false pretenses, and embezzlement into the single crime of theft did not change the elements of those offenses….

C. Elements of Robbery, Larceny, and Theft by False Pretenses and Their Application Here

We now consider the issue here: whether robbery's element of "felonious taking" can be satisfied through theft by false pretenses, the type of theft defendant committed.

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Reflected in that statutory definition are larceny's elements of "the taking of another's property, with the intent to steal and carry it away." The taking required in larceny, as in robbery, must be "felonious."

By adopting in the robbery statute the phrase "felonious taking" that was used in the common law with regard to both robbery and larceny, the California Legislature in all likelihood intended to attach to the statutory phrase the same meaning the phrase had under the common law.

…[A]ll larceny at common law was a felony, and thus the common law defined larceny as a "felonious taking." Because California's robbery statute uses the common law's phrase "felonious taking," and because at common law "felonious taking" was synonymous with larceny, we conclude that larceny is a necessary element of robbery….

Two differences in the crimes of larceny and theft by false pretenses tend to support our conclusion that only theft by larceny, not by false pretenses, can fulfill the "felonious taking" requirement of robbery.

First, *larceny* requires "asportation," which is a carrying away of stolen property. This element of larceny, although satisfied by only the slightest movement, continues until the perpetrator reaches a place of temporary safety. Asportation is what makes larceny a continuing offense. Because larceny is a continuing offense, a defendant who uses force or fear in an attempt to escape with property taken by larceny has committed robbery. Similarly, the Attorney General asserts that defendant committed robbery

because he shoved the Walmart security guards during his attempt to flee the store after acquiring the store gift cards through theft by false pretenses.

But *theft by false pretenses*, unlike larceny, has no requirement of asportation. The offense requires only that "(1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation." *People v. Wooten* (1996). The crime of theft by false pretenses ends at the moment title to the property is acquired, and thus cannot become robbery by the defendant's later use of force or fear. Here, when defendant shoved the store security guards, he was no longer engaged in the commission of theft because he had already acquired title to the Walmart gift cards; therefore, defendant did not commit robbery.

… We now consider another significant difference between larceny and theft by false pretenses. …[L]arceny requires a "trespassory taking," which is a taking without the property owner's consent. This element of larceny, like all its other elements, is incorporated into California's robbery statute. By contrast, theft by false pretenses involves the *consensual* transfer of possession as well as *title* of property; therefore, it cannot be committed by trespass. This is illustrated by the facts in a recent Court of Appeal decision, *People v. Beaver* (2010). There, the defendant staged an accident at his place of employment, a ski resort, to obtain medical expenses for a preexisting [knee injury]. The defendant was convicted of grand theft. The Court of Appeal reversed the conviction, holding that the jury was instructed on the incorrect type of theft—theft by larceny—and instead should have been instructed on theft by false pretenses. *Beaver* said: "The present matter did not involve a taking of property from another without his consent. [The ski resort] willingly paid for defendant's medical treatment on the false representation that [it] had caused defendant's injuries. This was theft by false pretenses, not larceny." The essence of *Beaver*'s holding is this: Because the ski resort consented to paying for the defendant's medical treatment, the defendant did not commit a trespassory taking, and hence did not commit larceny.

Here too defendant did not commit larceny. Walmart, through its store employees, consented to transferring title to the gift cards to defendant. Defendant acquired ownership of the gift cards through his false representation, on which Walmart relied, that he was using valid payment cards to purchase the gift cards. Only after discovering the fraud did the store seek to reclaim possession. Because a "felonious taking," as required [for robbery] must be *without the consent* of the property owner, or "against his will," and Walmart *consented* to the sale of the gift cards, defendant did not commit a *trespassory* (nonconsensual) taking, and hence did not commit robbery….

The dissent proposes a theory, not discussed in the parties' briefs, to bring defendant within the robbery statute…. The gist of the dissent's reasoning is this: Section 490a [of the California Penal Code] says any law or statute that refers to or mentions larceny or stealing must be construed as meaning "theft"; although the robbery statute does not expressly mention larceny or stealing, it refers to them indirectly through the words "felonious taking," which should be interpreted under § 490a as meaning "theft," a crime that includes theft by false pretenses. Therefore, the dissent concludes, the "felonious taking" element in the robbery statute encompasses defendant's conduct in this case.

The dissent's theory would require us to conclude that, by enacting § 490a, the Legislature intended to alter two of the substantive elements of robbery: asportation and a trespassory taking. But the 1927 legislation enacting § 490a and the theft consolidation statute (§ 484) left unchanged the elements of theft. We are not persuaded that the Legislature intended to alter the elements of *robbery*, to which § 490a makes no reference whatever, while also intending to leave intact the elements of *theft*, to which it explicitly refers. As this court said more than 80 years ago, "the essence of § 490a is simply to effect a change in nomenclature *without disturbing the substance of any law.*" *People v. Myers* (1929).

III

In resolving many complex legal issues, as Justice Oliver Wendell Holmes, Jr., observed, "a page of history is worth a volume of logic." To determine the meaning of the words "felonious taking" in our statutory definition of robbery, we have delved into the sources of this statutory definition and, in turn, into the history of the common law crime of larceny and the statutory crime of theft by false pretenses. This review has led us to conclude that the words "felonious taking" in the robbery definition were intended to refer only to theft committed by larceny and not to theft by false pretenses.

The logic and fairness of this conclusion may be open to question because a thief who uses force to resist capture may be equally culpable whether the theft was committed by larceny (for example, ordinary shoplifting) or by false pretenses (as occurred here).

Nevertheless, our task is simply to interpret and apply the laws as the Legislature has enacted them, not to revise or reform them to better reflect contemporary standards.

We reverse the Court of Appeal's judgment upholding defendant's four robbery convictions. Because other aspects of the Court of Appeal's decision may be affected by our reversal of defendant's robbery convictions, the matter is remanded to that court for further proceedings consistent with the views expressed in this opinion.

Dissenting opinion by BAXTER, J.

…[The majority's] reasoning and result contradict[] the legislative intent behind California's robbery and unified theft statutes. is in conflict with long-standing California jurisprudence, including several decisions of this court that have reached the opposite conclusion. And it is patently at odds with the important public policies served by the robbery statute. "Robbery violates the social interest in the *safety and security of the person* [robbed] as well as the social interest in the protection of property rights." Both interests are implicated when a thief enters a business establishment, steals property, and then uses force or fear against a robbery victim or victims while fleeing, regardless of the particular manner of theft employed. I respectfully dissent.

… At the same time as the 1927 consolidation of all common law forms of theft into a unified "theft" crime (§ 484), our Legislature also enacted this provision: "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall … be read and interpreted as if the word 'theft' were substituted therefor." (§ 490a).

Section 490a indicates the Legislature's intent that the different types of common law theft consolidated in § 484 are to be treated as the single crime of "theft" in California…

True, unlike the burglary statute, the robbery statute does not utilize either the term "larceny," or the term "stealing." Rather, it uses the broader phrase "felonious taking of personal property" to denote the taking element of robbery. Section 490a, however, states that any law or statute that "*refers to or mentions* larceny … *or stealing* " (italics added) should be read and interpreted as if the word "theft" were substituted. Thus, the statute need not specifically mention larceny or stealing; to simply refer to larceny or stealing is enough. A felonious taking *is* a taking done with the intent to steal another's property…

In short, the robbery statute *is* a statute that "refers to … larceny *or stealing*." (§ 490a, italics added.) That is because the "felonious taking" element of robbery *is* a taking done with the intent to steal another's property "against his will." Because § 490a directs that any law that "refers to … larceny or stealing" is to be read and interpreted as if the term "theft" was inserted therein, and because the robbery statute incorporates such a reference, albeit indirectly, the "felonious taking" element of robbery must be interpreted as synonymous with "theft." …Here, defendant's conduct in *stealing* gift cards from Walmart, although accomplished by false pretenses, plainly satisfied the felonious taking element of robbery.

The majority's analysis of the 18th century English common law roots of the various common law forms of theft … in support of its conclusion that the common law crime of theft by false pretenses is not a continuing form of theft, and cannot be transformed into robbery where force or fear is later used, overlooks the important remedial legislation that consolidated the common law forms of theft into the unified crime of "theft" in California….

I would affirm the judgment of the Court of Appeal.

Notes and questions on *People v. Williams*

1. *Williams* offers both an overview of common law theft offenses and an alternative statutory approach that is typical of many contemporary criminal codes. Note the multiple different offenses mentioned in the majority's discussion of the common law: larceny, robbery, theft by false pretenses, embezzlement, and larceny by trick. It may be helpful to identify the different elements of these offenses as they were typically defined at common law. To do so, it is useful to keep in mind a distinction between possession of property (having immediate control over it) and holding legal title to it (being recognized as the owner by law). Possession and ownership can coincide, but they can also diverge. If you've allowed me to borrow your car, I'm in temporary possession of it but I'm not the owner. The chart below captures the common law definitions of property offenses as

identified by the California court in *Williams*. Each of these offenses will be discussed in more detail later in this chapter, but comparing the definitions can help you get used to thinking of crimes in terms of their elements.

Larceny	◦ Taking (by trespass) ◦ Carrying away ◦ The property ◦ Of another ◦ With intent to permanently deprive the owner of possession
Robbery	◦ Larceny ◦ By force
False pretenses	◦ Acquiring title ◦ To the property ◦ Of another ◦ By fraud
Embezzlement	◦ While in possession ◦ Of the property ◦ of another, ◦ Converting that property to personal use ◦ By fraud
Larceny by trick	◦ Taking (by fraud, as a form of trespass) ◦ And carrying away ◦ The property ◦ Of another ◦ With intent to permanently deprive the owner of possession

2. According to the *Williams* court, larceny and related offenses emerged not primarily out of a concern to protect property rights, but rather with the "original purpose of preventing breaches of the peace." It was taking property in a way likely to produce violence or conflict that was criminalized; appropriation of property by fraud or secrecy was not initially seen to warrant criminal intervention. Today, criminal law is concerned with both force and fraud, and with the protection of property rights even when neither force nor fraud is deployed. Think about how and why societies have made different criminalization choices over the centuries. Both in the ancient past and here in the twenty-first century, people have disagreed about whether violence is categorically worse than deception. For example, after Bernie Madoff was convicted of fraud offenses involving over 64 billion dollars, one of the investors defrauded by Madoff invoked the ancient Italian poet Dante Aligheri, whose *Divine Comedy* famously imagines the descending circles of hell. According to Dante, those who commit fraud are subject to even more severe divine punishments than those who use violence. Though violence is certainly terrible, fraud was still more displeasing to God, since "the vice of fraud is man's alone." See Dante, *The Divine Comedy*; see also Burt Ross, *What I Told Madoff Today*, Daily Beast (June 29, 2009).
3. Common law larceny required both i) a taking (sometimes called "caption") by trespass, otherwise known as a taking without consent, and ii) "asportation," or the carrying away of the property. In most states, these somewhat archaic concepts have been replaced with the unified concept of "possession or control." For more details, see *State v. Donaldson*, the next case in this chapter.
4. At the beginning of Part III of its opinion, the *Williams*majority quotes Oliver Wendell Holmes, Jr.: "[A] page of history is worth a volume of logic." And the court then concedes that "the logic and fairness of [our] conclusion may be open to question…." Is the court sacrificing fairness unnecessarily in order to preserve dated and obscure legal concepts? Or is the reversal of Williams's robbery convictions a fair outcome after all? Is the court's decision dictated by earlier criminalization

decisions, and if so, which ones—common law decisions or legislative decisions? As you read the cases in this chapter, consider whether logic and history are in tension in theft law, and if so, which has prevailed.

Check Your Understanding (5-1)

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For the *Williams* majority (but not the dissent), common law categories and concepts continue to be relevant even for a modern theft statute. For a different assessment of the relevance of the common law, consider *State v. Donaldson*, below. It may be helpful first to consider the text of the Iowa statute applied in *Donaldson*, along with the text of the Model Penal Code provision on which the Iowa statute is based.

Iowa Code § 714.1. Theft defined

A person commits theft when the person does any of the following:
1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.

Model Penal Code § 223.2 . Theft by unlawful taking or disposition

(1) **Movable Property.** A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.

(2) **Immovable Property.** A person is guilty of theft if he unlawfully transfers immovable property of another or any interest therein with purpose to benefit himself or another not entitled thereto.

STATE of Iowa, Appellee

v.

Dean Lester DONALDSON, Appellant

Supreme Court of Iowa
663 N.W.2d 882

June 11, 2003

STREIT, Justice.

…At 1:50 a.m., a Sioux City police officer saw a van parked in front of Combined Pool & Spa with its sliding door partially open. The officer illuminated the van. As he walked towards the van, the brake lights flashed. Two men hotfooted across Highway 75. The officer gave chase, but was unable to find them. Upon returning to his squad car, the officer saw the steering column in the van had been forcibly removed and there were wires protruding from it. The radio was on and the “check engine” sign was lit on the console. Later, one of the men was found and identified as Dean Lester Donaldson.

Donaldson was charged with one count of second-degree theft as an habitual offender. Prior to the trial, Donaldson filed a motion to adjudicate law points arguing the facts did not support a charge of theft. Donaldson asserted because he never possessed the van, he could not be convicted of theft. Donaldson argued, at most, the facts supported a charge of attempted theft. However, Iowa does not recognize a separate crime of attempted theft. The State asserted Donaldson took possession of the van when he hot-wired it. The district court agreed with the State and denied Donaldson’s motion… After a trial, Donaldson was convicted of second-degree theft. Prior to sentencing Donaldson renewed his motion raising the same arguments in the original motion to adjudicate law points. The district court overruled the motion and sentenced Donaldson. Donaldson appeals.

…This appeal is limited to one main issue. We must determine whether the district court properly denied Donaldson’s motion for judgment of acquittal challenging the sufficiency of the facts to support a conviction of second-degree theft. The question is whether Donaldson possessed or controlled another’s van when he broke into it, dismantled the steering column, and manipulated

the ignition switch turning the radio on, lighting the "check engine" sign, and causing the brake lights to flash. Our review is for correction of errors of law.

…The State charged Donaldson with second-degree theft pursuant to Iowa Code § 714.1(1) [and with other offenses]. This statute provides "a person commits theft when" he or she "[t]akes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof." At the end of the State's case, Donaldson moved for a judgment of acquittal. He argued the State failed to prove the elements of theft…. Counsel argued the "starter must be engaged for there to be actual control over that vehicle." The court disagreed and overruled Donaldson's motion.

The Iowa theft statute is modeled after the Model Penal Code, with slight variation. Model Penal Code § 223.2. Our terms "possession or control" of another's property replace the common law larceny requirements of "caption" and "asportation." "Caption," or taking, occurred when the actor secured dominion over the property of another. The element of "asportation," or carrying away, was satisfied with even the most slight change in position of the stolen object. At common law, to prove a theft, the State had to show a defendant took the property of another, i.e., secured dominion over it, and carried the property away.

The asportation requirement was important at common law because if a defendant's actions fell short of causing the object of the theft to move, the defendant was guilty of attempt only. Because a completed larceny was generally a felony whereas attempt was a misdemeanor, significant differences in "procedure and punishment turned on the criminologically insignificant fact of slight movement of the object of theft." In modern criminal law, however, the penal consequences between attempt and a completed theft are so minimal that it has become less important to draw a bright line between the two actions. As such, the element of asportation is no longer necessary.

Iowa, like many other states following the Model Penal Code, has abandoned the common law asportation requirement. …The key to our statute is the words "possession or control." In determining the meaning of "possession" and "control," we look to the Model Penal Code for guidance as our statute is modeled after it. The Model Penal Code contemplates "control" of the object to begin when the defendant "use[s] it in a manner beyond his authority." The method of exerting control over the object of the theft is important only insofar as it "sheds light on the authority of the actor to behave as he did." Our statute replaces the common law element of "taking" with "possession." The Model Penal Code provides a person commits theft if he or she "unlawfully takes, or exercises unlawful control over" the property of another. A taking in this sense concerns whether the offender exerted control over the object "adverse to or usurpatory of the owner's dominion." That is, one possesses an object if he or she secures dominion over it. To summarize the above concepts, "possession or control" begins and a theft is completed when the actor secures dominion over the object or uses it in a manner beyond his authority.

Donaldson argues his conduct, at most, is sufficient to prove attempted theft, not a completed theft. We acknowledge the issue before us is complicated because "all theft partakes of the character of attempt." The line between attempt and a completed theft is a thin one. "The thief proposes to make the property his own more or less permanently; but he is nonetheless a thief if, shortly after he exerts his dominion over the property of another, he is prevented from making off with it."…

The question before us concerns whether the defendant possessed or controlled the object of the theft. The critical issue, as the statute dictates, is *not* whether the defendant used or operated the object of the theft. As to Donaldson's conduct, we must determine whether he exercised wrongful dominion or unauthorized control of the van. The judge instructed the jury on "possession" using the Iowa Criminal Jury Instructions.[1] Bearing in mind the definitions of "control" and "possession" as contemplated by the Model Penal Code, we turn to the facts.

The undisputed facts of the case [establish that] Donaldson entered a van owned by Combined Pool & Spa…. As the officer approached, Donaldson got out of the driver's side and ran away. The officer called after Donaldson, identified himself as a police officer, and ordered him to stop. Donaldson kept running. When the officer checked the van, he saw the steering column had been forcibly dismantled; there were wires hanging from the column. The ignition switch had been removed. The radio was operating. The "check engine" sign on the dashboard was lit. At trial, one of the officers testified Donaldson had engaged all of the electric systems. After turning on the electric accessory systems in the car, according to the officer, all Donaldson had left to do was engage the starter.

There is no evidence in the record to suggest Donaldson's tearing apart the steering column was intended for any purpose other than to deprive the owner of her possession of the van. Donaldson argues he did not possess or control the van because he did not have the "ability to readily move or remove" it. This, however, is not the test for possession or control. Because we have abandoned

the common law asportation requirement, movement or motion of the car is not essential to finding a defendant had possession or control of the car. Our theft statute does not state possession or control is tantamount to "operation" of the object of the theft. To interpret our statute in this manner is to restrict the definition of theft more narrowly than the legislature intended. Given a strict interpretation of the statute, the State only had to show Donaldson had control of the van, i.e., he had dominion over it in a manner inconsistent with his authority. We are unwilling to imply an "operation" requirement for certain kinds of property that are normally operated by its possessor.

The mere fact that Donaldson was interrupted by the police officer before he engaged the starter motor does not remove this case from the realm of a completed theft. It is not necessary that the engine was running and the van could have been moved. That is, technical operation of the van is not necessary to find Donaldson exercised wrongful dominion or unauthorized control over the van. … Certainly, Donaldson's acts were sufficient to set into motion the steps necessary to power the van. It was not necessary that the engine was actually running. Rather, at the moment Donaldson began to manipulate the electrical wires for the purpose of starting the engine, he exerted complete control over the vehicle.

In sum, the facts before us show Donaldson was using the van owned by another person. He had the power and intention at the given time to exercise unfettered dominion over the van. Donaldson was in a position to exclude all others from the van, for example, by locking it. No one else could have hot-wired the van or started it with a key while Donaldson had control over it. Moreover, he used the van without the owner's consent and in a manner beyond his authority. Donaldson entered the company's van around 1:30 in the morning. He tore apart the steering column. The ignition switch had been removed; wires protruded from the ignition. The brake lights flashed. The radio worked. The "check engine" sign was lit. When the officer approached the van, Donaldson got out of the driver's side and ran away. All of these facts together are sufficient to show Donaldson controlled the van within the meaning of § 714.1(1). As such, the trial court properly denied Donaldson's motion for judgment of acquittal. We affirm.

[The court noted in a footnote that in future theft prosecutions under 714.1, "the district court should sculpt its jury instructions using the concepts articulated in the Model Penal Code. The jury should be instructed a theft is completed when the defendant secures dominion over the object of the theft or uses it in a manner beyond his authority."]

Notes and questions on *State v. Donaldson*

1. In Chapter Seven, which covers gun and drug offenses, we will study the concept of "possession" in more detail. This case gives you a preview. The *Donaldson* court says that "possession" for purposes of property offenses should be defined differently than "possession" as that term is used in contraband offenses. What are the key differences between the different definitions of possession? Are the differences significant enough that Donaldson's conviction should have been reversed due to inadequate jury instructions? If not, why does the court advise the use of different instructions in future theft prosecutions?
2. In the second half of the twentieth century, inspired in part by the Model Penal Code, many U.S. jurisdictions consolidated the various narrowly defined property offenses that had existed at common law and created one new, broader offense called "theft." But in some states, like California, the old common law categories have continued to influence judicial interpretations of the new consolidated crime, as you saw in *People v. Williams*, above. In other states, including Iowa as illustrated by *Donaldson*, courts have viewed the consolidation of theft as a more substantial redefinition of property crimes. Had Dean Lester Donaldson "hot-wired" this van in California rather than Iowa, would he have been guilty of theft under Cal. Penal Code § 484?
3. A related question: does the Model Penal Code approach change the scope of property offenses? That is, is the same range of conduct treated as criminal under the common law definitions and the MPC, or does the MPC broaden (or narrow) the scope of liability for property offenses?
4. To help you assess the previous question, consider *Lee v. State*, 474 A.2d 537 (Ct. Sp. App. Md. 1984). *Lee* was a shoplifting case: the defendant put a bottle of liquor into his trousers in a store, was approached by an employee, and then put the bottle back on the shelf and fled the store. Was this conduct "theft"? The *Lee* court, like the courts in *Williams* and *Donaldson*, discussed in detail the history of common law property offenses, and the eventual consolidation of these offenses into one crime of theft. The court argued that consolidation created broader criminal liability for shoplifting than would have existed under common law.

   In Maryland… [s]everal separate offenses, each involving some sort of taking and carrying away of property with an intent to deprive the owner, were consolidated under Article § 27… The legislature consolidated these offenses in an effort to eliminate the "technical and absurd distinctions that have plagued the larceny related offenses and produced a plethora of special

provisions in the criminal law." …The evolution of theft law is particularly relevant to thefts occurring in modern self-service stores where customers are impliedly invited to examine, try on, and carry about the merchandise on display. In a self-service store, the owner has in a sense, consented to the customer's possession of the goods for a limited purpose. Under common law principles of theft, a person could not have been convicted if apprehended while still in the store because the perpetrator would have rightful possession (albeit temporarily) and thus could not perform the element of trespassory taking until he left the store without paying (at which point it might be too late). Under the present law, the fact that the owner temporarily consents to possession does not preclude a conviction for larceny if the customer exercises dominion and control over the property by using or concealing it in an unauthorized manner. Such conduct would satisfy the element of trespassory taking as it could provide the basis for the inference of the intent to deprive the owner of the property.

Lee, 474 A.2d at 540-541.

5. Both the *Williams* and *Donaldson* courts observe that one explicit aim of consolidation was easing the path of enforcement and making convictions easier to obtain. If indeed the consolidation of theft offenses resulted in an expansion of the scope of criminal law, then consolidation has not simply eased the burden on enforcement officials: it has increased their power and discretion. With that in mind, note that arrests, convictions, and sentences for property offenses show similar patterns of racial disparity as those identified for violent crimes and drug offenses. Racial disparities in the enforcement of property offenses have not (so far) received nearly as much scholarly or public attention as racial disparities in the enforcement of drug offenses, but there is evidence that enforcement officials do target persons of color for theft prosecutions more often than white persons who engage in similar conduct. For example, one study found that while persons who reported (anonymously) that they had engaged in shoplifting were overwhelmingly young and white, the individuals who were actually prosecuted for shoplifting were mostly "very old or very young Hispanic or black men." Rachel Shteir, The Steal: A Cultural History of Shoplifting 88-89 (2011). Some commentators describe the increased surveillance and detention of minority shoppers as the de facto criminalization of "shopping while black." Id.
6. The *Donaldson* court observes, "'All theft partakes of the character of attempt.' The line between attempt and a completed theft is a thin one." This observation raises difficult questions about the timing and completion of crimes. We will examine these questions in much greater detail in Chapter Eight, which addresses inchoate crimes including attempt. For now, notice that neither common law definitions of property crimes nor modern statutory definitions require the defendant to keep property permanently in order to be guilty of the offense. A defendant completed common law larceny by "taking" and "carrying away" the property (with the right mental state), but carrying away (also called asportation) could be achieved simply by a slight change in the position of the property, as the *Donaldson* court notes. For the Iowa statute applied in Donaldson, asportation is not necessary, and the crime of theft is complete as soon as the defendant "takes possession or control" of the property (with the right mental state).
7. As the previous note explains, most definitions of property offenses do not require the defendant to keep the property permanently. However, many definitions do require an intention to keep the property permanently. See, for example, the definition of larceny in *People v. Williams* earlier in this chapter: "The common law defined larceny as the taking and carrying away of someone else's personal property, by trespass, with the intent to permanently deprive the owner of possession" (emphasis added). Many courts characterize this intent requirement as a "specific intent" requirement.
8. In *People v. Perry*, 864 N.E.2d 196 (Ill. 2007), a defendant was charged with theft by deception after he occupied a hotel room for over three months but did not pay the bill. Under the Illinois statute, "A person commits theft when he knowingly … obtains by deception control over property of the owner … and intends to deprive the owner permanently of the use or benefit of the property." Is occupancy of a hotel room "property"? And did a defendant who did not intend to stay in the room forever act with the requisite intent to permanently deprive the owner? The Illinois Supreme Court upheld the defendant's conviction, finding that "[t]he property at issue here is the use of a hotel room. … One night in one room is a thing of value. When this thing of value is taken by deception, the owner has permanently lost the benefit of one night's income." Id. at 211.
9. Under the reasoning of *Perry* in the previous note, could non-payment of rent be a criminal offense? In fact, in almost every jurisdiction, rent disputes (including non-payment) are classified as civil matters. In Arkansas, however, a landlord can file a notice to vacate if a tenant is late with a rent payment, and if the tenant does not vacate within ten days, a warrant is issued for arrest. This "criminal evictions" law has drawn criticism from civil rights advocates for years, in part because the tenants prosecuted are disproportionately poor Black women. See Human Rights Watch, *Pay the Rent or Face Arrest: Abusive Impacts of Arkansas's Draconian Evictions Law* (2013). As of 2022, a challenge to the Arkansas law is pending in federal court.

10. Arkansas's criminal evictions statute is one of a kind. But the imposition of criminal liability for a failure to pay fees or other assessments is quite common. Commentators have used the term "the criminalization of poverty" to describe the heavy fees often assessed of criminal defendants and the additional sanctions imposed when defendants do not pay. The same phrase is also sometimes used to critique cash bail systems, which often require defendants without money to choose between lengthy pretrial detention or a quick guilty plea. See also Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. Crim. L. & Criminology 643 (2009) (discussing "the social construction of welfare fraud" and ways in which the welfare system and the criminal legal system have become increasingly intertwined).

The relevant statute for the next case is included within the text of the court's opinion.

STATE of Florida, Appellant

v.

David Paul SIEGEL, Appellee

District Court of Appeal of Florida, Fifth District
778 So.2d 426

Feb. 2, 2001

THOMPSON, C.J.

…[David Paul] Siegel was charged by Information with grand theft. This charge followed Siegel's expulsion from the University of Central Florida (UCF) for submitting fraudulent financial vouchers as a member of student government. The Information charged that Siegel:

[D]id … knowingly obtain or use, or endeavor to obtain or use a computer and computer equipment, of a value of THREE HUNDRED DOLLARS ($300.00) or more, the property of another, to-wit: UNIVERSITY OF CENTRAL FLORIDA … as owner or custodian thereof, with the intent to temporarily or permanently deprive said owner or custodian of a right to the property or a benefit therefrom, or to appropriate the property to the defendant's own use or to the use of a person not entitled thereto.

Both sides agree that Siegel was allowed to use, as part of his responsibilities as a member of the UCF student government, an IBM Thinkpad 755 CDV (laptop computer) owned by UCF. At some point, UCF officials demanded that Siegel return the laptop computer pursuant to UCF Student Government Laptop Policy. … Siegel refused to return the computer and, among other things, this criminal case resulted from that refus[al].

[Under Florida law,] a defendant may move for dismissal [by alleging] that "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant." Under this rule it is the defendant's burden to specifically allege and swear to the undisputed facts in a motion to dismiss and to demonstrate that no prima facie case exists upon the facts set forth in detail in the motion. The purpose of this procedure is to avoid a trial when there are no material facts genuinely in issue.

The trial court dismissed this case, according to the record, because when Siegel first received the laptop computer, he did not have the criminal intent to deprive UCF of the computer. The theft statute Siegel is charged under provides in part:

A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently: (a) Deprive the other person of a right to the property or a benefit from the property.

§ 812.014(1)(a). In defining "obtains or uses," the theft chapter provides in pertinent part:

"Obtains or uses" means any manner of:

…[c]onduct previously known as stealing; larceny; purloining; abstracting; *embezzlement;* misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception….

§ 812.012(2)(d) 1., Fla.Stat. (emphasis added). In certain types of theft cases, like larceny or false pretenses, criminal intent must be formed at the time of the original taking… Under [this statute], however, theft is more than just larceny or theft by false pretenses. Theft also includes the common-law crime of embezzlement.

[In a footnote, the court explained:

Embezzlement "may be defined as: (1) the fraudulent (2) conversion of (3) the property (4) of another (5) by one who is already in lawful possession of it." LaFave & Scott, *Criminal Law* at § 8.6. Under the state's theory of the case, Siegel lawfully possessed UCF's laptop computer, but refused to return it when the owner of the computer requested that he do so. This conduct arguably worked as an attempt to fraudulently convert the computer to Siegel's possession.]

Unlike the crimes of larceny and false pretenses, embezzlement does not require that the defendant have criminal intent when he obtains the property in question. The alleged facts, if proven, fit the crime formerly known as embezzlement and now known as theft under the omnibus theft statute.

Notes and questions on *State v. Siegel*

1. This case has a somewhat different procedural history than many of the appellate opinions included in this book, because it does not involve an appeal after a conviction. In this case, the trial court dismissed the charges against Siegel before any trial took place, and the prosecution then appealed that dismissal. Notice Siegel was charged with grand theft by an "Information," which is quoted in the court's opinion. Unlike an indictment, an information does not require the prosecutor to submit the charges to a grand jury for approval. But there may exist other limits on the prosecutor's discretion. Here, Siegel argued that the facts as alleged in the Information did not constitute the offense of grand theft.
2. Siegel was charged with grand theft, not a crime called embezzlement. Be sure you understand how the definition of embezzlement becomes important in this case. As you've seen earlier in this chapter, many states interpret their general "theft" statutes with reference to common law definitions of property crimes. The theft statute used to charge Siegel includes an element that the defendant "obtains or uses" the property of another. And a portion of the Florida statute provides that "obtains or uses" includes conduct previously known as embezzlement.
3. Look carefully at the elements of embezzlement as described by the Florida court. To commit this crime, the defendant must already be in "lawful possession" of the property in question. For example, an employee who is entrusted with company funds may be in lawful possession of that money. But if he takes the money for personal use, he may be guilty of embezzlement.
4. In other words, embezzlement does not require that the defendant have any wrongful intention at the time that he or she first takes possession of the property. That becomes important in this case. Siegel argued that he did not commit theft because he had no criminal intent when he first took possession of the laptop. For many theft crimes, this lack of criminal intent would be a plausible defense, thanks to a principle sometimes referred to as "concurrence of the elements." This principle requires that the prosecution must establish all necessary elements of the offense and show that they occurred simultaneously: the defendant must have held the requisite mental state at the time that the conduct elements took place. If Siegel "obtained" the laptop only at the moment that he first took possession of it, then he did not have the right mens rea at the time of the actus reus. But if Siegel's ongoing possession was an ongoing act of "obtaining or using" the property, then it does not matter if Siegel formed the intent to keep the laptop for his own personal use only later.

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10 U.S.C. § 921. Uniform Code of Military Justice, Article 121. Larceny and wrongful appropriation

(a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind–

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.

(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.

UNITED STATES

v.

Andrew S. COFFMAN, Lance Corporal (E–3), U.S. Marine Corps

U.S. Navy–Marine Corps Court of Criminal Appeals
62 M.J. 676

Decided 22 Feb. 2006

DORMAN, Chief Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of a false official statement and larceny….

The appellant pleaded guilty to the theft of several items of special operations equipment, such as a force vest, canteen covers, and a duty belt (hereinafter referred to as "gear"). The total value of the stolen gear exceeded $500.00. The gear belonged to another Marine…

The appellant was serving in Al Hillah, Iraq, when he took the gear he was charged with stealing. The gear was located in an open box, and, at the time he took it, the appellant did not know who owned the gear. The appellant found the box in a room that he and others had been told to clean out in preparation for another platoon's arrival. Unit personnel had previously used this room to store their packs. The room contained several boxes that they had been instructed to dispose of, including the box containing the gear. As they cleaned out the room, they discovered items that were never picked up by their owners and appeared to have been left behind for trash. The appellant took the box from a room where unit personnel had been storing their packs and he brought it to his rack. There was no name on the gear, but the appellant knew it did not belong to him. The appellant was the first one to find the box containing the gear. The appellant also knew that the items should not have been discarded. He went up and down the passageway asking whether anyone had left a box of gear in the room. He asked almost the entire platoon. When he could not determine who owned the gear, he decided to use it himself.

The appellant used the gear for about a month while going on patrols. The use continued until his section leader confronted him about whether the gear belonged to him. Initially, the appellant told the section leader that he had purchased the gear. This false statement was prosecuted under Article 107, UCMJ. The appellant did not learn who owned the gear until after he had surrendered it. The owner was a member of the appellant's battalion, and the appellant was acquainted with him. The appellant informed the military judge that if he had not been confronted by the command, he would have continued to use the gear.

As the providence inquiry continued, the appellant then answered "yes" or "no" to a series of questions dealing with the legality of his actions. He admitted that he knew it was wrongful to take the gear, that the gear was not abandoned, that he intended to permanently deprive the owner of the gear, that he had no legal justification or excuse for his actions, and that he took and retained the gear with a criminal state of mind.

… The appellant now argues that his plea is improvident because the military judge failed to adequately inquire into the "apparent defense of ignorance or mistake of fact as to whether the gear … was abandoned, lost, or mislaid."…

… Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for the plea exists. Mere conclusions of law recited by the accused are insufficient to provide a factual basis for a guilty plea. The accused "must be convinced of, and able to describe all the facts necessary to establish guilt." Acceptance of a guilty plea requires the accused to substantiate the facts that objectively support his plea.

…The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, and the only exception to the general rule of waiver arises when an error materially prejudicial to the substantial rights of the appellant occurs. … An abuse of discretion standard is applied in reviewing the question of whether a military judge erred in accepting a guilty plea. In considering the adequacy of guilty pleas, we consider the entire record…

In our review of the record, we determined that the military judge accurately listed the elements of larceny and defined the terms relevant to those elements. We also determined that the appellant indicated an understanding of the elements of the offense and that he acknowledged that they correctly described what he did. Thereafter, the military judge conducted an inquiry with the appellant to determine whether a factual basis for the plea existed. The inquiry went well until such time as the appellant essentially informed the military judge that the gear he took had been left in the room as trash. After that point, most of the questions asked by the military judge called for a "yes" or "no" answer, and many called for legal conclusions.

Abandoned property cannot be the subject of a larceny. The appellant's statement to the military judge that the gear had been left there as trash raised the issue of mistake of fact. Furthermore, since larceny is a specific intent offense, if the appellant had an honest belief that the property was abandoned, he has a complete defense.

For a complex offense such as conspiracy, robbery, or murder, a failure to discuss and explain the elements of the offense during the providence inquiry has been held to be fatal to the guilty plea on appeal. Similarly, a military judge should explain the elements of defenses, such as mistake of fact and abandonment, if raised by the appellant during the providence inquiry. Failure to do so can leave unresolved substantial inconsistencies in the pleas and/or raise questions concerning whether the appellant was armed with sufficient information to knowingly plead guilty. Where the elements of an offense, or defenses, are commonly known by most servicemembers, however, it is not necessary for the military judge to explain them, if it is otherwise apparent on the record that the accused understood the elements or the defense.

In the case before us, the military judge failed to explain the mistake of fact defense to the appellant. Although the military judge did ask the appellant if he believed the gear was abandoned, he did not provide the appellant with the legal definition of abandoned property. A reading of the case law with respect to this issue makes clear that the legal significance of the term "abandoned" is not one that would be "commonly known and understood by servicemembers."

Applying the standards of review noted above, we conclude that the record reveals a substantial basis in law and fact to question the appellant's guilty plea to larceny. Thus, we conclude that the military judge erred by failing to inform the appellant of the defense of mistake of fact and the definitions and legal significance of abandoned property. He did not adequately resolve the issue of mistake of fact. When the appellant informed the military judge that the gear had been left behind as trash, the military judge inappropriately asked the appellant "yes" or "no" type questions that called for legal conclusions. By not explaining the relevant legal terms, the military judge denied the appellant the ability to make an informed decision concerning the answers he provided. In light of these errors, we conclude that the appellant's guilty pleas to Charge II and its specification are not provident.

We take this opportunity to note that the error in this case does not fall solely on the shoulders of the military judge. At the conclusion of his inquiry into the providence of the guilty plea to the specification under Charge II, he asked counsel if either desired further questioning. Both counsel said they did not. Such a reply is all too common in cases where the issue before us is the providence of the plea. Trial counsel, in particular, should be ever vigilant during the plea providence inquiry and assist the military judge by suggesting areas of further inquiry concerning the elements of the offense or potential defenses.

Conclusion

Accordingly, the findings to Charge II and its specification are set aside. The remaining findings are affirmed….

Notes and questions on *United States v. Coffman*

1. The kind of problem that arises in *Coffman* is often called a "mistake of fact." When a defendant is mistaken about some key fact, will that mistake provide a defense to criminal liability? As is often true in law, it depends. Whether a defendant's mistake about a factual issue is a defense to a criminal charge is a question of the mens rea requirement of the charged offense. Does larceny, as defined in the Code of Military Justice, require the defendant to know that the property he took belonged to another specific person (and was not abandoned)? Because the military court interprets the applicable statute to require knowledge that the property is owned by someone, the defendant's mistaken belief that this property had been abandoned is relevant to his criminal liability. Compare to *Morisette v. United States* in Chapter Two.
2. Looking at the larceny statute in the military code, can you identify other mistakes that would be relevant to a determination of guilt? What if the defendant knew that the gear belonged to a Marine, but mistakenly thought it belonged to one of his close friends in the platoon who "wouldn't make a big deal" if the defendant took it? What if the defendant mistakenly believed the gear was worth less than $100, and mistakenly believed that the military larceny statute applied only to property worth over $100? A mistaken belief about what the statute criminalized would be characterized as a "mistake of law" rather than a mistake of fact. And whether mistakes of law matter to liability is again a question about the mens rea requirements of a particular statute. The key question is whether an accurate understanding of the applicable law is an element of the charged offense. Most statutes do not require knowledge of the law as an element, so it is usually true that "ignorance of the law is no excuse," or not a valid defense. For more on mistakes of law and the rare circumstances in which a mistake of law can serve as a valid defense, see *People v. Marrero* in Chapter Seven.

3. For our purposes, *Coffman* is useful not only to illustrate principles of mistake, but also as a rare instance of close judicial review of a guilty plea. The "providence inquiry" described by the appellate court is essentially a plea hearing, in which a military judge questions the defendant to be sure there is an adequate factual basis for the guilty plea. The appellate opinion that you've read then reviews (and reverses) the first judge's finding that the plea was supported by fact, or "provident." The basic principle that a guilty plea must have an adequate factual basis applies in state and federal courts as well as military ones. However, state and federal courts rarely scrutinize guilty pleas closely to ensure compliance with this requirement. The vast majority of guilty pleas (and the vast majority of all convictions in state and federal court) are not subject to any appellate review at all. Indeed, as discussed in Chapter Four, civilian courts sometimes accept "fictional pleas," or guilty pleas to charges that could not possibly be proven given the available evidence. What factors might distinguish military courts from civilian ones, and lead to closer scrutiny of pleas in the military judicial system?

Burglary and Trespass

New Mexico Stat. Ann. 30-16-3. Burglary.

Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.

A. Any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of a third degree felony.

B. Any person who, without authorization, enters any vehicle, watercraft, aircraft or other structure, movable or immovable, with intent to commit any felony or theft therein is guilty of a fourth degree felony.

New Mexico Stat. Ann. 30-14-8. Breaking and entering.

A. Breaking and entering consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, where entry is obtained by fraud or deception, or by the breaking or dismantling of any part of the vehicle, watercraft, aircraft, dwelling or other structure, or by the breaking or dismantling of any device used to secure the vehicle, watercraft, aircraft, dwelling or other structure.

B. Whoever commits breaking and entering is guilty of a fourth degree felony.

New Mexico Stat. Ann. 30-1 6 – 5. Possession of burglary tools.

Possession of burglary tools consists of having in the person's possession a device or instrumentality designed or commonly used for the commission of burglary and under circumstances evincing an intent to use the same in the commission of burglary.

Whoever commits possession of burglary tools is guilty of a fourth degree felony.

STATE of New Mexico, Plaintiff-Appellee

v.

Franklin D. BEGAYE, Defendant-Appellant

Court of Appeals of New Mexico
505 P.3d 855

March 30, 2021

HANISEE, Chief Judge.

Defendant Franklin Begaye … was arrested on February 28, 2017, following a report of a break-in at Ram Signs, a business in Farmington, New Mexico. Testimony established that around 8:00 p.m. that night, Ram Signs co-owner Michael Mordecki heard a loud bang coming from the front of the building. Soon thereafter, Mr. Mordecki discovered that the front window had been smashed in and called the police. Officer Justin Nichols arrived [and] observed a broken window, an overturned cash box, and disarray around an employee's desk. Nothing had been taken by the intruder, but the front office area had been rifled through….

Security footage provided by Monica Mordecki, also a co-owner of Ram Signs, revealed that the suspect was a male wearing light shoes, dark pants, and a dark jacket over a light hoodie. In searching nearby areas, Officer Nichols observed Defendant, who matched the description of the individual in the video, walking along Farmington's main street, and upon approach, Officer Nichols saw what appeared to be shards of glass on Defendant's jacket…. Officer Nichols detained and searched Defendant, finding a pair of black mechanic's gloves, and a small red flathead screwdriver in the front pocket of Defendant's pants….

Defendant was charged with fourth degree felony offenses of non-residential burglary, breaking and entering, and possession of burglary tools. At Defendant's jury trial, the State presented testimony from, among other witnesses, Mr. and Mrs. Mordecki and Officer Nichols. The State also played the security camera footage, presented photographs of the scene, and admitted the clothing, boots, gloves, and screwdriver that Officer Nichols collected from Defendant on the night of the incident. Defendant was convicted on all charges. This appeal followed.

Defendant argues that his convictions for burglary and breaking and entering violate his right to be free from double jeopardy because both convictions are premised on the same act of a single unauthorized entry…. Double jeopardy protects defendants from receiving multiple punishments for the same offense.

Here, Defendant raises a double-description double jeopardy claim, "in which a single act results in multiple charges under different criminal statutes[.]" *State v. Bernal* (2006). "In analyzing double-description challenges, we employ [a] two-part test, … in which we examine: (1) whether the conduct is unitary, and, if so, (2) whether the Legislature intended to punish the offenses separately." … "Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment in the same trial." *State v. Silvas* (2015). Here, the State does not dispute Defendant's contention that the conduct—the single unauthorized entry—was unitary. Accordingly, we consider the first part of the test to be satisfied…

Where, as here, Defendant's conduct is unitary, we next analyze legislative intent, looking first to the language of the statutes. "Absent a clear intent for multiple punishments, we apply" [the test from *Blockburger v. United States*, 284 U.S. 299 (1932).] *Blockburger* provides that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." "If one statute requires proof of a fact that the other does not, then the Legislature is presumed to have intended a separate punishment for each statute without offending principles of double jeopardy." *Silvas*. "That presumption, however, is not conclusive and it may be overcome by other indicia of legislative intent."

Since its adoption, the New Mexico Supreme Court has modified the *Blockburger* test, clarifying that application of the test "should not be so mechanical that it is enough for two statutes to have different elements." When discerning legislative intent for the purpose of the modified *Blockburger* test, we may look to the "language, structure, history, and purpose" of the relevant statutes. "If the statutes can be violated in more than one way, by alternative conduct, the modified *Blockburger* analysis demands that we compare the elements of the offense, looking at the [s]tate's legal theory of how the statutes were violated." We may ascertain the state's legal theory "by examining the charging documents and the jury instructions given in the case."

Here, Defendant argues that the modified *Blockburger* test should apply to [his] double jeopardy claim. Defendant contends that within a modified analysis and under the State's legal theory of the case, breaking and entering was subsumed within the burglary conviction, therefore, double jeopardy bars his conviction under the breaking and entering statute. Defendant further claims, in the alternative, that even if the elements of each statute are distinct, other indicia of legislative intent make clear that the Legislature did not intend to permit separate convictions under both the burglary and the breaking and entering statutes based on a single unauthorized entry. The State argues, in turn, that under either a strict or modified *Blockburger* test, Defendant's convictions are not barred by double jeopardy because both offenses require proof of an element the other does not and the Legislature intended to permit separate convictions under the two statutes.

While there is no stated intent that the burglary and breaking and entering statutes allow for multiple punishments, we can presume the Legislature intended to allow separate punishment under the statutes because each provision requires proof of a factual element that the other does not. Section 30-16-3, prohibiting non-residential burglary, reads in pertinent part, "[b]urglary consists of the unauthorized entry of any … dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein." Meanwhile, Section 30-14-8(A) prohibits breaking and entering and reads, in pertinent part, "[b]reaking and entering consists of the unauthorized entry of any … dwelling or other structure, movable or immovable, where entry is obtained by fraud or deception, or by the breaking or dismantling of any part of the … dwelling or other structure[.]" While both offenses require an

unauthorized entry into a dwelling, the burglary statute requires a defendant to have a specific intent "to commit any felony or theft therein." Further, the breaking and entering statute requires the unauthorized entry to be effectuated by a specified means, which the burglary statute does not. Therefore, under the *Blockburger* strict elements test, both offenses require proof of an element the other does not, and we can infer therefrom that the Legislature intended to authorize separate punishments under the burglary and breaking and entering statutes.

This inference, however, is not conclusive … [and] we apply the modified *Blockburger* test to examine other indicia of legislative intent. *SeeState v. Ramirez* (2016) (explaining that "[w]hen applying *Blockburger* to statutes that are vague and unspecific or written with many alternatives, we look to the charging documents and jury instructions to identify the specific criminal causes of action for which the defendant was convicted" and to determine whether the Legislature intended to allow separate punishments under multiple statutes).

Although we recognize that the purpose of "New Mexico's breaking[ ] and[ ] entering statute is itself grounded in common law burglary[,]" each statute presents distinct objectives that we rely on to guide our analysis. To reiterate, breaking and entering requires an unauthorized means of entry, such as an actual "breaking." … In *State v. Sorrelhorse* (2011), we held that the offense of criminal damage to property was a lesser included offense of breaking and entering because both offenses require actual property damage. *Sorrelhorse* indicates that, where entry is obtained by breaking or dismantling physical property, the evident purpose of the breaking and entering statute is to punish unauthorized entry accomplished by physical damage to property.

In comparison, while the burglary statute is likewise intended to safeguard possessory property interests, the evolution of common law burglary in New Mexico leads us to believe that the Legislature intended to authorize separate punishments under the statutes. At common law, "[b]urglary consisted of breaking and entering a dwelling of another in the night time with the intent to commit a felony." Initially, the crime required some physical act or element of force but did not specifically require damage to property. However, as the common law developed, the "breaking" component of common law burglary could be satisfied by a constructive breaking and did not necessarily require a physical act. For example, this Court held that "entry by fraud, deceit, or pretense was sufficient to constitute the 'unauthorized entry' requirement, which had been adopted by the New Mexico Legislature instead of the common law requirement of 'breaking.' " Therefore, we conclude the purpose of the breaking and entering statute is sufficiently distinct from the purpose of the burglary statute. The crime of burglary punishes the broader criminal conduct of any unauthorized entry when there is specific criminal intent.

Having concluded that the Legislature intended to allow separate punishments under the two statutes, we turn next to the State's theory of the case. A comparison of the instructions tendered to the jury for the two offenses establishes that the breaking and entering charge was not subsumed into the burglary charge. To convict Defendant of breaking and entering, the jury was required to find, in pertinent part, that (1) "[D]efendant entered a structure without permission"; and (2) "[t]he entry was obtained by the breaking of a window[.]" Meanwhile, a guilty verdict on the burglary charge required the jury to find, in pertinent part, that Defendant (1) "entered a structure without authorization[,]" and did so (2) "with the intent to commit a theft when inside."

Although it agrees on appeal that Defendant's entrance through the window of Ram Signs constituted unitary conduct for the purposes of both statutes, at trial the State did not suggest that the jury rely on the unauthorized entrance as the sole basis for conviction of each crime. Here, the crucial distinction in the two crimes is that the unauthorized entrance required by the burglary charge jury instruction also included the specific intent "to commit a theft when inside." Hence, the State's theory of the case for burglary required the jury to find something more than what was required for breaking and entering. Similarly, although the unauthorized entrance through the broken window was a common element of both charges, to convict Defendant of breaking and entering, the jury had to find that the unauthorized entrance was effectuated by breaking the window. That additional element—one that was not required by the burglary instruction—establishes that Defendant's conviction for breaking and entering could not have been subsumed within the aggravated burglary conviction.

The charging documents specifically relied on the "breaking or dismantling" component of the breaking and entering statute in charging Defendant with breaking and entering, and relied on the "intent to commit a felony or theft therein" component of the burglary statute in charging Defendant with burglary. As such, the State's theory of the case regarding the conduct required by the two charges was adequately distinguishable and not solely premised on the unitary conduct. Therefore, we hold that Defendant's convictions for breaking and entering and aggravated burglary did not offend his right to be free from double jeopardy….

Notes and questions on *State v. Begaye*

1. In addition to the burglary and breaking and entering charges, Franklin Begaye was also charged with possession of burglary tools—namely, gloves and a screwdriver, which were found in his pockets when he was arrested. The possession of burglary tools charge required proof that the items were commonly used in burglaries or that they had in fact been used in a specific burglary. In a portion of the opinion omitted here, the New Mexico court found that there was insufficient evidence that Begaye had actually used gloves or a screwdriver in the break-in at Ram Signs. Thus the court did not have to consider whether a defendant could be convicted of separate offenses of burglary and possession of burglary tools. Can you imagine why a legislature might want to criminalize the possession of burglary tools as a separate offense? Do you think the legislature likely intended to punish burglary, and possession of burglary tools, with separate punishments?
2. *Begaye* involves a very common situation: multiple criminal statutes could potentially apply to a particular act by a defendant. You have previously encountered this scenario with *State v. Cissell* in Chapter Three. In that case, the defendant objected because he was convicted and sentenced under a statute with a more severe penalty when another statute, with a less severe penalty, was equally applicable to his conduct. Cissell argued that to charge him with the more severe offense violated equal protection and due process, but the Wisconsin court rejected his claim. Notice that Begaye's claim here is a little bit different. Begaye raised a double jeopardy challenge, arguing that to punish him for both burglary and breaking and entering is to punish him twice for the same conduct. The Double Jeopardy Clause of the Fifth Amendment provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Whether the Double Jeopardy Clause bars multiple punishments depends on whether the punishments are for "the same offense," and the analysis of that question can be complex. To evaluate such challenges, most states follow *Blockburger v. United States*, which is explained and discussed in this case.
3. The facts of *Begaye* probably coincide with a fairly common perception of the crime of burglary: entry with probable intent to steal. Notably, though, burglary (as defined at common law, and also as defined in most modern statutes) does not actually require any intent to take property or otherwise commit a property offense rather than some other kind of crime. As the court notes, common law burglary was "breaking and entering a dwelling of another in the night time with intent to commit a felony." Any felony would suffice, so a person who entered another's dwelling with intent to kill the resident would be guilty of burglary. Modern statutes typically define burglary with an equivalent or similar mens rea requirement – intent to commit a felony or other crime inside the place burglarized. But many jurisdictions have eliminated other aspects of common law burglary, such as the requirement of "breaking," as the *Begaye* court mentions and as discussed further in the next note. Modern burglary statutes also often omit any requirement that the entry be into a dwelling or that it take place at night.
4. Again, the *Begaye* court describes common law burglary as "breaking and entering a dwelling of another in the night time with intent to commit a felony." What is a "breaking," as that term was understood at common law? Must a lock, a window, or some other part of the property actually get broken? Early judicial accounts of burglary required some act of physical force to enter the property, though this "breaking" by force did not need to cause lasting damage to the property. For example, many courts held that opening an unlocked but closed door or window was a sufficient "breaking" for the crime of burglary, but simply walking through an open door was not breaking. "As the common law developed," the *Begaye* court tells us, "the 'breaking' component of common law burglary could be satisfied by a constructive breaking and did not necessarily require a physical act." A person who tricked a homeowner into letting him in – pretending to be a city inspector, for example – could be guilty of burglary by "constructive" breaking.
5. The usual mens rea of burglary – intent to commit a felony – is often described as a "specific intent" requirement. As discussed above, larceny is also often described as a "specific intent" crime, given the typical requirement of intent to permanently deprive the owner of the property. Courts often distinguish between "specific intent" and "general intent" crimes. These terms developed at common law and do not have a single uniform definition, but you should know how the terms are most commonly used. Usually, a description of a crime as a "specific intent" crime means that the crime is defined to include some mental state requirement beyond the defendant's mental state regarding the actus reus of the offense. In contrast, the classification of an offense as one of "general intent" usually means that the only mens rea requirement is one related to the defendant's mental state regarding the conduct elements of the offense. This explanation will probably be hard to grapple in the abstract, so an example is useful. In *Begaye*, the breaking and entering statute would probably be treated as a "general intent" offense. Notice that the New Mexico breaking and entering statute does not actually specify a mental state requirement at all. But given courts' usual presumptions against strict liability, and given the mens rea default rules discussed in Chapter Two, a court would probably require that the defendant commit the actus reus of the offense – unauthorized entry – with at least knowledge or recklessness. The prosecution thus must establish something about the defendant's mental state, but only the defendant's mental state toward the actus reus of the offense: the defendant knew she was entering without authorization, or the defendant was at

least reckless with regard to whether she was entering without authorization. Contrast that "general intent" with burglary, which requires evidence of a further mental state – namely, a plan to do something specific (commit a crime) once inside the place entered. In rejecting the defendant's double jeopardy claim, one factor emphasized by the *Begaye* court is that burglary is a "specific intent" crime while breaking and entering is not.

6. Given that burglary is entry with intent to commit any felony, prosecutors have often charged this offense in the context of domestic violence, when a person enters a residence in violation of a protective order or with intent to harm someone inside in the resident. Burglary statutes have even been used to prosecute persons for entering what is technically their own legal residence. In that context, burglary statutes sometimes come into conflict with "anti-ousting" statutes which provide that a husband and wife cannot exclude one another from their shared dwelling. Consider *State v. Lilly*, below.

Ohio R.C. 2911.12. Burglary; trespass in a habitation[ ]

(A) No person, by force, stealth, or deception, shall do any of the following:

(1) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense;

(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense;

(3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense.

(B) No person, by force, stealth, or deception, shall trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present.

…

(D) Whoever violates division (A) of this section is guilty of burglary. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

(E) Whoever violates division (B) of this section is guilty of trespass in a habitation when a person is present or likely to be present, a felony of the fourth degree.

Ohio R.C. 2911.21. Criminal trespass

(A) No person, without privilege to do so, shall do any of the following:

(1) Knowingly enter or remain on the land or premises of another…

Ohio R.C. 3103.04. Interest in the property of the other

Neither husband nor wife has any interest in the property of the other, except [as provided by a statutory duty to support one's spouse], the right to dower, and the right to remain in the mansion house after the death of either. Neither can be excluded from the other's dwelling, except upon a decree or order of injunction made by a court of competent jurisdiction.

The STATE of Ohio, Appellant

v.

Harold Dean LILLY, Appellee

Supreme Court of Ohio
87 Ohio St.3d 97

Decided Oct. 20, 1999

[Syllabus by the Court:] On February 5, 1997, Harold Dean Lilly, Jr., defendant-appellee, was indicted on nineteen criminal counts: twelve counts of rape, two counts of attempt to commit rape, three counts of possessing criminal tools, one count of kidnapping, and one count of burglary. All offenses were alleged to have been against his estranged wife, Jacqueline K. Lilly.

Count nineteen of the indictment [charging burglary] stated that on or about January 26, 1997, defendant had trespassed in Jacqueline Lilly's residence when she was present or likely to have been present, with the purpose of committing a criminal offense therein. Defendant pled not guilty on February 11, 1997 to all of the charges.

Defendant and Jacqueline K. Lilly ("Mrs. Lilly") married in August 1988. They separated in early 1996 and got back together in September of that year. In November 1996, they separated again… [In January 1997] Mrs. Lilly … leased an apartment in West Carrollton, Ohio…. Defendant moved in with his own mother after the couple separated.

Mrs. Lilly testified that on January 26, 1997, she and the defendant spent the morning and afternoon together doing various errands. The defendant repeatedly asked Mrs. Lilly if they could watch the Super Bowl that evening together, but she declined. Mrs. Lilly testified that over the course of the evening, defendant asked her to have sex with him and she asked him to leave. She told the jury that defendant became angry, slapped her repeatedly, and burned her with a cigarette. She further explained that, to avoid further harm, she engaged in various sexual acts with defendant, which Mrs. Lilly testified were against her will.

Mrs. Lilly testified that later in the evening, the defendant drove her to two bars. At the 1470 Club, in Kettering, Ohio, Mrs. Lilly quietly asked one of the bar employees to call the police. After defendant followed her into the women's restroom at the bar, one of the bar's security guards went into the restroom to check on Mrs. Lilly. The security guard told defendant that he wanted to speak to Mrs. Lilly alone and defendant refused. The security guard pushed defendant out of the way while Mrs. Lilly and a female bar employee ran into the back office and locked the door. After the defendant's attempts to kick the door in were unsuccessful, he fled.

Mrs. Lilly was taken to the hospital to be examined and then to the police station to be interviewed… Police officers then took her to her apartment to get some clothing and personal items in order for her to stay in a shelter. At her apartment, Mrs. Lilly discovered that her purse was missing and about six pairs of her jeans had been ripped up. Officers noticed that the attic cover was open [and] smelled fresh cigarette smoke.

After Mrs. Lilly had collected her belongings and was ready to get in her car, she discovered that her automatic garage door opener was missing from her car. She tried to start her car, and when it would not start, officers investigated and found that the car's spark plug wires had been detached. In addition, Mrs. Lilly noticed a pair of defendant's gym shoes that were not there previously. At approximately 8:00 a.m. on January 27, officers drove Mrs. Lilly to a shelter.

Detective Mark Allison testified that on the afternoon of January 27, he informed defendant that a warrant had been issued for his arrest. The next day, Detective Allison interviewed defendant… Defendant admitted to the officers that he drove back to Mrs. Lilly's apartment in the early morning of January 27…. Defendant stated that he had left the door unlocked prior to leaving with Mrs. Lilly earlier in the evening so he could get back in. Defendant told the detectives that he ripped up several pairs of Mrs. Lilly's jeans, yanked the spark plug wires on her car, and took her purse. Defendant stated that he arrived at the apartment around 12:30 a.m. on January 27, after leaving the bar and was there until 12:00 p.m. that day. Defendant admitted that he was hiding at the apartment when police searched it.

At trial, Mrs. Lilly testified that the lease for her apartment was in her name and the defendant did not have a key. Mrs. Lilly testified that defendant did not contribute money for her apartment. She further testified that defendant knew that it was her place.

During the trial, the state withdrew one count of rape and one count of attempted rape. The jury returned a verdict of guilty on the burglary charge and not guilty on the remaining charges. Defendant appealed his burglary conviction, and the Montgomery County Court of Appeals reversed the trial court's conviction, finding that [a civil anti-ousting law] negated the state's proof of the element of trespass as a matter of law.

Opinion

LUNDBERG STRATTON, J.

This case presents the court with the question of whether R.C. 3103.04 precludes prosecution of one spouse for burglary committed in the residence of the other spouse. For the reasons that follow, we hold that a spouse may be criminally liable for trespass and/or burglary in the dwelling of the other spouse who is exercising custody or control over that dwelling. R.C. 3103.04 is inapplicable in criminal cases.

In this case, the evidence showed that defendant entered by deception the separately leased property of his estranged spouse with intent to commit a crime. However, the court of appeals concluded that in the absence of a court order, R.C. 3103.04 prevented

Mrs. Lilly from excluding defendant from her apartment and therefore the element of trespass could not be proven. Although the defendant did not raise this alleged R.C. 3103.04 privilege in the trial court, the court of appeals, nevertheless, found that it amounted to plain error. We disagree…

At common law, husband and wife were regarded as one. The legal existence of the wife during coverture was merged with that of her husband. As such, the wife was incapable of making contracts, of acquiring property, or of disposing of property without her husband's consent. In pursuance of a more liberal policy in favor of the wife, statutes were passed across the country to relieve the married woman from the disabilities imposed upon her as a femme covert by the common law.

…[I]n 1887, the General Assembly enacted what is now R.C. 3103.04 to "define the rights and liabilities of husband and wife." 84 Ohio Laws 132. The Act related both to the relationship between husband and wife and to the rights of each in the property of the other. [After some slight amendments over the years,] [t]he statute today is reflected in R.C. 3103.04:

"[Interest in the property of the other]

"Neither husband nor wife has any interest in the property of the other, except [specific statutory provisions]. Neither can be excluded from the other's dwelling, except upon a decree or order of injunction made by a court of competent jurisdiction."

… Notably, R.C. 3103.04 is situated in the domestic relations chapter of the Revised Code. Further, a review of the 1887 Act reveals that it primarily concerned property rights as they relate to domestic relations.

A review of other jurisdictions reveals seven other jurisdictions with a statute similar to R.C. 3103.04. … Significantly, we note that our review indicates that none of these jurisdictions applies this civil statute in criminal contexts.

Thus, we conclude that R.C. 3103.04 was intended to address property ownership rights of married persons, matters of a civil nature. Privileges of a husband and wife with respect to the property of the other were not meant to be enforced criminally and do not affect criminal liabilities. Because we find that the General Assembly never intended for R.C. 3103.04 to apply in criminal contexts, we must turn to the Criminal Code to address this issue.

The crime of burglary, with which defendant was charged, provides:

"(A) No person, by force, stealth, or deception, shall do any of the following:

" * * *

"(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense * * *." R.C. 2911.12(A)(2).

"Criminal trespass" is defined as:

"(A) No person, without privilege to do so, shall do any of the following:

"(1) Knowingly enter or remain on the land or premises of another." R.C. 2911.21.

The law of burglary evolved out of a desire to protect the habitation. Because intrusions into the habitation are dangerous to occupants, "the offense is viewed as serious, because of the higher risk of personal harm involved in maliciously breaking and entering an occupied, as opposed to an unoccupied, structure." 1974 Legislative Service Commission Comment to R.C. 2911.12.

Because the purpose of burglary law is to protect the dweller, we hold that custody and control, rather than legal title, is dispositive. Thus, in Ohio, one can commit a trespass and burglary against property of which one is the legal owner if another has control or custody of that property.

A majority of other jurisdictions that have addressed this issue have found that the entry of an estranged spouse upon the property of the other spouse constitutes an unauthorized entry to support charges of trespass and burglary….

Civil, peaceful avenues of redress exist to enforce the rights of a person who believes he or she has been wrongfully excluded from certain property. There is no privilege to use force, stealth, or deception to regain possession. See R.C. 2911.21(C) ("It is no defense to a charge under this section that the offender was authorized to enter or remain on the land or premises involved, when such authorization was secured by deception.").

In this case, there is no evidence that defendant had any right to custody or control of the leased property. The apartment was leased solely in Mrs. Lilly's name. Defendant did not pay any part of the rent on Mrs. Lilly's apartment. While defendant claims that he may have stayed at the apartment occasionally and performed maintenance tasks there for Mrs. Lilly, defendant never lived at the apartment, did not have a key to the apartment, and did not keep any of his belongings in the apartment. Accordingly, it was reasonable for the jury to find that when, without permission, defendant entered Mrs. Lilly's apartment through a door he had previously by deception left unlocked, he trespassed. When he trespassed in Mrs. Lilly's apartment for the purpose of committing a crime, *i.e.*, theft of her purse and damage to her property, it was reasonable for the jury to conclude that defendant committed a burglary.

Thus, there was ample evidence at trial for the jury to have determined that the defendant trespassed in Mrs. Lilly's dwelling and that he did so with the purpose or intent of committing a crime. Sufficiency of the evidence is considered in a light most favorable to the prosecution. As such, we find that there was sufficient evidence of burglary to sustain his conviction. Therefore, we reverse the judgment of the court of appeals and reinstate defendant's conviction for burglary…

Notes and questions on *State v. Lilly*

1. In Ohio, and in many other jurisdictions, the offense of burglary is now defined a trespass with the intent to commit a crime (other than the trespass itself) in the place being entered. (What crime did Lilly intend to commit in his wife's apartment, according to this court?) But as you will see in Chapter Eight, doctrines of criminal attempt already impose criminal liability for those who intend to commit an offense and take steps toward the commission of that offense. Someone who enters a home with intent to steal from it is likely liable for attempted theft. Why, then, is it necessary to have burglary as a separate criminal offense? The drafters of the Model Penal Code considered this issue, but ultimately decided to keep a burglary offense as part of their recommended code. As the drafters explained,

   The critical issues to be confronted in the law of burglary are whether the crime has any place in a modern penal code and, if so, how it should be graded. The first question arises because of the development of the law of attempt. Traditionally, an independent substantive offense of burglary has been used to circumvent unwarranted limitations on liability for attempt. Under the Model Code, however, these defects have been corrected. It would be possible, therefore, to eliminate burglary as a separate offense and to treat the covered conduct as an attempt to commit the intended crime plus an offense of criminal trespass. Section 221.1 nevertheless continues burglary as an independent substantive offense carrying felony sanctions. In part, this solution reflects a deference to the momentum of historical tradition. More importantly, however, the maintenance of a crime of burglary reflects a considered judgment that especially severe sanctions are appropriate for criminal invasion of premises under circumstances likely to terrorize occupants.

   Model Penal Code 221.1, explanatory note.

2. Note that Harold Lilly was indicted on nineteen counts, including twelve counts of rape, two counts of attempted rape, and a kidnapping charge. Note also that there were witnesses to some of Mr. Lilly's conduct: security guards at a bar tried to protect Jacqueline Lilly from her husband, and a female bar employee fled to a back office with Jacqueline. But Harold Lilly was acquitted of all charges except the burglary charge. We don't have access to the jury's deliberations, but can you imagine possible reasons that the jury might have convicted only on the burglary charge and acquitted on all others?
3. Does the *Lilly* court rely on a sharp dichotomy between civil law (such as the anti-ousting statute) and criminal law? Or does the court's decision tend to collapse the distinction between civil and criminal law? Professor Jeannie Suk has characterized responses to domestic violence like the one we see in *Lilly* as a form of "state-imposed de facto divorce." She writes,

   …The Ohio Supreme Court took the position that the criminal law would ignore the anti-ousting statute. The anti-ousting provision "was intended to address property ownership rights of married persons, matters of a civil nature. Privileges of a husband and wife with respect to the property of the other were not meant to be enforced criminally and do not affect criminal liabilities." Because the anti-ousting statute regulated in the domains of property and family relations, it simply did not apply in a criminal case…

   What is notable here is the purportedly easy division of the world into criminal and civil spheres of regulation. If applied, the anti-ousting statute would have directly conflicted with the spousal burglary conviction. According to the theory the court adopted, criminal and civil spheres were mutually exclusive and thus the civil anti-ousting statute, which regulated property interests, could have no effect on the criminal law question of burglary.

But the crime of burglary does not operate apart from a property regime. The court's assertion that property law and criminal law represented wholly separate spheres deviated from the common law relation between burglary and property law. Classically, burglary law was dependent upon the underlying allocation of property rights. The criminal law question of whether a person committed burglary depended on property law for its application. The underlying property arrangement determined whether his entry was burglarious.

The *Lilly* court indicated its intention to treat the criminal and civil spheres as wholly separate for purposes of this case. But by declining to apply the anti-ousting statute in a burglary case, the court was actually allowing criminal law, as [domestic violence] policy, to trump the law of property. The effect was to reallocate property rights between spouses such that burglary would [apply.]

… What we see here is a reversal of the dependence of burglary law on the law of property. Whereas traditionally, burglary depended on the prior allocation of possessory rights determined by property law, we now see the criminal law subordinating property law to its interests, in effect reallocating private rights. While property law had previously set the conditions for burglary, criminal law now takes precedence in defining property rights in this DV context. … Even as it claims to treat civil interests as a separate sphere, the criminal law, through its coercive power and its claim to the public interest, has an unmatched capacity to reorganize private interests.

Jeannie Suk, *Criminal Law Comes Home*, 116 Yale L.J. 2 (2006).

4. Given the serious allegations against Harold Lilly, and given the jury's failure to convict on any of the rape and kidnapping charges, one might be relieved that burglary was available as a proxy charge in this case. Keep in mind that the same broad criminal laws that will make it easier to convict Lilly of something will make it easier to convict other defendants, too. Trespass is even easier to prosecute than burglary, and in some contexts civil rights advocates have contended that trespass laws are used to harass and oppress persons of color. In 2012, a number of civil rights organizations filed a federal lawsuit to challenge "Operation Clean Halls," an NYPD program in public housing projects and other large residential buildings. Under the program, police patrolled the buildings and subjected many occupants to stops and frisks, often filing trespass charges against those who could not prove residence in the building. "Many tenants who live in Clean Halls buildings are restricted in their ability to maintain familial ties and friendships due to the use of aggressive police tactics in their homes," the New York Civil Liberties Union explained in a public statement about its lawsuit. "The program is part of a citywide practice of suspicionless police stops and arrests that primarily impact communities of color." The lawsuit, *Ligon v. City of New York*, eventually settled (along with the more widely publicized lawsuit challenging NYPD stop-and-frisk practices, *Floyd v. City of New York*). But Operation Clean Halls continued in a modified form under a new name, the Trespass Affidavit Program, until it was shut down in the fall of 2020. Other cities continue to operate Trespass Affidavit Programs, under which building owners submit lists of building residents to law enforcement and invite law enforcement to patrol the buildings and arrest non-residents.

Check Your Understanding (5-2)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Robbery

N.J.S.A. 2C : 15-1a(1)

a. **Robbery defined.** A person is guilty of robbery if, in the course of committing a theft, he:

(1) Inflicts bodily injury or uses force upon another; or

(2) Threatens another with or purposely puts him in fear of immediate bodily injury; or

(3) Commits or threatens immediately to commit any crime of the first or second degree.

An act shall be deemed to be included in the phrase "in the course of committing a theft" if it occurs in an attempt to commit theft or in immediate flight after the attempt or commission.

b. **Grading.** Robbery is a crime of the second degree, except that it is a crime of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon.

STATE of New Jersey

v.

Francisco SEIN

Supreme Court of New Jersey
590 A.2d 665

Decided May 21, 1991

CLIFFORD, J.

The narrow issue on this appeal … is whether the sudden snatching of a purse from the grasp of its owner involves enough force to elevate the offense from theft from the person to robbery as defined by *N.J.S.A.* 2C:15-1a(1)….

-A-

On August 27, 1986, Edythe Williams cashed her unemployment check at Proper Check Cashing, a concession located in the Woolworth store on Main Street in Paterson. Mrs. Williams placed the proceeds in a zipped compartment in the strapless, clutch-type purse that she carried under her arm. After purchasing a notebook in Woolworth's, she left the store and headed for her car, which she had parked a couple of blocks away.

Mrs. Williams arrived at her car intending to drop off the notebook and continue shopping in the area. She went to the passenger side and put her key in the lock, all the while carrying the purse under her right arm. As Mrs. Williams stood in the street, defendant, Francisco Sein, walked up and stood close beside her on her left. Mrs. Williams turned to face the man, thinking he had approached to ask a question, but defendant said nothing. Instead, "he reached across [her] and just slid [her] pocketbook–which wasn't very hard to do–from under [her] arm and took off," running toward Main Street. There was no evidence that defendant used any force other than that required to slide the purse from beneath Mrs. Williams' arm.

The police apprehended defendant, who was subsequently indicted for robbery… At trial, defendant moved at the conclusion of the State's case for a judgment of acquittal in respect of the robbery charge, contending that the case should proceed only on the lesser-included offense of theft from the person, defined by *N.J.S.A.* 2C:20-3a as the "unlawful[ ] tak[ing], or exercis[ing of] unlawful control over, movable property of another with purpose to deprive him thereof." The crux of defendant's argument was that there was no evidence in the record that the taking of Mrs. Williams' purse was accompanied by the use of force against her person, a requirement for conviction under*N.J.S.A.* 2C:15-1a(1). The State, on the other hand, urged that a judgment of acquittal would be improper because the Legislature intended that the force used to remove the purse from the victim was sufficient to elevate the unlawful taking to a robbery. The trial court denied defendant's motion, and the jury subsequently found defendant guilty of second-degree robbery.

On appeal, defendant contended that the trial court had erred by submitting the second-degree-robbery charge to the jury because there was no evidence that defendant had used force on Mrs. Williams in the course of the purse-snatching. The Appellate Division agreed… The court reversed the robbery conviction and remanded for the entry of a judgment of conviction for theft and for resentencing for that offense.

Before us, the State argues that the Appellate Division's construction of the "uses force upon another" language in the robbery statute, *N.J.S.A.* 2C:15-1a(1), both misconstrues the plain meaning of the statute and contravenes the relevant legislative intent. According to the State, the Appellate Division's standard will "change the focus of a robbery committed through the use of force from the conduct of the perpetrator to the nature of the property that he stole * * * and the particular characteristics of the victim as well as the victim's actions." In addition, the State submits that the standard established by the Appellate Division to determine the amount of force necessary to effect a robbery is "inexact and unworkable," and that therefore jurors will be required to use concepts founded in the science of physics to determine whether more force was used than that quantum necessary merely to remove the object.

-B-

Cases involving "snatching" have required courts to determine where to draw the line between robbery and the lesser offense of larceny from the person. A certain amount of "force" is necessary to take property from the person of another, but whether the

amount necessary merely to accomplish that taking is sufficient to warrant the more serious penalties associated with robbery has vexed those courts that have considered the question.

Some jurisdictions have construed the term "force" as used in the state's robbery statute to mean mere physical force or energy, while others have rejected hypertechnical distinctions in favor of a view that acknowledges that snatching an object from the grasp of the owner increases the risk of danger to the victim and justifies enhanced punishment. Those jurisdictions implicitly recognize that victims do not turn over their property willingly, even if they do not resist or struggle with a thief. Thus, the amount of physical energy necessary to take the property is deemed sufficient to support a robbery conviction.

The predominant view, however, is that there is insufficient force to constitute robbery when the thief snatches property from the owner's grasp so suddenly that the owner cannot offer any resistance to the taking. *See* W. LaFave & A. Scott, *Criminal Law* § 8.11(d), at 781 (2d ed.1986). This "majority rule" has been set forth in the following terms:

[A] simple snatching or sudden taking of property from the person of another does not of itself involve sufficient force to constitute robbery, though the act may be robbery where a struggle ensues, the victim is injured in the taking, or the property is so attached to the victim's person or clothing as to create resistance to the taking.

People v. Patton (Ill. 1979).

The legislative history of New Jersey's robbery statute, *N.J.S.A.* 2C:15-1, when read in the context of the Code Commentary on theft, reveals that our Legislature intended to adopt the majority rule.

-C-

At common law, robbery was defined in New Jersey as "the felonious taking of personal property from the person or custody of another by force or intimidation." The pre-Code robbery statute, *N.J.S.A.* 2A:141-1, codified the common law.

The Appellate Division summarized the general state of the law of robbery under the pre-Code statute in*State v. Culver* (1970), where it stated:

N.J.S.A. 2A:141-1 provides that any person who forcibly takes from the person of another money or personal goods and chattels of any value whatever by violence or putting him in fear, is guilty of a high misdemeanor. Thus, force or intimidation is a necessary element of the crime and must precede or be concomitant with the taking. The property stolen need not have been in contact with the person from whom it was taken at the time it was stolen, and if taken by fear it must be the result of such demonstration or threat as to create reasonable apprehension on the part of the victim that, if the theft were resisted, force would be used. *While a secret or sudden taking of property from the owner without putting him in fear and without open violence is deemed larceny, if there be a struggle to keep it or any violence or disruption, the taking is robbery.*

The foregoing summary suggests that [before 1979] New Jersey followed the majority view as stated in *People v. Patton*, above.

In 1979, the Legislature revamped the criminal laws by enacting the New Jersey Code of Criminal Justice… Under [the Code's robbery statute] as originally enacted, "[a] person [was] guilty of robbery if, in the course of committing a theft, he: (1) [i]nflicts bodily injury upon another; or (2) [t]hreatens another with or purposely puts him in fear of immediate bodily injury; or (3) [c]ommits or threatens immediately to commit any crime of the first or second degree."

In 1981, however, the Legislature amended *N.J.S.A.* 2C:15-1a(1) to read that a person is guilty of robbery if in the course of committing a theft he "[i]nflicts bodily injury *or uses force* upon another." *L.* 1981, *c.* 22, § 1 (emphasis added). The Legislature's intention regarding the addition of the "or uses force" language is made clear by the following Statement of the Senate Judiciary Committee:

Senate Bill No. 885 amends *N.J.S.A.* 2C:15-1 to clarify that a person is guilty of robbery if he uses any force upon another in the course of committing a theft. Under present law only a person who inflicts bodily injury upon another in the course of committing a theft is guilty of robbery. Senate Bill 885 extends the definition of robbery to cover the so-called "blind-side" mugging. This occurs when a person commits an act of theft-for example a purse snatching-by approaching the victim from behind *and using some degree of force to wrest the object of his theft from the victim.* Often, however, no bodily injury is inflicted in these cases and therefore the offenses committed could be found to be theft rather than robbery.

[*Statement of the Senate Judiciary Committee to Senate Bill 885* (Apr. 21, 1980) (emphasis added).]

The State contends that that Statement shows that the Legislature contemplated that a sudden, surprise snatching of property held in the grasp of another or in some way in contact with the person of another involves the use of force sufficient to elevate the taking to a robbery.

To the contrary, that the Legislature intended to broaden the concept of force beyond the pre-Code understanding of that term is not at all clear. The Senate Judiciary Committee Statement begins by saying the amendment is to "*clarify* that a person is guilty of robbery if he uses force upon another in the course of committing a theft." (Emphasis added.) That suggests that the omission of the "or uses force" language in the Code as originally enacted in 1979 was an oversight. In amending *N.J.S.A.* 2C:15-1a(1), the Legislature merely intended to clarify that the type of force required to support a robbery conviction under the pre-Code statute still would be sufficient to elevate a theft to a robbery.

As we indicated earlier, "a simple snatching or sudden taking of property from the person of another does not of itself involve sufficient force to constitute robbery" under the pre-Code statute, and nothing in the Senate Judiciary Committee Statement undercuts that standard. Although the Committee Statement refers to a "purse snatching" as an example of the conduct the amendment was intended to cover, it goes on to state that snatchings rising to the level of robbery include only those that involve "some degree of force to *wrest* the object" from the victim. (Emphasis added.) To "wrest" is to "pull, force, or move by violent wringing or twisting movements." *Webster's Third New International Dictionary* 2640 (1971). The Legislature apparently determined that the violence associated with "wresting" is deserving of more severe punishment. It did not, however, intend to eliminate the requirement that robbery by use of force include force exerted "upon another."

Moreover, the Commentary to the Code definition of "theft" strongly suggests that the Legislature did not intend that a surprise purse-snatching unaccompanied by injury, threat, struggle, or attempted resistance would constitute the crime of robbery. In discussing *N.J.S.A.* 2C:20-3 [New Jersey's theft statute], which provides in pertinent part that "a person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof," the Legislature made clear the following:

The crime here defined may be committed in many ways, i.e., by a stranger acting by stealth or *snatching from the presence or even the grasp of the owner* or by a person entrusted with the property as agent, bailee, trustee, fiduciary or otherwise.

[II *New Jersey Penal Code: Final Report of the New Jersey Criminal Law Revision Commission*.]

The theft statute thus includes purse-snatchings from the grasp of an owner, while the robbery statute includes purse-snatchings that involve some degree of force to wrest the object from the victim. The only way to reconcile the two statutes is to hold that robbery requires more force than that necessary merely to snatch the object.

If the Legislature had intended that the amount of force necessary to snatch the object would be sufficient to constitute a robbery, it could have amended the theft statute to indicate that it includes only those snatchings in which the object of the theft is loose or can be cut loose, but not those in which the object must be removed from the victim. It did not do so.

The standard we adopt today continues the focus of a robbery on the conduct of the perpetrator rather than on the nature of the property stolen or the characteristics of the victim and his or her actions. Furthermore, we do not agree with the State's contention that this standard is "inexact and unworkable." If in fact jurors will henceforth be required to resort to concepts founded in the science of physics to determine whether more force was used than that quantum necessary merely to remove the object, that is hardly a dismaying by-product of a correct interpretation of the statute. Such concepts are used frequently by juries in their deliberations and are entirely within their ken.

-D-

… There is no indication that the Legislature intended to change the pre-Code rule that "a secret or sudden taking of property from the owner without putting him in fear and without open violence is deemed larceny, [but] if there be struggle to keep it or any violence or disruption, the taking is robbery." To the extent that the robbery statute and the Senate Judiciary Committee Statement are burdened with ambiguity, as so persuasively argued by the Chief Justice in his dissent, that ambiguity surely cannot inure to the benefit of the State. "[P]enal statutes that are open to more than one reasonable construction must be construed strictly against the State."

Because there is no evidence that defendant's conduct involved the type of force sufficient to elevate the theft to a robbery under *N.J.S.A.* 2C:15-1a(1), the judgment of the Appellate Division is affirmed.

WILENTZ, C.J., dissenting.

I would hold that, under the statutory amendment, all purse snatchings are robberies, regardless of the amount of force used. I believe this construction of the amendment achieves the overriding goal of the Legislature: to deter and to prevent purse snatchings, not some kind, one kind, or a particular kind, but all purse snatchings.

I recognize the legitimacy of the majority's decision. The issue of statutory interpretation facing the Court is difficult. But I cannot accept what I believe is an interpretation that falls far short of the legislative intent even in the face of the persuasive analysis in its support. A basic societal interest is left unprotected despite the Legislature's clear intent to protect it. It is our interest in personal safety.

Determining the appropriate judicial role in construing statutes that do not accurately reflect the Legislature's intent is sometimes problematic. That problem is magnified as the distance between the legislative intent and the Legislature's language grows. Where, as here, a criminal statute is involved, the judiciary's attempt to bridge the gap can conflict with notions of fairness and due process: it is the criminal statute that determines a crime—we do not jail people for violating legislative intent.

This case presents an extreme example of the problem. The Legislature clearly intended to make *every* purse snatching a robbery and just as clearly did not say so. The question is how far the judiciary should go to effect the legislative purpose despite the lack of legislative language.

…A literal application of the "uses force upon another" language to the offense of purse snatching suggests that force used solely upon a purse would be insufficient to elevate the crime from theft to robbery. Pursuant to such a construction, one who snatched a purse without touching the victim, even if he exerted a great deal of force in order to pull a purse tightly clutched under his victim's arm, would not be guilty of robbery. A robbery would result only if he pulled the owner's hand itself, pushed her arm to loosen the clutch, or in some way used force upon the *person* as well as on the purse. That reading of the statute, closely conforming to the statutory language, would remove a substantial portion of purse snatching offenses from the robbery statute, contrary to the Legislature's intent… The majority and this dissent both recognize that the statute should not be interpreted so literally. We differ, however, in our reading of the legislative history concerning the nature and strength of the legislative purpose, and therefore differ concerning the appropriate statutory interpretation.

I disagree with the majority's interpretation of the Judiciary Committee's Statement…. The Statement … taken as a whole, clearly suggests that the Legislature (to the extent the Judiciary Committee is its surrogate) intended to make *all* purse snatchings robberies, as did the Governor when he signed the bill.

… Certainly, given the text of the statutory amendment and the less than perfect clarity of the Committee Statement, one cannot fault the majority for concluding that the nature of the force determines the quality of the offense. My own reading of the legislative intent arises from other sources as well, however, sources of which we can fairly take judicial notice. Those sources are the vast increase in muggings and purse snatchings that preceded the law and society's acute concern over these crimes.

For more than a decade we have witnessed a seemingly unprecedented upsurge in crime. Prominent among these offenses have been "street crimes," stranger-to-stranger offenses including ordinary muggings (usually thought to include some degree of violence or its threat) and "purse snatchings," meaning just what it says, not necessarily implying any violence or force whatsoever. That no one could any longer safely walk the streets produced fear and fury on the part of society. Purse snatching was particularly loathsome, given its unpredictability, lack of warning, almost total randomness, and the fact that women were almost invariably the victims. Force and violence were often present and certainly they were major elements of society's concern. But it was the offense itself, and its usual attributes, the insult and offense to the person, the potential danger, the helplessness, and the utter unredeemable ugliness of being "attacked"—for that is the universal perception–with or without force, by some amoral stranger who takes command of your belongings—it was the offense itself, purse snatching, regardless of its differing qualities, that was society's concern. I find it most difficult to believe that either society or the Legislature ever intended to further penalize only "wresting" purse snatchings, but not the swift skillful removals that involve practically no force. Society and the Legislature condemn this offense regardless of whether the victim resists or whether because of "wresting," she becomes immediately aware of the violation. This is not to say that the Legislature could not have selected the extent of force as a critical factor in elevating the crime from theft to robbery. Certainly, the dangers are increased when a thief uses excessive force, whether because of an utter disregard for the victim or because of the necessities caused by her resistance; and to the extent force bears on the victim's "awareness," with its

resulting fear, that is one of the most offensive aspects of the crime. The Legislature did not, however, intend to define the crime by the variables of fear and force. Rather, it intended to define *all* purse snatchings as robberies.

… It seems most unlikely that the Legislature sought to transform a thief into a robber only if the thief encounters resistance while accomplishing his goal. Such a result amounts to equating the defendant's blameworthiness with the victim's reflexes. A thief who finds it necessary to tug the purse from under a woman's arm or from her instinctively tightened grasp is deemed a robber, while one who slides the purse out and removes it, as in this case, remains merely a thief. Similarly, one who takes a purse suspended by a shoulder strap or chain while the woman's arm is resting on the purse is a robber, while one who covertly lifts the purse without engaging her conscious or inertial resistance is but a thief.

…Deterrence of purse snatching is what the Legislature wanted to accomplish, and it would be most surprised to learn that all it had deterred was purse snatching involving wresting, and had left out the many purse snatchers who go out ready and willing to wrest, but who, because of some fortuitous circumstance, grab the purse without such consequence. The announcement it wanted to make to society is that *all* purse snatchings are robberies so that the offenders should know it when they go out in the night—and more and more frequently, even in the day—to prey on their helpless victims.

The Legislature knew what too many of us know—that it is not only the one on a motor bike who takes the tourist's purse as he strolls on the street, not only the person on the down escalator who grabs the shoulder bag from the victim on the up escalator and dashes off into the crowd, but more so it knew what is not shown on the television ads—the street criminal who pulls your purse out from under your arm, from behind, or face-to-face, without noticeable force and without threat other than the perceived possibility that resistance may lead to injury or even death. In each case the victim does not resist, and the only force may be the lifting of the object, but surely this is the force that the Legislature had in mind.

This construction of the statute is, of course, not limited to purses or to women. A person commits a robbery whenever he or she unlawfully takes an article held by or within the possession of a person, or attached to the outside of a person's garments. This definition encompasses any kind of article, not just a purse, and it would presumably extend to pickpocketing, although the legislative history, overwhelmingly indicating an intent to reach purse snatchers, provides no indication of an intent to reach the pickpocket. If, as is entirely possible, the Legislature did not intend so broad a scope for its new definition of robbery when applied to pickpocketing, legislative amendment may be needed. Distinctions exist between the two: purse snatching is usually accompanied by some degree of force and victim awareness, while pickpocketing is usually characterized by stealth, lack of force, and no victim awareness.

…I would reverse the judgment of the Appellate Division and reinstate the guilty verdict.

Notes and questions on *State v. Sein*

1. As noted in the introduction to this chapter, robbery is often classified as a "violent crime" rather than a property offense. Robbery does involve the taking of property, but it typically requires the taking of property by a specific means: the use or threat of physical force. The exercise of force (or the threat to exercise it) is a frequent concern of criminal law, and the next chapter will examine crimes involving force or violence in much greater detail. Once recurring question will be the one raised here in *Sein*: what exactly does the word "force," or the word "violence," mean when it is used in a criminal statute? About a year after deciding *State v. Sein*, the New Jersey Supreme Court addressed the meaning of the term "force" again, this time in the context of sexual assault. You'll that case, *In re. M.T.S.*, in Chapter Six, and have an opportunity then to think more about whether the concept of force is or should be defined uniformly across criminal law.
2. Between majority and dissent in *Sein*, who offers the more convincing interpretation of the state legislature's intent with respect to this particular statute? Is it clear that Judges Clifford (for the majority) and Chief Judge Wilentz (dissenting) are trying to ascertain the legislature's intent, as opposed to trying to vindicate their own instincts about whether purse snatchings should be criminalized as robberies?
3. Consider carefully the end of the dissent, where Chief Judge Wilentz says that his interpretation of the statute is "not limited to purses or women." If that is true, why wouldn't pickpocketing become robbery, according to the dissent?
4. Use robbery to practice your ability to analyze mental state requirements. What is the mens rea requirement of the New Jersey statute? (Remember, the absence of an explicit textual reference to mental states does not mean that a statute lacks a mens rea requirement!) Do you think robbery would be classified as a "specific intent" or "general intent" crime?

N.Y. Penal Law 160.00. Robbery; defined

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

The People of the State of New York

v.

Edward REID

The People of the State of New York

v.

Walter RIDDLES

Court of Appeals of New York
508 N.E.2d 661

Decided May 5, 1987

SIMONS, J.

The common issue presented by these two appeals is whether a good-faith claim of right, which negates larcenous intent in certain thefts, also negates the intent to commit robbery by a defendant who uses force to recover cash allegedly owed him. We hold that it does not….

I

Defendant Edward Reid was charged in a multicount indictment with felony murder, three counts of robbery in the first degree, one count of criminal possession of a weapon in the third degree and various other crimes. He was acquitted of the murder count but convicted of the robbery and possession counts. The additional charges were dismissed by the trial court.

The convictions stem from defendant's forcible taking of money from three others. The evidence established that defendant and his stepbrother, Andre McLean, approached … three men … standing on a street corner in The Bronx. Defendant and McLean were holding pistols when defendant demanded that the three men hand over money "that belonged to him," apparently referring to money owed him as the result of prior drug transactions. [Two men] gave defendant money but [a third, Donnie Peterson] responded that he had none and would have to go upstairs to his apartment to get some. As the men walked up the stairs, toward Peterson's apartment, defendant "snatched" McLean's pistol, placed it in his waistband and demanded that McLean turn over money he was holding for him. McLean handed defendant $300. A moment later, he rushed at defendant, a "shot went off" striking McLean and defendant fled. McLean subsequently died from a single gunshot wound to his chest.

Defendant Walter Riddles was indicted for robbery in the second degree and assault in the second degree. He was convicted after a bench trial of robbery in the third degree for forcibly taking money from Genevieve Bellamy on November 10, 1982.

Bellamy and defendant both testified at trial, each providing different descriptions of events. Bellamy maintained that while she was waiting for a taxi at a street corner in The Bronx, defendant, whom she did not know, drove up to the curb and asked for directions. According to Bellamy, when she leaned into defendant's automobile to help him, defendant grabbed her, forced her into the car and demanded money from her. Bellamy stated she did not have any, but defendant struck her in the face, searched her pockets, and, upon discovering $50, took the money and ordered her out of the automobile.

Defendant disputed her story. He testified that he knew Bellamy prior to the incident and that she owed him $25. He stated that … on the evening of November 10 … she offered to pay him $15 toward her debt if he drove her downtown so she could pick up a package. Defendant maintained that he took Bellamy downtown, as she asked, but that she was unable to obtain her package so he

drove her back uptown. Defendant testified that during the return trip, Bellamy again offered to pay him $15 toward her debt, but upon seeing her counting a large sum of money, he took the full amount she owed him, $25, and no more.

In pronouncing judgment, the court stated that it credited the portion of defendant's testimony indicating that he had taken the money from Bellamy to satisfy a debt but the court held that because defendant used force he was nevertheless guilty of robbery.

II

A person "commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force." The larceny statute, in turn, provides that an assertion that "property was appropriated under a claim of right made in good faith" is a defense to larceny (*see* Penal Law § 155.15). Since a good-faith claim of right is a defense to larceny, and because robbery is defined as forcible larceny, defendants contend that claim of right is also a defense to robbery. They concede the culpability of their forcible conduct, but maintain that because they acted under a claim of right to recover their own property, they were not guilty of robbery, but only some lesser crime, such as assault or unlawful possession of a weapon.

Defendants' general contention is not without support. Several jurisdictions have held that one who acts under a claim of right lacks the intent to steal and should not be convicted of robbery. That logic is tenable when a person seeks to recover a specific chattel: it is less so when asserted under the circumstances presented in these two cases: in *Reid* to recover the proceeds of crime, and in *Riddles*, to recover cash to satisfy a debt.

We have not had occasion to address the issue but the Appellate Divisions [lower NY courts] to which it has been presented have uniformly ruled that claim of right is not a defense to robbery. Their determinations have been based upon the interpretation of the applicable statutes and a policy decision to discourage self-help and they are consistent with what appears to be the emerging trend of similar appellate court decisions from other jurisdictions. For similar reasons, we conclude that the claim of right defense is not available in these cases. We need not decide the quite different question of whether an individual who uses force to recover a specific chattel which he owns may be convicted of robbery. It should be noted, however, that because taking property "from an owner thereof" is an element of robbery, a person who recovers property which is his own (as compared to the fungible cash taken to satisfy a claimed debt in the cases before us) may not be guilty of robbery.

The claim of right defense is found in the larceny article of the Penal Law, which provides that a good-faith claim of right is a defense to trespassory larceny or embezzlement. The defense does not apply to all forms of larceny. For example, extortion is a form of larceny, but the Legislature, consistent with a prior decision of this court, has not authorized a claim of right defense to extortion. The exception is significant for extortion entails the threat of actual or potential force or some form of coercion. Thus, the inference may reasonably be drawn that in failing to authorize a claim of right defense for extortion in Penal Law § 155.15 (1), and by failing to incorporate it in article 160 of the statute, which governs robbery, the Legislature recognized that an accused should not be permitted to invoke it in crimes involving force. We assume that if the Legislature intended to excuse forcible taking, it would have said so.

Our decision also rests upon policy considerations against expanding the area of permissible self-help. Manifestly, a larceny, in which the accused reacquires property belonging to him without using force, differs from a robbery in which the defendant obtains money allegedly owed to him by threatening or using force. "The former is an instance of mistake, not subjected to penal sanctions because the threat to private property is not so serious as to warrant intervention by the criminal law. The latter is a species of self help and whether or not the exponent of force or threats is correct in estimating his rights, he is resorting to extra-judicial means in order to protect a property interest" (Note, *A Rationale of the Law of Aggravated Theft*, 54 Colum L Rev 84, 98 [1954]). Since such forcible conduct is not merely a transgression against property, but also entails the risk of physical or mental injury to individuals, it should be subjected to criminal sanctions. Consequently, we find the courts in both *People v Reid* and *People v Riddles* correctly denied defendants' requests to assert claim of right defenses.

… We have considered defendant Reid's remaining points and find them either unpreserved or without merit.

Accordingly, the orders of the Appellate Division should be affirmed.

Notes and questions on *People v. Reid*

1. Recall that in *People v. Williams*, the California case presented early in this chapter, the court relied on common law property crime definitions (including larceny) to interpret the state robbery statute. Here in *Reid*, the New York court takes a similar

approach, perhaps with even better statutory authority: the New York statute at issue here explicitly refers to larceny to define the crime of robbery. That approach – understanding robbery as larceny + the use or threat of force – creates the legal question that arises in *Reid*: should a circumstance that provides a defense to larceny also provide a defense to the more serious crime of robbery?

2. To think through that question, it may help to put the use of force aside for a moment and focus solely on larceny. Why is a good faith claim of right a defense to the crime of larceny?
3. Do the considerations that make a good faith claim of right relevant to liability for larceny also apply in the robbery context? Why or why not?
4. In 2007, the former football star O.J. Simpson was arrested after he and five other men confronted sports memorabilia dealers in a Las Vegas Hotel and took items at gunpoint. Simpson later claimed that he was simply recovering commemorative items and awards that had been stolen from him. Would Simpson's claim, if true, exonerate him from a charge of robbery under the analysis of *State v. Reid*? For the analysis of a Nevada court (applying a Nevada robbery statute), see *Simpson v. State*, 367 P.3d 819 (Nev. 2010).

Arson

Md. Crim. L. § 3-204. Reckless endangerment [as of 2001]

(a) A person may not recklessly:

(1) engage in conduct that creates a substantial risk of death or serious physical injury to another; or

(2) discharge a firearm from a motor vehicle in a manner that creates a substantial risk of death or serious physical injury to another.

Md. Crim. L. § 6-102. Arson [as of 2001]

(a) A person may not willfully and maliciously set fire to or burn:

(1) a dwelling; or

(2) a structure in or on which an individual who is not a participant is present.

Reginald T. HOLBROOK

v.

STATE of Maryland

Court of Appeals of Maryland
772 A.2d 1240

June 5, 2001

HARRELL, Judge.

Following a non-jury trial in the Circuit Court for Wicomico County, Reginald T. Holbrook (Petitioner) was convicted of first degree arson, eight counts of reckless endangerment, and making a threat of arson… We granted Petitioner's *writ of certiorari*…

I.

… There is no significant dispute about the facts in this case. In 1998, Alisha Collins leased a residence at 230 Ohio Avenue in Salisbury, Maryland. Between April and May of that year, nine people lived there [including] Alisha Collins, … her aunt, DeKota Collins, … and, Mr. Holbrook, who was DeKota Collins's boyfriend. Mr. Holbrook resided at the home for several months and contributed to the rent.

DeKota Collins was the representative payee for Mr. Holbrook's social security payments. On May 1, 1998, Mr. Holbrook and DeKota Collins had an argument over his money during which he made a menacing gesture toward her with a screwdriver. Alisha Collins called the police. The responding officer told Mr. Holbrook that he would have to leave and not to return to the premises. The officer stayed while Mr. Holbrook removed all of his belongings. Alisha Collins testified at trial that Mr. Holbrook was "really mad."

About an hour after leaving the premises, Mr. Holbrook returned and asked to speak to DeKota. She told him, “Reggie, I don’t want you no more. I just want you to leave me alone and don’t come back here no more.” Mr. Holbrook sat on the porch and cried. About one hour later, Alisha Collins and her husband left the premises with Mr. Holbrook. The three shared a cab ride, during which Mr. Holbrook repeatedly said “I’m going to get all of you.”

On May 6, 1998, Alisha Collins observed Mr. Holbrook walking back and forth across the street from her house. She testified that he said “I’ll burn this mother fucker up.” Over the objection of defense counsel, Alisha Collins testified that a week before Mr. Holbrook left the home, she overheard an argument between him and DeKota Collins during which Mr. Holbrook said “I’ll burn this mother fucker house down” and “I got people that can hurt you that live upstate.”

[Quoted from the lower court opinion:] On the evening of May 7, 1998, Mr. Holbrook came to the door of the home and asked to see DeKota Collins. Alisha Collins lied and said that she was not home. Mr. Holbrook remained outside of the house for about 45 minutes calling DeKota’s name… That night, Alisha Collins fell asleep on the living room sofa. Sometime after midnight, she awoke to the smell of smoke. She awoke her husband, who went out the back door and discovered a pillow burning on the back porch. All of the occupants safely evacuated the house.

[Also from lower court opinion:] Kevin Ward, a firefighter with the Salisbury Fire Department, testified that the flames from the burning pillow were about 6 to 12 inches high when he arrived, and that there were char marks on the threshold to the rear door and smoke in the basement. Alisha Collins testified that she saw Mr. Holbrook across the street 10 to 15 minutes after the fire was discovered. She told the police that Mr. Holbrook started the fire. Mr. Holbrook was questioned by the police and by the fire marshal. He was subsequently arrested and charged with arson, reckless endangerment, and threats of arson.

On 29 April 1999, Petitioner was tried in a bench trial in the Circuit Court for Wicomico County. The court found Petitioner guilty of one count of first degree arson, eight counts of reckless endangerment [one count for each of the eight persons present in the house at the time of the fire], and one count of making a threat of arson. [The threat charge is not before this Court.] At the 28 June 1999 sentencing proceeding, defense counsel requested that the trial judge merge the reckless endangerment convictions into the first degree arson conviction; the court declined. Petitioner received a 30 year sentence for the arson conviction, with all but 22 ½ years suspended. For the first reckless endangerment conviction, Petitioner was sentenced to five years, to run consecutive to the arson sentence. For each of the remaining seven convictions of reckless endangerment, Petitioner received five years, to run consecutive to the arson sentence, but concurrent to the first reckless endangerment sentence, as well as to each other.

… Petitioner contends that the Court of Special Appeals erred in holding that a conviction and consecutive sentence for reckless endangerment did not merge into the conviction and sentence for first degree arson, when the reckless endangerment was the creation of risk of harm to persons inside a dwelling where Petitioner set a fire on a porch, and the first degree arson was the setting of the fire at the dwelling.

II.

Petitioner argues that, under either the required evidence test [for violations of the Double Jeopardy Clause] or the rule of lenity, or for reasons of “fundamental fairness,” the reckless endangerment convictions and sentences should have merged into the arson conviction and sentence. Concluding that arson and reckless endangerment are separate and distinct crimes, we disagree with Petitioner’s assertion. For reasons we shall explain, we hold that, under the circumstances of this case, the Court of Special Appeals did not err when it affirmed the Circuit Court’s refusal to merge reckless endangerment with arson.

III.

We reiterate that “the cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature.” When striving to determine the legislative intent of any statute, we first examine the plain language of the statute.

Ordinarily, we afford the words of the statute their natural and usual meaning in the context of the Legislature’s purpose and objective in enacting the statute. Moreover, we should avoid “resorting to subtle or forced interpretations for the purpose of extending or limiting [the statute’s] operation.”

A. Common Law and Legislative History

1. Reckless Endangerment

Reckless endangerment is purely a statutory crime. Modeled after § 211.2 of the Model Penal Code and first enacted in Maryland [in] 1989, reckless endangerment was codified originally … under the subtitle destroying, Injuring, etc., Property Maliciously. Effective 1 October 1996, the Legislature repealed [the first reckless endangerment statute] … enacting in its stead Md. Code Art. 27, § 12A–2 under the subtitle of assault. This statute presently provides, in pertinent part:

(a) *Creation of substantial risk of death or serious physical injury; penalties.*

—(1) Any person who recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person is guilty of the misdemeanor of reckless endangerment and on conviction is subject to a fine of not more than $5,000 or imprisonment for not more than 5 years or both.

* * * *

(c) *More than one person endangered.*—If more than one person is endangered by the conduct of the defendant, a separate charge may be brought for each person endangered.

… In two recent cases, we have discussed the legislative underpinnings of the reckless endangerment statute, as well as the elements of the crime. In *State v. Pagotto* (2000), we noted that

[t]his statute is aimed at deterring the commission of potentially harmful conduct before an injury or death occurs. The statute was enacted "to punish, as criminal, reckless conduct which created a substantial risk of death or serious physical injury to another person. It is the reckless conduct and not the harm caused by the conduct, if any, which the statute was intended to criminalize." Thus, the focus is on the conduct of the accused.

… In *Jones v. State* (2000), we concluded that

[t]he elements of a prima facie case of reckless endangerment are: 1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; 2) that a reasonable person would not have engaged in that conduct; and 3) that the defendant acted recklessly.

Noting that most Maryland cases addressing these elements discuss the requisite mental state to sustain a reckless endangerment conviction, both *Pagotto* and *Jones* cite to *Minor v. State* (1992), where the Court adopted and applied an objective *mens rea:*

[G]uilt under the statute does not depend upon whether the accused intended that his reckless conduct create a substantial risk of death or serious injury to another. The test is whether the appellant's misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the statute was designed to punish.

2. Arson

At common law, arson was defined as the malicious burning of the dwelling of another. Moreover, "at common law, arson [was] an offense against the security of habitation or occupancy, rather than against ownership or property."

To be convicted of common law arson, the State had to establish four elements: (1) that the building burned was a dwelling house or outbuilding within the curtilage; (2) that the building burned was occupied by another; (3) that the building was actually burned, as mere scorching would not suffice; and, (4) that the accused's *mens rea* was willful and malicious.

…The present day arson statute, under which Petitioner was convicted, defines arson as "willfully and maliciously set[ting] fire to or burn[ing] a dwelling or occupied structure, whether the property of the person or another." Md.Code Art. 27, § 6(a). "Dwelling," the term applicable in this case, is defined as "a structure, regardless of whether an individual is actually present, any portion of which has been adapted for overnight accommodation of individuals." Md.Code Art. 27, § 5(b). Additionally, "maliciously" is defined as " an act done with intent to harm a person or property," Md.Code Art. 27, § 5(c), while "willfully" is defined as "an act which is done intentionally, knowingly, and purposefully." Md.Code. Art. 27, § 5(f).

IV.

A. Required Evidence Test

Under the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, the State can neither hold multiple trials nor punish a defendant multiple times for the same offense. Where a legislature, however, specifically authorizes cumulative punishment under two statutes irrespective of whether they prohibit the same conduct, such punishment may be imposed under the

statutes in a single trial. *Jones* ("[T]he Double Jeopardy Clause does no more than prevent the sentencing court from proscribing greater punishment than the legislature intended.")).

In the present case, Petitioner received multiple punishments for the same conduct under two statutes in a single trial. As the Court of Special Appeals noted correctly, under Maryland common law, the required evidence test is the appropriate "test for determining whether the different statutory or common law offenses, growing out of the same transaction, are to merge and be treated as the same offense for double jeopardy purposes." [In a footnote, the court observed that "the required evidence test is commonly referred to as the *Blockburger* test, see *Blockburger v. United States* (1932)," and is also sometimes called "the same evidence test," the "elements" test, or the "same elements" test.] The required evidence test

is that which is minimally necessary to secure a conviction for each … offense. If each offense requires proof of a fact that the other does not, or in other words, if each offense contains an element which the other does not, the offenses are not the same for double jeopardy [and merger] purposes, even though arising from the same conduct or episode. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offenses are deemed to be the same for double jeopardy [and merger] purposes.

As a matter of course, merger occurs when two offenses are based on the same act or acts and are deemed to be the same under the required evidence test; however, "the Legislature may punish certain conduct more severely if particular aggravating circumstances are present … by imposing punishment under two statutory offenses."

In Petitioner's view, "every first degree arson necessarily involve[s] a reckless endangerment," but not vice versa. This assertion, however, is anomalous in light of the language of the statutes. Instead, we agree with the State's and the Court of Special Appeal's positions that arson and reckless endangerment do not merge under the required evidence test because each offense has an element not present in the other.

As discussed *supra*, the offense of arson requires a defendant to act "willfully and maliciously," while the reckless endangerment offense requires proof that the defendant acted "so reckless[ly] as to constitute a gross departure from the standard of conduct that a law-abiding person would observe." Petitioner argues that these *mens reae* are one and the same… While this reasoning may have been true [under prior versions of our statutes, it is not true today]. Section 5 of Art. 27, which provides the definitions for the terms used within the arson statute, defines "maliciously" as "an act done with intent to harm a person or property," and "willfully" as "an act which is done intentionally, knowingly, and purposefully." Examining the plain language used to define "maliciously" and "wilfully," we conclude that the Legislature intended for arson to be a specific intent crime.

Conversely, the Legislature clearly intended for reckless endangerment to be a general intent crime, one whose *mens rea* requirement is the conscious disregard of the risks and indifference to the consequences to *other persons.*…

We distinguish further the elements of these offenses, for, in contrast with reckless endangerment, arson clearly is defined as a crime against *habitation.* To reiterate, Art. 27, § 6 provides that "[a] person may not wilfully and maliciously set fire to or burn a dwelling or occupied structure, whether the property of the person or another." In the present case, the record reflects that, the day before the incident, Petitioner threatened to "burn this mother fucker up" and to "burn this mother fucker house down." Applying the statute to this evidence, the Circuit Court convicted Petitioner of wilfully and maliciously setting fire to or burning the Collinses' dwelling. Because dwelling "means a structure, *regardless or whether an individual is actually present,* any portion of which has been adapted for overnight accommodation of individuals" (emphasis added), we conclude that, in keeping with its common law roots, first degree arson is a crime against habitation, not persons or property. In contrast, reckless endangerment, in keeping with its statutory construction, is a crime against persons, not habitation or property. This is indicative, though not dispositive, of a legislative intent that the crimes may be punished separately. This bears on our later analysis of the rule of lenity with greater weight.

…We reject Petitioner's argument that, under the required evidence test, the same evidence necessary to convict on the arson offense would always be sufficient to establish the reckless endangerment offense. Accordingly, Petitioner was not convicted twice for the same offense in violation of the Double Jeopardy Clause of the United States Constitution.

B. The Rule of Lenity

When, as in the present case, two offenses do not merge under the required evidence test, we nonetheless may consider, as a principle of statutory construction, the rule of lenity, which "provides that doubt or ambiguity as to whether the legislature intended

that there be multiple punishments for the same act or transaction will be resolved against turning a single transaction into multiple offenses."

… We believe that the Legislature moved the offense of reckless endangerment to its current subtitle in an effort to avoid the very guesswork that Petitioner encourages us to engage in today: whether reckless endangerment could be a crime against property or habitation as well as against persons. We note that, like attempt to commit a crime, reckless endangerment is an inchoate crime, for it "is intended to deal with the situation in which a victim is put at substantial risk of death or serious bodily harm but may, through a stroke of good fortune, be spared the consummated harm itself." In this case, Petitioner was convicted of recklessly endangering the Collins family by setting fire to a pillow on their porch even though, through a stroke of good fortune, he caused no injury to them. But what if Petitioner had intended to harm the Collinses, and he in fact did cause such harm? What if his crime was no longer inchoate, but complete? It is our view that, even if Petitioner's intent was not general, but specific as to harming the Collins family, and even if the act of burning the pillow had caused an injury to one or more of the Collinses, the completion of the *mens rea* and the *actus reus* would not have ripened into the offense of arson, but rather into the offense of battery, or worse. It, however, would not have ripened under the rule of lenity into the offense of arson.

We believe that there is clear legislative intent that persons convicted of arson also may be convicted of reckless endangerment. It is not logical to assume that the Legislature intended that reckless endangerment would merge for purposes of sentencing with arson. Rather, the General Assembly intended arson and reckless endangerment to be separate offenses subject to multiple punishments. Because there is no doubt or ambiguity as to whether the Legislature intended that there be multiple punishments for Petitioner's act, the punishments are permitted and the statutory offenses do not merge for sentencing purposes.

Notes and questions on *Holbrook v. State*

1. Holbrook involves a multiple-charges situation somewhat similar to *State v. Begaye*, discussed earlier in this chapter. Recall that in *Begaye*, the defendant was charged with two separate offenses, burglary and breaking and entering, for the same conduct. The *Begaye* court rejected the defendant's argument that these separate convictions violated his right to be free from double jeopardy. Here in *Holbrook*, the defendant argued that he could not be convicted of both arson and reckless endangerment for the same conduct. Does the Maryland court in *Holbrook* use the same test to assess the double jeopardy claim that the New Mexico court used in *Begaye*?
2. Double jeopardy claims are just one of many contexts in which it is important to be able to identify the separate elements of an offense, including any mens rea requirement. If you were to list the separate elements of the Maryland reckless endangerment offense, what elements would you include? What is the mens rea requirement of that statute?
3. The *Holbrook* court says that arson is an offense against habitation, rather than an offense against property. What might be the difference?
4. Some common law courts held that it was impossible to commit arson against one's own property. As with burglary, this principle has changed with modern criminal statutes. Many states now explicitly define arson to include intentional destruction by fire of one's own property. And some states have a specific offense of burning one's own property in order to collect insurance proceeds.
5. Is arson a "violent" crime? Again, we will discuss the classification of crimes as violent, and consider "force" as an element of criminal offenses, in more detail in the next chapter. But it is worth noting now that one approach to "violent crime" defines the category to include offenses that involve "the use of force against the person or property of another. Under that definition, arson against someone else's property could be a violent crime, but arson against one's own property would not be violent. See, e.g., *United States v. Wilder*, 834 F. App'x 782, 784 (4th Cir. 2020).
6. The Maryland arson statute is fairly typical in requiring "willful and malicious" intent; many other arson statutes use similar mens rea language. The terms "malice" and "malicious" appear frequently in criminal statutes, but there is no single uniform definition of these terms. (Nor do courts always agree what "willful" means.) Chapter Six provides greater detail of the term "malice" in the specific context of homicide law. As the *Holbrook* court notes, the Maryland arson statute defines "maliciously" to mean "with intent to harm a person or property." Given this definition, the court categorizes arson as a "specific intent crime" and thus distinguishes it from reckless endangerment (a "general intent crime"), allowing the defendant to be convicted of both offenses.
7. In California, arson is similarly defined with a mens rea of "willfully and maliciously." "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any

structure, forest land, or property." Cal. Penal Code § 451. But the California Supreme Court has interpreted this language to create a "general intent" crime that requires only that the defendant intend to engage in the conduct that starts the fire. Under California law, it is not necessary to show the defendant intended to cause any harm, or even intended to start a fire, in order to convict a defendant of arson. The California court reached this conclusion in *In re. V.V.*, 252 P.3d 979 (2011), which involved two minors who had lit a firecracker on a hill in Pasadena. The firecracker exploded and caused a brush fire. The Supreme Court found sufficient evidence of "willful and malicious" intent, emphasizing that the minors had deliberately set off the firecracker, and that a reasonable person would realize that the firecracker could start a fire. It did not matter, the court said, if these defendants did not intend to set a fire, or if these defendants were not actually aware of the risk that the firecracker would start a fire.

V.V. and J.H. were not required to know or be subjectively aware that the fire would be the probable consequence of their acts. … A defendant may be guilty of arson if he or she acts with awareness of facts that would lead a reasonable person to realize that the direct, natural, and highly probable consequence of igniting and throwing a firecracker into dry brush would be the burning of the hillside….

Although V.V. and J.H. did not intend to set the hillside on fire, they knew that their intentional acts created a fire hazard. J.H. told the police he attempted to throw the firecracker onto a concrete area on the hillside, while V.V. said they wanted to throw the firecracker onto a green area on the hillside.

In re V.V., 252 P.3d at 985.

End of Chapter Review

Check Your Understanding (5-3)

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Cumulative Review

Check Your Understanding (5-4)

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The original version of this chapter contained H5P content. You may want to remove or replace this element.

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1. [Fn. 3 of original opinion]. As to the definition of "possession" the judge instructed the jury as follows:
   - The word "possession" includes actual as well as constructive possession, and also sole as well as joint possession.
   - A person who has direct physical control of something on or around his person is in actual possession of it.
   - A person who is not in actual possession, but who has knowledge of the presence of something and has the authority or right to maintain control of it either alone or together with someone else, is in constructive possession of it.
   - If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint.

   I Iowa Criminal Jury Instructions no. 200.47. As we address below, these instructions are more helpful in controlled substance cases. Jury instructions on the definition of "possession" and "control" under § 714.1 should be based upon the concepts articulated in the Model Penal Code. ↵

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7.8: Crimes Against the Person

Introduction

In this chapter, we consider offenses that involve the threatened or actual use of force against another person, or the infliction of some kind of bodily injury. This category of offenses is often labeled “Crimes against the person,” a term that emerged at common law but is now replicated in many contemporary penal codes. Crimes against the person are crimes against individual victims, but that is not the only factor that makes them “against the person.” In the typical usage, “against the person” means “against the body”: crimes against the person are crimes that involve injuries or threats to the physical body of a victim. Some courts and commentators equate the category “crimes against the person” with the phrase “violent crime,” and in this chapter we will also explore the classification of certain offenses as “violent.” We will focus on assault, sexual assault, and homicide in this chapter, but many other offenses – including robbery and arson, both discussed in Chapter Five – have been classified as violent on at least some occasions. As you read, look for both patterns of commonality and points of divergence in the ways that different places, at different times, have classified conduct as violent, or violence as criminal.

The offenses discussed in this chapter are important for several reasons. To many law students and lawyers, and indeed to many non-specialists, crimes such as homicide or sexual assault represent the “core” of criminal law, the type of conduct that most warrants criminalization. In an era in which American criminal law is subject to extensive criticism and many commentators have argued for abolition of much of the criminal legal system, crimes against the person may pose a particular challenge. Even if some types of harmful or unpleasant conduct are best addressed through non-criminal legal measures, the anti-abolitionist might argue, murder and rape are acts whose very labels invoke criminal law. As you consider how society should best respond to acts of violence that are presently punished as homicides or assaults, you should be attentive to variations in the legal definitions of those terms and discretion in their application.

By the end of this chapter, you should understand the typical components of assault, sexual assault, and homicide, and you should be familiar with interpretive questions that arise frequently in relation to these offenses. The offenses in this chapter will allow you to develop further your understanding of mens rea, or mental states, since the specific mental state that accompanies the infliction of an injury often makes the difference between one type of assault or another, or one type of homicide versus another. And as in every chapter, you should use the materials here to expand and deepen your understanding of criminal law in practice, with specific focus on the interaction of criminalization, enforcement, and adjudication decisions.

This chapter also introduces a few important topics that have not yet been addressed in depth, but that are relevant even beyond the category of crimes against the person: omission liability, causation, and affirmative defenses. Omission liability, or the imposition of criminal liability for failing to act rather than for acting in a prohibited way, was addressed briefly in Chapter Two, but here we’ll consider it in more detail. Principles of causation are relevant to many criminal offenses, but they arise especially often in the types of crimes addressed in this chapter. And finally, affirmative defenses are a special type of defense argument that we will consider in this chapter (and again later, in Chapter Ten).

We begin our study of crimes against the person with assault. Then we move on to homicide, and finally, at the end of the chapter, we consider rape or sexual assault. As is probably already clear, the factual backgrounds of the cases in this chapter are often disturbing. Please be prepared to encounter sensitive and potentially unsettling material.

Assault

Minnesota Stat. § 609.02

Subd. 10. Assault. “Assault” is:
(1) an act done with intent to cause fear in another of immediate bodily harm or death; or

(2) the intentional infliction of or attempt to inflict bodily harm upon another.

§ 609.221. Assault in the first degree

Subd. 1. Great bodily harm. Whoever assaults another and inflicts great bodily harm may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $30,000, or both.

STATE of Minnesota

v.

Alie Christine Theodore DORN

Supreme Court of Minnesota
887 N.W.2d 826

December 7, 2016

MCKEIG, Justice.

Appellant Alie Dorn [was convicted a]fter a bench trial … of first-degree assault under Minn. Stat. 609.221, subd. 1 (2014) (great bodily harm)…. Dorn maintains that the evidence was insufficient to convict her of first-degree assault because (1) she did not intentionally harm [the victim], and (2) her actions did not "inflict" bodily injury, which Dorn contends requires direct causation. We affirm.

I.

On July 20, 2013, appellant Alie Dorn, then 22 years old, attended a large outdoor party near Thief River Falls in Marshall County. D.E., then 19 years old, also attended. Most people at the party, including Dorn and D.E., were drinking alcohol. Dorn and D.E. did not know each other, but at approximately 1:00 a.m., they were standing about 5 feet away from each other next to a large bonfire. The bonfire was made of wooden pallets… and by 1:00 a.m. it had burned down to embers.

Within earshot of Dorn, D.E. told his friend that Dorn looked like a drug dealer. Dorn overheard and replied, "What?" D.E. repeated that Dorn looked like a drug dealer. Dorn reacted by pushing D.E. in the chest using two hands. D.E. lost his balance and took a step or two backwards toward the fire. Dorn asserts that D.E. then "came at" her, failing to heed the "fair warning" of her first push, at which point she "shoved" D.E. in the chest a second time, again using two hands. D.E. contests Dorn's allegation that he came at her, asserting that he never regained his balance before Dorn shoved him a second time. Both agree that D.E. then fell and landed on his right side in the burning embers, sustaining significant burn injuries.

… Dorn told police that she "shoved" D.E. to get him out of her personal space because he was "in [her] face," "saying a bunch of stuff," "calling [her] a drug dealer," and "standing close" to her. She said she did not intend to push D.E. into the fire. [D.E. did not touch or attempt to touch Dorn, and Dorn has not appealed the district court's finding that she did not act in self-defense.]

Following a bench trial, the district court convicted Dorn of first-degree assault… The court of appeals affirmed…. We granted Dorn's petition for review.

II.

[First-degree assault-harm requires "great bodily harm," which includes "bodily injury … which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ." Dorn does not dispute that D.E.'s injuries constituted great bodily harm.] … [But] Dorn argues that the evidence was insufficient to satisfy the definition of assault-harm … because she did not intentionally harm D.E., and her actions did not directly cause D.E.'s injuries. Dorn's sufficiency challenge requires us to address the mens rea, actus reus, and causation required for assault-harm….

The application of the law to Dorn's conduct requires an evaluation of the sufficiency of the evidence. We will not disturb the verdict if the factfinder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could have reasonably concluded that the defendant was guilty…. We "view the evidence in the light most favorable to the verdict and assume that the factfinder disbelieved any testimony conflicting with that verdict." This standard applies to both bench trials and jury trials.

A.

We first consider whether Dorn possessed the mens rea required for assault-harm. "Mens rea is the element of a crime that requires 'the defendant know the facts that make [her] conduct illegal.'" Without this mens rea element, a statute imposes strict criminal liability. Strict-liability statutes are "generally disfavored," and therefore, "legislative intent to impose strict criminal liability must be clear."

In *State v. Fleck* (Minn. 2012), we concluded that assault-harm requires only general intent. General intent is satisfied when a defendant "intentionally engag[ed] in the prohibited conduct." In other words, "a general-intent crime only requires proof that 'the defendant intended to do the physical act forbidden, without proof that [she] meant to or knew that [she] would violate the law or cause a particular result.' " Further, the defendant must do the act of her own volition or free will.

For assault-harm, "[t]he forbidden conduct is a physical act, which results in bodily harm upon another." Specifically, assault-harm requires "only an intent to do the prohibited physical act of committing a battery. The State must therefore prove that "the blows to complainant were not accidental but were intentionally inflicted."

…[I]n proving the mens rea element of general-intent crimes, the State need not show that the defendant "meant to or knew that [she] would violate the law or cause a particular result." [To commit assault-harm,] a defendant need only intend "to do the prohibited physical *act* of committing a battery." Nothing in [our precedents] suggests that the defendant must intend *to commit* a battery; rather, the defendant need only intend to commit an act that *constitutes* a battery.

This standard does not impose strict liability because it requires the defendant to "know the facts that make [her] conduct illegal." Specifically, for assault-harm, a defendant must intend the act that makes her conduct a battery; in other words, she must intentionally apply force to another person without his consent. *See* II.B., *infra*. If, instead, we required the intent *to commit* a battery, a defendant would not only need to know the *facts* that make her conduct illegal, but would also need to know that her conduct breaks the law. It is well settled, however, that a mistake of law is generally not a defense to a general-intent crime….

The evidence is sufficient to establish that Dorn possessed the mens rea required for assault-harm. Indeed, Dorn admits that she "shoved" D.E. to get him out of her personal space. She does not contend that she pushed D.E. accidentally or involuntarily. Dorn may not have understood that her conduct constituted an unlawful battery, or that it would result in bodily harm. Dorn did, however, intentionally apply force to another person, which satisfied the mens rea element of assault-harm.

B.

Next, we consider whether Dorn's conduct constituted a battery, and therefore satisfied the actus reus required for assault-harm. The court of appeals determined that Dorn's conduct constituted a battery because she applied physical force to D.E. In Minnesota, the separate crime of battery has been incorporated into the definition of assault. At common law, criminal battery was "the intentional application of unlawful force against the person of another." "Force" was "satisfied by even the slightest offensive touching."

… Dorn correctly points out that the language of the assault-harm definition does not include the word "battery." Rather, the language requires the "infliction" of bodily harm. "Inflict" means "to lay (a blow) on" or "cause (something damaging or painful) to be endured." The definitions of "battery" and "inflict" are therefore similar, requiring the State to show that the defendant engaged in nonconsensual physical contact.

The evidence is sufficient to show that Dorn's conduct constituted a battery or "infliction" of harm. Dorn pushed D.E. twice in the chest with two hands, hard enough to cause him to lose his balance. Dorn admitted that her actions were not consensual or friendly. Rather, Dorn "shoved" D.E. to get him out of her personal space because he was "in [her] face," "saying a bunch of stuff," "calling [her] a drug dealer," and "standing close" to her. She characterized her first push as "fair warning." At that point, Dorn had committed a battery because she intentionally applied nonconsensual force against D.E. She committed a second battery when she shoved D.E. again. Both of these actions also "inflicted" harm because she imposed something unpleasant, "a blow." As such, Dorn's conduct satisfied the actus reus element of assault-harm.

C.

Finally, we consider whether Dorn's conduct was the legal cause of D.E.'s injuries. The Legislature used the word "cause" in the assault-fear provision, but chose the word "infliction" for the assault-harm provision. Dorn argues that "inflict" is a stricter standard than "cause" and requires direct, not just proximate or "substantial factor," causation. *SeeState v. Gatson* (Minn. 2011) (explaining that under a homicide statute in which the word "cause" is used, the State need only prove that the defendant's acts were a " 'substantial causal factor' leading to the death"); *see alsoState v. Olson* (Minn. 1989) (explaining that a defendant may rebut substantial causation by establishing that "intervening conduct [was] the sole cause of the end result").

Dorn contends that she did not inflict bodily harm because her pushes did not harm D.E. directly; rather, D.E. was injured only because he tripped over debris and stumbled into the fire. The district court did not make a finding as to whether D.E. tripped over

debris, concluding that this determination was not essential because "[D.E.]'s movements were initiated by [Dorn]'s actions." The court of appeals held that the same "substantial causal factor" standard that applies to "cause" also applies to "infliction," and that Dorn failed to identify a genuine superseding cause under this standard.

…Assuming without deciding that an "infliction" requires direct causation as Dorn argues, the evidence is sufficient to show that Dorn directly caused D.E.'s bodily harm. Even if D.E. stumbled on debris as he fell, Dorn pushed D.E. hard enough to cause him to lose his balance within a few feet of hot embers, and D.E. fell into the fire within moments of Dorn's push. The causation standard for assault-harm is therefore satisfied, even under Dorn's narrower proposed interpretation.

Thus, the evidence is sufficient to sustain Dorn's conviction for first-degree assault….

Affirmed.

Notes and questions on *State v. Dorn*

1. At common law, the crime of battery was an intentional and offensive (unwanted) use of physical force against another person; the crime required actual physical contact. Assault was usually defined as an attempted battery – an effort to use offensive force against someone else, but not necessarily a successful effort. Assault did not require actual touching. As states codified their criminal laws, many eliminated this distinction between assault and battery and instead adopted a broadly defined assault offense like the one you see in *Dorn*, which encompasses both threats to use force and actual applications of force. The threat prong of assault is often defined, again like the Minnesota statute, as acting with intent to put another person in fear of death or immediate bodily harm.
2. The statutory approach described above means that "assault" now covers a huge range of conduct, from an angry look and a raised fist all the way to a brutal or even deadly physical attack. When we think in terms of threatening conduct rather than actual physical contact, many if not most of us have been victims of assault at one point or another. Thinking again of threatening conduct, perhaps many of us have also committed the offense. Jurisdictions frequently subdivide assault into narrower categories, perhaps using degrees (first-degree assault, second-degree assault, etc.) or distinguishing between "simple assault" and "aggravated assault." For example, Georgia defines simple assault as the attempt to inflict a violent injury or the placing of another person in fear of injury. Aggravated assault occurs when an otherwise simple assault is accompanied by an intent to murder, rape, or rob, or when the defendant uses a deadly weapon, or when the defendant discharges a firearm from a motor vehicle. Note that in Georgia, neither simple nor aggravated assault requires actual physical contact with a victim or actual injury. See Ga. Code Ann. §§ 16-5-20; 16-5-21. The federal Bureau of Justice Statistics (BJS) collects data on crime and criminal prosecutions nationwide, and it uses generic definitions of crimes to create some consistency notwithstanding variations in state statutes. BJS defines "simple assault" as "an unlawful physical attack or threat of attack," and "aggravated assault" as "an attack or attempted attack with a weapon, regardless of whether injury occurred, and an attack without a weapon when a serious injury results." See https://bjs.ojp.gov/topics/violent-crime. Notice that BJS classifies both aggravated and simple assaults as "violent crime." Some courts have taken a narrower approach and held that a simple assault, such as a threat of harm that does not involve a weapon or an actual injury, is not a violent crime.
3. Among the offenses that are labeled as violent, assault tends to be the most frequently charged. It is not a direct source of a large portion of prison sentences, since assault convictions are frequently punished with non-custodial sentences or sentences in jail rather than prison. ("Jail" facilities are usually designed for short-term confinement for persons awaiting trial or sentenced to a year or less of custody; prisons are designed for longer term confinement for persons with sentences of more than one year in custody.). But assault convictions are a significant source of America's "violent crime" rates, and assault convictions contribute indirectly to mass incarceration in the following way: Many jurisdictions impose much longer prison sentences on defendants with prior convictions for violent crime. Thus, a person convicted of assault who is later charged with another offense is more likely to serve a lengthy prison sentence.
4. For serious forms of assault that require an actual injury, the issue of causation becomes important. This issue is also important in many homicide cases, since a homicide conviction requires proof that the defendant caused the victim's death. We'll explore causation principles in more detail in the homicide section of this chapter, but use *State v. Dorn* to begin identifying the terminology and basic ideas. How did Alie Dorn support her claim that she was not the cause of the victim's burn injuries? Why did the court reject her argument?

5. The *Dorn* court characterizes assault-harm as a "general intent" crime, which should bring to mind the discussion of "general intent" and "specific intent" offenses in Chapter Five. What is the mens rea of assault-harm, according to the court? How does the court's description of the required mental state differ from the mental state requirement that the defense would adopt?

Colorado Rev. Stat. § 18-3-203

(1) A person commits the crime of assault in the second degree if:

… (b) With intent to cause bodily injury to another person, he or she causes such injury to any person by means of a deadly weapon; or

(c) With intent to prevent one whom he or she knows, or should know, to be a peace officer, firefighter, emergency medical care provider, or emergency medical service provider from performing a lawful duty, he or she intentionally causes bodily injury to any person; or

(c.5) With intent to prevent one whom he or she knows, or should know, to be a peace officer, firefighter, or emergency medical service provider from performing a lawful duty, he or she intentionally causes serious bodily injury to any person; or

(d) He recklessly causes serious bodily injury to another person by means of a deadly weapon; or…

(i) With the intent to cause bodily injury, he or she applies sufficient pressure to impede or restrict the breathing or circulation of the blood of another person by applying such pressure to the neck or by blocking the nose or mouth of the other person and thereby causes bodily injury.

The PEOPLE of the state of Colorado, Petitioner

v.

Dearies Deshonne Austin LEE, Respondent

Supreme Court of Colorado
476 P.3d 351

November 23, 2020

JUSTICE GABRIEL delivered the Opinion of the Court.

This case requires us to determine whether, under prevailing Colorado equal protection principles, a defendant may be charged with second degree assault based on conduct involving strangulation under both the deadly weapon subsection of the second degree assault statute, and the strangulation subsection of that same statute.…

I. Facts and Procedural History

[Dearies Deshonne Austin] Lee had been together with the alleged victim, T.M., for about two years, and the two had a child but were separated at the time of the incident in question. According to T.M., Lee came to her apartment to pick up their child and demanded that T.M. gather the child's belongings. Lee allegedly became frustrated that T.M. was not moving fast enough, and he became violent, ultimately grabbing T.M. by the neck and pushing her onto her bed. According to T.M., Lee continued to apply pressure to her neck until she lost consciousness.

T.M. subsequently regained consciousness and went into the living room to get her daughter. There, Lee allegedly confronted her again and, according to T.M., pushed her onto the couch and again began to strangle her, causing her to lose consciousness a second time.

Based on these allegations, the People charged Lee with, among other things, two counts of second degree assault under the strangulation subsection of the applicable statute, 18-3-203(1)(i). Eight months later, however, the People moved to add two additional counts of second degree assault under the deadly weapon subsection, 18-3-203(1)(b), asserting that Lee had used his hands as a deadly weapon. The trial court granted this motion.

Thereafter, Lee moved to dismiss the added counts, arguing, among other things, that those counts, as charged, violated his right to equal protection under the Colorado Constitution. The trial court held a hearing on Lee's motion and ultimately granted that

motion, dismissing the added counts on equal protection grounds. [The court of appeals affirmed.] … The People then petitioned this court for certiorari review, and we granted their petition…

II.B. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." "Although the Colorado Constitution contains no equal protection clause, we have construed the due process clause of the Colorado Constitution to imply a similar guarantee." Dean v. People, 366 P.3d 593 (2016). "Equal protection of the laws assures the like treatment of all persons who are similarly situated."

In the criminal law context, the United States Supreme Court has concluded that "where a defendant's conduct violates more than one criminal statute, the government's choice to prosecute under the statute with the harsher penalty does not violate federal equal protection, absent evidence of selective enforcement based on a prohibited standard such as race, religion, or other arbitrary classification." This court, however, has yet to adopt the federal equal protection standard, the People did not ask us to do so in this case, and thus whether we should adopt the federal standard is not now before us. To the contrary, the parties appear to agree on the applicable principles of Colorado law, and we therefore turn to those principles.

We have long held, in contrast with the above-noted federal precedent, that "Colorado's guarantee of equal protection is violated where two criminal statutes proscribe identical conduct, yet one punishes that conduct more harshly." [See *United States v. Batchelder* (1979).] Along the same lines, we have said that "separate statutes proscribing with different penalties what ostensibly might be different acts, but offering no intelligent standard for distinguishing the proscribed conduct, run afoul of equal protection under state constitutional doctrine." Accordingly, we have opined that to overcome an equal protection challenge, "a person of average intelligence" must be able to distinguish the conduct proscribed by one offense from the conduct proscribed by another. Moreover, the distinction between the two offenses must be "sufficiently pragmatic" to "permit an intelligent and uniform application of the law." …

C. Application

Turning, then, to the facts of this case, we start by examining the statutory language of the two provisions at issue.

[The court quoted the statutory definition of second degree assault-strangulation, reprinted above.] Second degree assault-strangulation is a class four felony and an extraordinary risk crime, subject to a potential prison sentence of two to eight years.

A person commits the crime of second degree assault-bodily injury with a deadly weapon if, "[w]ith intent to cause bodily injury to another person, he or she causes such injury to any person by means of a deadly weapon." § 18-3-203(1)(b). A deadly weapon, in turn, is defined as "(I) A firearm, whether loaded or unloaded; or (II) A knife, bludgeon, or any other weapon, device, instrument, material, or substance, whether animate or inanimate, that, in the manner it is used or intended to be used, is capable of producing death or serious bodily injury." § 18-1-901(3)(e). In accordance with this definition, we have opined that hands may be deadly weapons if in the manner they are used, they are capable of producing death or serious bodily injury…. Second degree assault-bodily injury with a deadly weapon, like second degree assault-strangulation, is a class four felony, but because it is also a per se crime of violence, it subjects a defendant to a potential prison sentence of five to sixteen years.

…[Lee] contends that applying [the assault with deadly weapon] provision to an act of strangulation violates prevailing Colorado equal protection principles. To decide this issue, we must determine whether subsections 18-3-203(1)(b) and (1)(i) proscribe identical conduct with one of these subsections punishing that conduct more harshly than the other. The parties do not appear to dispute that the penalties under these subsections differ. Accordingly, we must decide whether these provisions proscribe identical conduct or, as pertinent here, whether they proscribe what ostensibly might be different acts but offer no intelligent standard for allowing a person of average intelligence to distinguish the conduct proscribed by one provision from that proscribed by the other.

As noted above, subsection 18-3-203(1)(b) and subsection 18-3-203(1)(i) both require proof that the perpetrator intended to cause bodily injury and, in fact, caused such injury. The distinction between the two lies in the means used to cause that injury. Subsection 18-3-203(1)(b) requires the use of a deadly weapon. Subsection 18-3-203(1)(i), in contrast, requires proof of bodily injury due to strangulation. Accordingly, on their face, these provisions ostensibly proscribe different acts. The question thus becomes whether they offer any intelligent standard for distinguishing between such acts.

…[To] decide whether second degree assault-strangulation and second degree assault-bodily injury with a deadly weapon proscribe identical conduct, we must consider whether strangulation, as it is defined in the second degree assault statute, will always involve

the use of a deadly weapon….

Our case law "contemplates a two-step inquiry in determining whether an instrument is a deadly weapon. First, the object must be used or intended to be used as a weapon. Second, the object must be capable of causing serious bodily injury." A " 'weapon' is defined as 'an instrument of offensive or defensive combat: something to fight with: something (as a club, sword, gun, or grenade) used in destroying, defeating, or physically injuring an enemy.' "

In the case of strangulation, we have little difficulty concluding that the perpetrator is using an instrument—whether hands or an object of some kind—as a weapon because in such a case, the perpetrator is using the instrument to injure the victim. In addition, when a person is applying sufficient pressure to impede or restrict another's breathing or blood circulation, as required for second degree assault-strangulation, the person is obviously using the instrument of strangulation in a manner capable of causing serious bodily injury, whether or not serious bodily injury actually results: "When a victim is strangled, she is at the edge of a homicide. Unconsciousness may occur within seconds and death within minutes …. In 'strangulation,' external compression of the neck can impede oxygen transport by preventing blood flow to or from the brain or direct airway compression."

Because, in a strangulation, the instrument being used to strangle the victim (whether hands or otherwise) is always being used as a weapon and will always be at least capable of causing serious bodily injury or death, we conclude that strangulation will always involve the use of a deadly weapon. As a result, with regard to acts of strangulation, we further conclude that subsections 18-3-203(1)(b) and (1)(i) proscribe identical conduct. And because these provisions proscribe identical conduct but the deadly weapon subsection punishes that conduct more harshly than the strangulation subsection, we conclude that under prevailing Colorado equal protection principles, a defendant may not be charged with second degree assault based on conduct involving strangulation under both subsections. Rather, the defendant must be charged under the strangulation provision.

In so concluding, we are not persuaded by the People's various hypotheticals purporting to show distinctions between second degree assault-strangulation and second degree assault-bodily injury with a deadly weapon. In one of the People's hypotheticals, an assailant lightly places his or her hands over the mouth or nose of a victim, "applying sufficient pressure to impede or restrict breathing for a matter of moments." In the People's view, such a scenario would satisfy the elements of second degree assault-strangulation but not those of second degree assault-bodily injury with a deadly weapon. For several reasons, we disagree.

First, as noted above, whenever a person, with the intent to cause bodily injury, causes bodily injury by applying sufficient pressure to the neck or by blocking the nose or mouth of another, thereby impeding or restricting the other person's breathing or blood circulation, the hands or other instrument used to apply such pressure will have been used in a manner capable of producing death or serious bodily injury…. Thus, by definition, the perpetrator's hands or other instrumentality of strangulation will have been used as a deadly weapon, even with allegedly "light" pressure.

Second, to the extent that the People's hypotheticals envision scenarios in which the perpetrator is putting a hand over a victim's mouth with allegedly "light" pressure and solely to keep the victim from screaming, it is not clear that this conduct would even constitute second degree assault-strangulation, which, as noted above, requires both an intent to cause bodily injury and resulting bodily injury.

Third, to the extent that the People's hypotheticals turn on the degree of injury caused to the victim (e.g., bodily injury as opposed to serious bodily injury), such distinctions are not relevant to distinguishing between second degree assault-strangulation and second degree assault-bodily injury with a deadly weapon because the statutory scheme already addresses differences based on the degree of injury: strangulation resulting in bodily injury constitutes second degree assault under subsection 18-3-203(1)(i), and strangulation resulting in serious bodily injury constitutes first degree assault….

Finally, in our view, the People's suggestion that the distinction between subsections 18-3-203(1)(b) and (1)(i) should somehow turn on the amount of pressure employed or the length of time a perpetrator applies such pressure does not articulate "a sufficiently pragmatic difference to permit an intelligent and uniform application of the law." In particular, the People do not explain when, in the course of a strangulation, the hands or other instrumentality would cross the line from a non-deadly weapon to a deadly one, and we cannot discern a pragmatic standard that would allow a person of average intelligence to make such a determination.

For these reasons, we conclude that under prevailing Colorado equal protection principles, a defendant may not be charged with second degree assault based on conduct involving strangulation under both the deadly weapon and strangulation subsections of the second degree assault statute but rather must be charged under the strangulation subsection.

Although our analysis is based on the plain language of the statutory provisions at issue and we therefore need not resort to other tools of statutory construction, we note that the legislative history of subsection 18-3-203(1)(i) supports our conclusion here.

The General Assembly added strangulation subsections (and corresponding sentencing provisions) to the assault statutes in 2016. These subsections were intended to institute a change from prosecutors' past practice. *See* Gen. Assemb. Legis. Council, Research Note for H.B. 16-1080, 70th Gen. Assemb., 2d Reg. Sess. (2016). Specifically, prior to these amendments, prosecutors charged strangulation under the deadly weapon subsection of the second degree assault statute. *See* Hearings on H.B. 16-1080 before the H. Judiciary Comm., 70th Gen. Assemb., 2d Sess. (Feb. 9, 2016) (statement of Mark Hurlbert, Assistant Arapahoe County District Attorney). Such a charge, however, frequently required expert testimony, and obtaining such testimony was not always easy, particularly in rural jurisdictions. As a result, strangulation often resulted in convictions of the lesser offense of misdemeanor third degree assault. *See id.* (statement of Rep. Mike Foote, sponsor of H.B. 16-1080).

To address these issues, one goal of the 2016 amendments was to create a specific strangulation statute that dispensed with proof of the deadly weapon element. *Id.* (statement of Rep. Foote) ("The elements [of subsection (1)(i)] don't require the finding of hands as a deadly weapon."). And a second goal was to elevate all forms of strangulation resulting in bodily injury to a felony in order to achieve more consistency in charging decisions and sentencing statewide. *See* Hearings on H.B. 16-1080…. Toward that end, the legislation's sponsor stated that he envisioned that all strangulations would be prosecuted under this new provision. Hearings on H.B. 16-1080 before the H. Judiciary Comm., 70th Gen. Assemb., 2d Sess. (Feb. 9, 2016) (statement of Rep. Mike Foote).

In our view, this legislative history fully supports our conclusion that a defendant in Lee's position must be charged under the strangulation, and not the deadly weapon, subsection of the second degree assault statute. In addition to violating the equal protection principles discussed above, concluding otherwise would undermine the legislature's goal of achieving more consistency in charging decisions and sentencing statewide….

III. Conclusion

For the reasons set forth above, the deadly weapon subsection of the second degree assault statute, subsection 18-3-203(1)(b), and the strangulation subsection of that statute, subsection 18-3-203(1)(i), proscribe identical conduct, yet the deadly weapon subsection punishes that conduct more harshly than does the strangulation subsection. Accordingly, we conclude that under prevailing Colorado equal protection principles, a defendant may not be charged with second degree assault based on conduct involving strangulation under both the deadly weapon and strangulation subsections. Rather, the conduct must be charged under the strangulation subsection. We therefore affirm the judgment of the division below.

JUSTICE SAMOUR dissents and CHIEF JUSTICE COATS and JUSTICE BOATRIGHT join in the dissent.

JUSTICE SAMOUR, dissenting.

"Two roads diverged in a wood, and [this court] took the one less traveled by." As in Robert Frost's seminal poem, "The Road Not Taken," that decision "has made all the difference." But here, the path less trod is not a desirable one: This court's stubborn loyalty to Colorado's unique equal protection doctrine—one that has been soundly rejected by the U.S. Supreme Court and the overwhelming majority of jurisdictions—infringes on the charging discretion of the executive branch of government with no discernible justification beyond "my house, my rules." … And while our court's inexplicable resistance to the logical force of the U.S. Supreme Court's unanimous decision in *United States v. Batchelder* (1979) is reason enough for me to dissent, I further believe that, even under Colorado's peculiar equal protection doctrine, there is no due process violation here. Accordingly, I respectfully dissent on both grounds…

Notes and questions on *People v. Lee*

1. In your study of enforcement decisions in Chapter Three, you read *State v. Cissell*, in which the Supreme Court of Wisconsin found no due process or equal protection violation in Wisconsin's two statutes that both criminalized failure to support one's child, identical for all practical purposes except in the penalties they imposed. As noted in that earlier discussion, the approach of the *Cissell* court is endorsed by the U.S. Supreme Court with respect to the federal constitution, and followed in most states: a jurisdiction can enact overlapping or identical statutes that punish the same conduct, but impose different penalties. Prosecutors then have the discretion to choose which statute to use (and thus to determine what sentencing range will apply), and this structure does not violate the federal constitution or most state constitutions. As the dissenting opinion points out in *People v. Lee*, Colorado is an outlier on this specific issue. The Colorado Supreme Court has interpreted Colorado's own state

constitution to prohibit that kind of prosecutorial discretion. Thus, under Colorado law, when two statutes punish identical conduct but authorize different penalties, the defendant must be charged with the offense that carries the lesser penalty. What are the different penalties for assault by strangulation, 18-3-203(i), and assault by deadly weapon, 18-3-203(b)?

2. The dissent criticizes the majority for what it calls the "my house, my rules" approach. What, if anything, is wrong with "my house, my rules" as justification for Colorado's unique approach? If you were a state court judge deciding whether to follow the majority approach (as in *Cissell*) or the Colorado approach, what factors would you consider? Which precedent would you follow?
3. Setting aside the equal protection / overlapping statutes issue, *People v. Lee* is fairly representative of assault prosecutions in other respects. For example, it is not unusual for jurisdictions to interpret the term "deadly weapon" broadly, as the Colorado courts have done. Many other jurisdictions have similarly held that fists or hands can constitute "deadly weapons" if they are used in a sufficiently violent manner. Note that these interpretations do not mean that all assaults by fist will in fact be charged as assaults with a deadly weapon. Instead, the broad interpretations further expand the discretion of prosecutors, who have the option, but not the obligation, to charge a more serious form of assault.
4. *People v. Lee* is also useful as a source of insight about criminalization choices. Why did the Colorado General Assembly (the state legislature) choose to add a specific strangulation statute even though the state had already criminalized assault by deadly weapon?
5. Another respect in which *Lee* is typical of many assault cases: the violence occurred in the context of an intimate relationship. Should domestic violence be codified as a separate offense? Many jurisdictions do take that approach. Indeed, assault of a spouse, intimate partner, or family member is one offense for which many jurisdictions have enacted mandatory arrest or mandatory prosecution statutes, an exception to the general rule of broad enforcement discretion enjoyed by police and prosecutors. However, courts have not always viewed those mandatory enforcement rules as actually creating an enforceable legal duty to arrest (or prosecute). See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). Perhaps surprisingly, some advocates for victims of domestic abuse have questioned whether mandatory arrest and prosecution, and indeed the use of criminal interventions more broadly, is the best way to address problems of intimate violence. See Leigh Goodmark, Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence (2018).

KentuckyRevised Statutes 508.010. Assaultin the first degree.
A person is guilty of assault in the first degree when:

(a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or

(b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

[An additional statute relevant to the next case is quoted within the court's opinion.]

COMMONWEALTH of Kentucky, Appellant

v.

Rita MITCHELL

Supreme Court of Kentucky
516 S.W.3d 803

April 27, 2017

Opinion of the Court by Justice HUGHES:

Kentucky Revised Statute (KRS) 501.030, one of the foundational provisions of the Penal Code, provides generally that a person may not be found guilty of a criminal offense unless

(1) He has engaged in conduct which includes a voluntary act or *the omission to perform a duty which the law imposes upon him and which he is physically capable of performing*; and (2) He has engaged in such conduct intentionally, knowingly, wantonly or recklessly as the law may require, with respect to each element of the offense.

(emphasis supplied). These are the Penal Code versions of the ancient "*actus re[u]s*" and "*mens rea*" requirements for criminal liability. As the emphasized portion of the statute indicates, the Penal Code allows for criminal liability premised upon a person's failure to act, but only in limited circumstances. At the time of the alleged omission, the defendant must have been under a legal duty to act (as opposed to a moral or some other sort of extra-legal duty), such that his or her inaction amounted to a breach of that duty. And even then liability is appropriate only if the duty was one which the person was physically capable of performing….

RELEVANT FACTS

In October 2010, in response to reports that a "boy" was being "kept" in deplorable conditions, Monroe County police officers, fire and rescue workers, and a social worker … were all summoned to a mobile home … in Tompkinsville. The home was owned by Donna Bartley, but at the time its only occupants, aside from a large pack of dogs, were two people: Rita Mitchell, Bartley's long-time friend and until recently house-mate, and Bartley's then twenty-four year-old son, a young man we shall refer to as James.

Mitchell and James are both impaired and both have received Social Security Disability Benefits for several years. …Mitchell testified that in October 2010 and for some time prior, she suffered from chronic obstructive pulmonary disease (COPD), a condition which limited her mobility and for which she required an artificial oxygen supply. She also suffered, she testified, from chronic depression, which in the fall of 2010 had become acute and disabling.

James suffers from cerebral palsy, significant intellectual disability, and possibly from autism. These significant conditions have, throughout his life, made him highly dependent on others for the provision of even life's most basic necessities, such as food, clothing, shelter, mobility, and health care. The record does not indicate how Bartley managed to care for James during his first seven years, but according to Mitchell's testimony, when James was about seven, Bartley and Mitchell, who had known each other from childhood, agreed to become house-mates. Bartley was to provide the residence and to manage the household in exchange for Mitchell's help with the cooking, cleaning, and care of James as well as Mitchell's contribution of her disability benefits to the household income. This arrangement worked well enough that it continued even after Bartley had a second and then a third child, a son and a daughter, for both of whom Mitchell helped to care. A social worker testified that he visited the Bartley residence in 2003, while Bartley and Mitchell were caring for all three children, and found the home clean and orderly and the children, including James, adequately provided for.

By late spring or early summer of 2010, however, Bartley and Mitchell's arrangement had begun to break down. …Bartley and her two younger children, by then teenagers, moved to a new home in Glasgow, Kentucky, while Mitchell and James were left behind in the Monroe County mobile home…. Bartley increasingly disassociated herself from her son and Mitchell…. Although she remained in control of the purse strings, including Mitchell's and James's social security benefits, Bartley ceased to make the mortgage payments on the mobile home; ceased to provide for trash removal; ceased to pay for water service, which was discontinued in August 2010; and visited the mobile home only on weekends, delivering food and a few gallons of water.

Mitchell was unable to cope with this virtual abandonment. We have described elsewhere the deplorable condition in which the rescue workers found the Monroe County mobile home in October 2010. *SeeBartley v. Commonwealth*, 400 S.W.3d 714 (Ky. 2013). Suffice it to say here, that by then trash had piled up outside the residence, the residence had been overrun by more than twenty semi-feral dogs, whose filth had accumulated on the floors and furniture, and Mitchell had apparently ceased making any effort to care for James, beyond perhaps giving him some water and the microwavable snack foods that Bartley provided. In a back room with the radio blaring to drown out the young man's screams, the rescue workers found James naked on a bare mattress across which had been spread a sheet of plastic….

As bad as James's plight was (and to a person the rescue workers testified that they had never before encountered a scene as wrenching), the treating physician testified that for James the outcome easily could have been [fatal]….

In December 2010 the Monroe County grand jury indicted Bartley and Mitchell. Both women were charged with first-degree criminal abuse of James, under KRS 508.100, and with first-degree assault, under KRS 508.010. With respect to both women, the latter charge alleged, among other things, that they had caused James serious physical injury by "severely neglecting to meet his physical needs."

…The jury found both [defendants] guilty of first-degree assault, found Bartley guilty of first-degree (intentional) criminal abuse, and found Mitchell guilty of second-degree (wanton) criminal abuse. …[I]n December 2014, [the Court of Appeals] affirmed Mitchell's second-degree criminal abuse conviction, but reversed her conviction for first-degree assault. With respect to the assault,

the panel concluded that Mitchell could not be said to have assumed a legal duty to care for James, since she had done nothing to prevent Bartley, the biological mother, from providing that care in the first instance….

The Commonwealth contends that in so ruling the Court of Appeals erred….

ANALYSIS

As the discussions in *Bartley* and *Staplesv. Commonwealth* (Ky. 2014) indicate, our trial courts have been confronted in recent years by a new generation of crime-by-omission cases, cases involving new forms of parental neglect and abuse and cases brought against non-parents for alleged failures to protect or care for the children of others. These cases have posed difficult and intertwined questions of both substance and procedure. This case is yet another of that sort.

As we explained in *Bartley*, "to proceed with a prosecution alleging a criminal omission, the Commonwealth must … identify a specific 'legal duty,' the breach of which would subject the defendant to criminal sanction. Any dispute about the existence of the alleged duty should be resolved by the trial court, and disputes about the facts giving rise to that duty in the particular case should be incorporated in the instructions for jury resolution."

… In *Bartley*, we concluded that the Commonwealth's failure to identify at the outset the specific "legal duty" Bartley was alleged to have breached did not amount to a palpable error. As we explained, a parent's non-delegable duty to support and care for a disabled adult child has long been established in our law, both our statutory law and our case law….

As the Commonwealth notes, Mitchell's appeal raises similar questions. In her case, too, it appears, the Commonwealth failed to make clear at the outset the specific "legal duty" Mitchell was alleged to have breached, and in her case, too, we are initially confronted with a question as to whether Mitchell adequately preserved that error. Inasmuch as Mitchell's objections during trial were essentially the same as Bartley's, we agree with the Commonwealth that she did not…. Accordingly, Mitchell is entitled to relief only if the error was palpable, *i.e.*, only if the error was, or should have been, apparent, and then only if it resulted in "manifest injustice," what we have characterized as either a skewed outcome or a proceeding "so fundamentally tainted … as to threaten [the] defendant's entitlement to due process of law."

Implicitly, at least, the Court of Appeals concluded that the error—the failure to specify Mitchell's alleged duty to care for James—was indeed palpable. The panel relied on *West v. Commonwealth* (Ky. App. 1996) [for the proposition] that affirmative legal duties of care can arise in at least four distinct circumstances:

[F]irst, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

Although the Commonwealth did not specify *any* theory whereby Mitchell could be found to have breached a legal duty to care for James, the appellate panel understood the Commonwealth to have alleged only the fourth type of circumstance mentioned [above], *i.e.*, that Mitchell had through her relationship with Bartley voluntarily assumed James's care. In its view, however, Mitchell could not reasonably be found to have secluded James from the aid of others—at least from his mother's aid—and thus, under *West's* fourth scenario, she could not be deemed subject to assault liability for having failed to provide care that it was really Bartley's duty to provide….

[The Commonwealth argues that] even if the Court of Appeals strict and literal reading of *West's* fourth set of duty-creating circumstances accurately reflects the law, *i.e.*, even if no legal duty of care arises from the voluntary assumption of a care-giving role provided there is no concomitant seclusion of the helpless person from all other caregivers, the appeals panel erred by disregarding evidence that Mitchell did indeed isolate James not only from the world at large, but from his mother as well. Bartley's defense, in fact, based on snippets of Mitchell's statements to investigators and her trial testimony, was that James's situation only became distressing during the two or so weeks prior to his rescue, and during that period Bartley relied—carelessly, perhaps, but not criminally—on Mitchell's repeated assurances that James was doing fine. That evidence was sufficient, according to the Commonwealth, to allow even a strict "voluntary assumption of duty" case against Mitchell to go to the jury.

More fundamentally, the Commonwealth contends that the appeals panel's narrow construction of *West's* fourth common-law duty category does not accurately reflect the law. Mitchell's voluntary assumption of James's care could rightfully be deemed to have ripened into a legal duty, a sort of *in-loco-parentis* duty, the Commonwealth implies, notwithstanding Bartley's concomitant and arguably superior duty as a parent. The prosecutor focused on the seventeen-year duration of Mitchell's care of James and the

evidence that Bartley and Mitchell were, on some level, colluding to keep James from being cared for by others lest, as Mitchell testified, Bartley lose custody of James and his accompanying social security benefits. In these circumstances, the Commonwealth insists, Bartley's duty ought not shield Mitchell from the consequences of her own….

We … agree with the Commonwealth that the evidence against Mitchell was sufficient to support potentially viable assault-by-omission theories. We thus further agree that the Court of Appeals panel erred by disregarding that potential and dismissing Mitchell's assault charge altogether. Accordingly, the Court of Appeals' opinion must be reversed.

As the Commonwealth's argument also makes abundantly clear, however, the Commonwealth's failure to specify the duty of care it was alleging against Mitchell had an utterly different effect on Mitchell's case than its similar failure with respect to Bartley had on hers. In *Bartley*, the Commonwealth's error meant little, since it was clear to all—parties, court, and jury alike—that Bartley was being prosecuted for injuries arising from the alleged breach of her parental duty, a legal duty well and clearly established. With respect to Mitchell, however, the Commonwealth's failure to specify the legal duty (or duties) Mitchell was alleged to have breached meant much more.

It meant that no one had a clear idea how to respond to the evidence the Commonwealth presented, and so had to respond uncertainly. Mitchell could not tailor her defense to specific claims that a particular duty had arisen and been breached; the trial court had to rely on generalities in assessing Mitchell's directed-verdict motion; and most importantly, the jury, having not been apprised that a particular legal obligation was being alleged and that moral obligation alone was not enough, was left to its own devices when asked to find whether or not Mitchell had "caused serious physical injury to [James] by severely neglecting to meet his needs." Each of these uncertainties constitutes a serious flaw in the proceedings, and their combination, we are convinced, denied Mitchell a fundamentally fair trial as to the assault charge. The Commonwealth's error in not specifying the legal duty it believed Mitchell had breached (and the court's error in not insisting that it do so), was thus palpable…. [It] so tainted the trial as to threaten Mitchell's entitlement to due process.

… In our view, there is clearly evidence in the record of this case that could support the finding of a legal duty on the part of Mitchell. … [But] the jury must receive a specific instruction on the nature of the duty which Mitchell owed to James and the alleged breach of that duty. Only then has the jury been given the necessary instruction on the law applicable to the criminal omission form of first-degree assault with which Mitchell has been charged.

CONCLUSION

In sum, we agree with the Court of Appeals, *albeit* on different grounds, that Mitchell is entitled to relief, but we also agree with the Commonwealth that the relief awarded by the appeals panel was not legally appropriate. The problem was not that the Commonwealth failed to introduce sufficient evidence of an assault…. The problem, rather, was that the Commonwealth failed adequately to specify the duty giving rise to assault-by-omission it was alleging, and that failure undermined the fairness of Mitchell's trial. Mitchell's remedy is thus not the dismissal of the assault charge, but rather the reversal of her assault conviction and sentence. Accordingly we reverse the Court of Appeals' Opinion and remand this matter to the Monroe Circuit Court for additional proceedings consistent with this Opinion.

Notes and questions on *Commonwealth v. Mitchell*

1. In Chapter Two, we discussed the concept of "actus reus" as well as the "voluntary act requirement." The principle that a crime requires an actus reus, or a guilty act, is widely invoked as a constraint on criminalization choices that prevents legislatures from criminalizing mere thoughts in the absence of action. But doctrines of omission liability do permit the criminalization of inaction in some circumstances. The general rule is that omission liability requires a clear legal duty to act. That duty to act could come from the criminal statute itself, so a legislature could define a duty to act (such as a duty that persons with criminal convictions register with the authorities, as required by the statute in *Lambert v. California*). Or the duty to act could come from another source of law. Citing *West v. Commonwealth*, the Kentucky Supreme Court identifies four possible sources of duties to act that could then support criminal liability for an omission: a statute, a status relationship (such as parent-child), a contract, or a voluntary assumption of care while secluding the victim from other sources of care. Given these four categories, did Rita Mitchell have a legal duty to provide care to James, according to the Kentucky Supreme Court? What are the strongest arguments for or against finding such a duty?

2. Recall (from Chapter Two) that courts treat "actus reus" and "voluntary act" as two separate requirements. The first term captures the idea that a crime should involve some act or conduct (or omission). The second emphasizes volition. The "voluntary act requirement" reflects an effort to distinguish voluntary acts from involuntary ones. Arguably, Kentucky law tries to distinguish voluntary omissions from involuntary ones: note the statutory requirement that an omission be one that the defendant "is physically capable of performing."
3. You are reading about omission liability in the context of an assault charge, but keep in mind that omission liability may be imposed for many different types of offenses – including, again, a failure to register as a convicted person if required by law to do so. Filing requirements that carry criminal penalties, such as a tax crime for failure to file, also rely on omission liability. As the *Mitchell* court notes, omission liability is used fairly often in cases of abuse and neglect, when parents or other designated caregivers are charged with failing to provide adequate care to their dependents.
4. Can omissions be violent? At least some courts have answered in the affirmative. In *United States v. Scott*, 990 F.3d 94 (2d. Cir. 2021), the Second Circuit concluded that assault by omission and manslaughter by omission could be classified as "violent crimes" for purposes of federal sentencing enhancements if the offenses involved the intentional infliction of injury, even if the "infliction" was accomplished by a failure to act. The classification of crimes as "violent" is important, because many U.S. jurisdictions impose more severe sentences on a defendant who has prior convictions for "violent" offenses. Legal definitions of "violent crime" or "crimes of violence" often extend much more broadly to include any crime that involves conduct that creates a risk of physical injury, whether or not any injury is intended or accomplished. See Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 Ala. L. Rev. 571, 602-610 (2011).
5. Rita Mitchell was charged with both first degree assault (the main focus of this opinion) and a separate offense of "criminal abuse." She was convicted of second degree criminal abuse, which occurs when a person "wantonly abuses another person … and thereby … causes torture, cruel confinement, or cruel punishment…." Kentucky Rev. Statutes 508.110. Abuse, in turn, is defined under Kentucky law as "the infliction of physical pain, injury, or mental injury, or the deprivation of services by a person which are necessary to maintain the health and welfare of a person." Kentucky Rev. Statutes 508.090(1). In a footnote not included in the edited opinion above, the Kentucky Supreme Court concluded that criminal abuse was a "result crime" that could be established by showing that a defendant, by either omission or commission, caused a given result (e.g., torture or cruel confinement). Mitchell had directly caused James's confinement, the court concluded, and thus her conviction for criminal abuse did not require proof that she had a legal duty to care for James. See *Mitchell*, 516 S.W.3d 803, 812 n. 3.

Check Your Understanding (6-1)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

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Homicide

Homicide is the umbrella term used to describe a group of offenses that all involve causing the death of another person. Murder and manslaughter are the most familiar categories of homicide. These categories existed and evolved in English common law centuries ago, and then were adopted in the American colonies and then in the states. The labels murder and manslaughter are still used in most modern statutory regimes. But jurisdictions may define other types of homicide as well, such as negligent homicide or vehicular homicide, and jurisdictions often divide murder and manslaughter into subcategories, such as first degree murder, second degree murder, and so on. The factors that differentiate murder from manslaughter, or first degree murder from lesser degrees, can again vary by jurisdiction. If you are trying to figure out how a particular killing is most likely to be classified, it is always a good idea to check the statutes of the specific jurisdiction where the killing took place. But with that said, there are some typical patterns that hold true across most jurisdictions. For example, murder statutes usually (but not always) require an intent to kill, while manslaughter or other forms of homicide often do not require intentional killing. This section aims to help you see both commonalities and variations in the law of homicide across different jurisdictions.

The actus reus of any homicide offense is usually simply stated: causing the death of another human being. The simplicity may be deceptive, though, because what it means to "cause" death is frequently contested in homicide cases. Several of the cases in this section will help you identify and apply the principles that courts use to evaluate causation.

The mens rea of homicide offenses, in contrast, varies much more widely. Indeed, the defendant's mental state, or mens rea, is usually the distinguishing factor that separates different types of homicide. To get an idea of the types of mental states that have long been seen as relevant to the legal evaluation of a killing, consider the common law definition of murder as a killing with "malice aforethought." Over time, in homicide law "malice aforethought" came to stand for not one single state of mind, but four different mental states. (The term malice is also sometimes used outside of homicide law; for one example, see the definitions of arson discussed at the end of Chapter Five.) The prosecution could establish malice aforethought by showing that the defendant acted with an intent to kill or an intent to cause serious bodily injury or extreme recklessness (sometimes described as acting with a "depraved heart" or an "abandoned and malignant heart") or intent to commit a felony ("felony murder"). Any of these mental states could suffice to convict a defendant of murder. Common law manslaughter, on the other hand, was usually defined as a killing without malice. One form of manslaughter was an intentional killing "in the heat of passion," or in response to some legally adequate form of provocation. Manslaughter also included unintentional killings, such as causing death through ordinary (but not extreme) recklessness, or causing death in the course of some unlawful but not felonious act ("misdemeanor-manslaughter").

In today's statutory world, different levels of homicide are codified by each jurisdiction, and the influence of common law categories is visible but not determinative. Most U.S. states divide the crime of murder into degrees; first-degree murder may require an intentional, premeditated killing, while second-degree murder may include killings by extreme recklessness or killings in the course of a different felony offense. Manslaughter is often but not always defined similarly to the common law definition. And many jurisdictions include a lesser category of homicide such as negligent homicide or vehicular homicide. Again, there are no universal definitions of any of these specific homicide offenses; always consult the relevant statute! Nevertheless, the cases below should help you get a sense of typical definitions.

The Basics of First Degree Murder

Kansas Stat. § 21-5402 (formerly 21-3401)

a) Murder in the first degree is the killing of a human being committed:

(1) Intentionally, and with premeditation; or

(2) in the commission of, attempt to commit, or flight from any inherently dangerous felony.

STATE of Kansas, Appellee

v.

Joseph Dodds MORTON, Appellant

Supreme Court of Kansas
86 P.3d. 535

March 26, 2004

The opinion of the court was delivered by BEIER, J.:

Defendant Joseph Dodds Morton appeals his first-degree murder and aggravated robbery convictions. He argues that he could not be convicted of first-degree murder on the combined theories of premeditation and felony murder, that the evidence on premeditation presented at his trial was insufficient, and that prosecutorial misconduct and cumulative error require reversal.

Morton was discharged from his employment at a grocery store. He decided to rob the store; he stole an unloaded gun from his mother…, loaded the gun with loose bullets…, and returned to the store with the excuse of returning his uniform.

Before entering the store, Morton parked across the street to check the number of cars in the parking lot and ensure that only the manager remained inside after hours. He hid the gun between his two work shirts. When he entered, store manager David Morrell asked about Morton's box cutter and bailer key. Morton then left the store and sat in his car for approximately 2 minutes, pondering whether he should commit the crime. He then reentered the store and told Morrell he "was [t]here for the money." Morrell offered no resistance and led Morton to the store office, where money was on a desk. According to Morton, he then squeezed the trigger of the gun. He said he was not sure where he was pointing the gun and fired to scare the manager. After pulling the trigger, however, he heard the manager hit the floor. Morton left the store [to the parking lot], … and then returned…. He stole a video recorder and videotape, destroyed security monitors, and took a cordless phone to ensure that Morrell could not call the police. According to

Morton, when he returned to the office, he saw Morrell slumped on the floor. He admitted that Morrell looked dead. He did not check him for signs of life or summon help.

Other evidence at trial demonstrated Morrell had been shot in the face from a distance of not more than three feet.

After the crime, Morton went to play billiards with friends. He told his girlfriend that he robbed the store, purchased stereo equipment for his car and 2 pounds of marijuana, and took his girlfriend shopping. A few days later, Morton offered to pay a friend to destroy the security videotape and then fled the state. He eventually confessed to the crime, making a recorded statement to the police.

At trial, the jury received the following Instruction No. 9:

"In this case, the State has charged the defendant Joseph Dodds Morton with one offense of Murder in the First Degree and has introduced evidence on two alternative theories of proving the crime.

"The State may prove murder in the first degree by proving beyond a reasonable doubt that the defendant killed David Morrell intentionally and with premeditation or in the alternative by proving beyond a reasonable doubt that the defendant killed David Morrell and that such killing was done while in the commission of a felony or in flight from attempting to commit a felony, to-wit: aggravated robbery, as fully set out in these instructions.

"Here evidence is presented on the two alternate theories of proving the crime charged, you must consider both in arriving at your verdict."

Instruction No. 10 stated, in part:

"If you do not have a reasonable doubt from all the evidence that the State has proven murder in the first degree on either or both theories, then you will enter a verdict of guilty."

During closing argument, the prosecutor said:

"Was this killing premeditated? That's the second question we want to look at. And to look at that question, we look at the jury instructions. And if you remember in the jury instructions, premeditation means to have thought it over beforehand for any length of time. Premeditation does not necessarily mean that somebody has to plan it out weeks or months beforehand. And if you remember—you look at that police statement. Detective Zeigler's last question was, okay, did you plan this out last week or weeks before and he said no. But it doesn't have to be weeks or months before.

"We know he walked off the job on Friday. We don't know, though, if he started thinking about it Saturday or Sunday or Monday or Tuesday. But we do know that he started thinking about it before he got to the Save–A–Lot store. And remember one thing. Premeditation means to have thought over the matter beforehand for any length of time."

The prosecutor then gestured with her fingers as though she was firing a gun and continued: "That can be premeditation under the laws of the State of Kansas. One squeeze of the trigger is all it takes." The defense did not object.

The jury returned a guilty verdict, but its verdict form stated the jurors were "unable to agree whether the defendant is guilty of Murder in the First Degree on the theory of premeditated murder or felony murder." The jury "unanimously [found] the defendant guilty of murder in the first degree on the combined theories of premeditated murder and felony murder."

Conviction of First–Degree Murder on Combined Theories

Morton breaks this first issue in two, presenting it first as a violation of his right to a unanimous verdict and second as an error in instructions. Both challenges, when reduced to their essence, require us to decide a question of law, and our review is therefore unlimited.

… Morton points to language from *State v. Vontress* (1998) and *State v. Wakefield* (1999) [that emphasizes] "that as stated in the statute, premeditated murder and felony murder were separate and distinct offenses." This language is confusing when considered in isolation. It is inconsistent with previous and succeeding Kansas case law, as well as the reasoning and outcome of the cases in which it appears. …[T]he statement was dicta, included in *Vontress* without any analysis of whether premeditated murder and felony murder actually constitute separate crimes.

Before *Vontress* and *Wakefield* were decided, this court had stated clearly: "Premeditated and felony murder are not separate, distinct offenses but are two separate theories under which the crime of first-degree murder may be committed." In essence, the

felonious conduct proved in a felony murder is a stand-in for the deliberation and premeditation usually required to be proved in a first-degree murder case.

In *Vontress*, the jury was presented with a verdict form similar to the one used in this case. During deliberations it marked the form to indicate that the first-degree murder conviction was based on the jury's unanimous agreement on the defendant's guilt of premeditated murder *and* its unanimous agreement on the defendant's guilt of felony murder. The defendant received the harsher sentence available only for premeditated murder. The defendant appealed, arguing the verdict was ambiguous. We held that there was no ambiguity. The jury had found the defendant guilty under each theory of first-degree murder, and his sentence for premeditated murder was not illegal.

… Regardless of whether we consider jury unanimity a federal constitutional guarantee or a state statutory right, [our precedents] confirm that Morton got all that he was entitled to in this case. Although we know from the verdict form that Morton's jury could not agree on premeditation or felony murder, it was unanimous as to his guilt of first-degree murder. That was enough as long as the evidence of each means was sufficient. Instruction and conviction on the combined theories was proper. Moreover, because Morton was not given the harsher sentence appropriate only for a unanimous conviction under a premeditation theory, his sentence also would pass muster.

Sufficiency of the Evidence of Premeditation

As discussed above, in order to uphold a conviction based on alternative means under *State v. Timley*, we must see sufficient evidence of each means in the record before us. Morton's next argument is that the evidence of premeditation presented at his trial was insufficient.

"When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt."

We have recognized several factors that will give rise to an inference of premeditation:

"(1) the nature of the weapon used; (2) lack of provocation; (3) the defendant's conduct before and after the killing; (4) threats and declarations of the defendant before and during the occurrence; and (5) the dealing of lethal blows after the deceased was felled and rendered helpless. The jury has a right to infer premeditation from the established circumstances if the inference is a reasonable one." *State v. Murillo* (2000).

We see ample evidence to support the second and third factors in the record before us.

Morton admitted Morrell did nothing to provoke him. There was no resistance on the manager's part.

In addition, Morton's actions before entering and reentering the store and after the shooting reflected careful initial planning, reconsideration and a determination to proceed, and callous disregard of the consequences. Morton admitted deciding ahead of time to rob the store. He then went to no small trouble to steal the gun from his mother and prepared an excuse to use in the event he was questioned about his reappearance at the store after being discharged from employment. He then drove to the store and parked across the street, where he could carefully observe how many cars remained in its parking lot, guaranteeing that he would be alone with Morrell after business hours. After entering the store for the first time, he left and sat in his car awhile, thinking through his plan again and deciding to proceed. He then reentered the store and followed Morrell to the store office, where he took the money on the desk.

After intentionally squeezing the trigger, shooting Morrell in the face, and hearing Morrell hit the floor, Morton left the store a second time. He returned to his car, "took a turn around in the parking lot," and apparently decided he had not done enough to cover his tracks. He entered the store a third time and observed the apparently lifeless Morrell on the floor. Morton did nothing to assist Morrell. Instead, he stole or destroyed the security camera and videotape and monitors that might have led to his apprehension by law enforcement. Morton then went out to socialize, playing billiards and purchasing marijuana. He later offered to pay a friend to destroy the security videotape and then left town.

With all of this evidence in the State's favor, some of it from the defendant himself, members of the jury could have reasonably disregarded Morton's story that he fired the gun only to scare Morrell and did not know where it was pointing. There was ample evidence to support premeditation.

Prosecutorial Misconduct in Closing Argument

When there is no contemporaneous objection to a prosecutor's argument, we reverse only if the prosecutor's misconduct rises to the level of violating a defendant's right to a fair trial and denies the defendant his or her Fourteenth Amendment right to due process. Further, we generally employ a two-step process to analyze prosecutorial misconduct claims. First, we decide whether the prosecutor's comments were outside the wide latitude allowed in discussing the evidence. Second, we decide whether the comments constituted plain error; that is, whether the statements were so gross and flagrant that they could have prejudiced the jury against the defendant and denied him or her a fair trial. If so, reversal is required.

In this case, the prosecutor's questionable conduct consisted of gesturing with her fingers as though she were firing a gun and stating: "That can be premeditation under the laws of the State of Kansas. One squeeze of a trigger is all it takes." This was not a comment on the evidence but a purported statement of controlling law. Because a misstatement of controlling law denies a criminal defendant his or her right to due process, we agree with the defense that the alleged error must be reviewed on appeal despite the absence of an objection at trial.

In *State v. Pabst* (2002), this court held that premeditation was defined adequately in Pattern Instructions for Kansas (PIK) Crim.3d 56.04(b), as "to have thought over the matter beforehand." In our view, premeditation "means something more than the instantaneous, intentional act of taking another's life."

In *Pabst*, the prosecutor had said:

" '[*T*]*here's no amount of time required.*

….

" 'You notice that there's no time element in premeditation. There's no interval that's required. *There's no plan.* You don't have to think about it for weeks.

….

" 'You don't have to think about it for weeks, days, hours, 50 minutes, ten minutes. It means to have thought over the matter beforehand. *It's the conscious act of a person.*'"

We held that this language did not constitute a misstatement of the law and thus did not qualify as prosecutorial misconduct.

However, we cautioned prosecutors to read *State v. Holmes* (2001), [in which] the prosecutor had said: "[P]remeditation can occur in an instant. That's the law in the State of Kansas." We held that this definition did constitute a deliberate misstatement, noting the prosecutor had been cautioned in the instructions conference before argument began. In *Pabst*, we amplified that holding by warning prosecutors to avoid the use of the word "instant" or any synonym or motion that would convey that message.

[In a later case,] we … found the prosecutor's statement that "something can be premeditated as soon as it happens" to be a misstatement of the law. In that case, however, this court saw nothing in the record to indicate the misstatement was deliberate and held it to be harmless.

When the prosecutor in this case pantomimed the firing of a gun and made her accompanying comment that "[o]ne squeeze of a trigger is all it takes," she conveyed the message that premeditation can be instantaneous, or virtually so. This definition of premeditation approximated those given by the prosecutors in *Holmes*… and we conclude that she misstated Kansas law. Although she also mentioned the correct definition from the jury's instructions more than once, we do not regard this as a cure for her colorful misstatement of such a critical point—a definition of one of the crime's essential elements.

The defense argues that we should also hold that the prosecutor's conduct was deliberate rather than unintentional because she was a "seasoned veteran." Morton contends that the prosecutor necessarily knew better and purposely ignored what she knew to bolster weak evidence of premeditation.

We can go along with defendant approximately halfway. Morton is correct that an experienced prosecutor such as the one in his case should have been well aware of … numerous recent cases on prosecutorial misconduct and/or the definition of premeditation. … This prosecutor should have known better and apparently did, given her references to the correct definition in the jury instructions. As our earlier discussion makes evident, however, we cannot agree with Morton that the State's evidence of premeditation was weak. We do not discern any motivation for deliberate misconduct.

That being said, we are nevertheless compelled to hold here that the prosecutor's misstatement regarding premeditation requires reversal. Although we see plenty of evidence of premeditation in Morton's behavior, when judged under the correct definition, we know in this particular case that not every member of the jury was willing to convict on that basis. Because of the jury's specific statement in its verdict form that it could not agree unanimously on the premeditation theory, we are not comfortable calling the prosecutor's error harmless beyond a reasonable doubt. Morton is therefore entitled to reversal and a new trial.

Notes and questions on *Morton*

1. Like many jurisdictions, Kansas separates homicides—unlawful killings—into several subcategories. And like many jurisdictions, Kansas distinguishes among different types of homicides by focusing on the defendant's mental state. Joseph Morton, the defendant here, did not argue that he didn't kill the store manager. Instead, the defense argued that the evidence was insufficient to establish the right mental state for first degree murder. In Kansas (again, like many other jurisdictions), first degree murder requires "premeditation." How is that term defined in Kansas? What evidence here supports a finding of premeditation?
2. Some of the evidence of premeditation submitted here relates to the defendant's actions after the shooting. How do acts taken after a shooting help establish the defendant's state of mind before the shooting?
3. Sufficiency of evidence (or insufficiency) is one common basis for appeals in criminal law; jury instructions are another. In this case, the court focuses also on the prosecutor's characterization of the law in her closing argument. Compare the prosecutor's statements in *Pabst*and *Holmes*, both quoted in this case. The statement in *Pabst*was found to be permissible by an appellate court, but the statement in *Holmes*was found to be a (deliberate) misstatement. What is the key difference between the statements? Were the prosecutor's statements at Morton's trial more like one of these precedents than the other?
4. Kansas law defines first degree murder to include intentional, premeditated killings and killings in the course of "any inherently dangerous felony." There are thus two ways to commit first degree murder in Kansas—premeditated murder, or felony murder. Most U.S. jurisdictions have some form of "felony murder," or a type of murder that involves causing a death while committing some other felony offense. Jurisdictions vary in whether they classify felony murder as first, second, or even third degree murder; they also vary with regard to which felony offenses can serve as the predicate for a felony murder conviction. Among commentators and courts, felony murder is controversial, in part because it typically requires no proof of mens rea other than the mens rea of the underlying felony. Thus, if a defendant commits a felony offense with a mental state of recklessness, but (accidentally and unintentionally) kills someone while committing that felony, the defendant may be guilty of murder.
5. Morton was charged and convicted with aggravated robbery, a felony, along with murder. The prosecution argued both that Morton killed intentionally with premeditation and that Morton killed in the course of an inherently dangerous felony. The jury convicted Morton of first degree murder, but apparently was not unanimous about the underlying rationale for first degree murder—premeditated murder or felony murder. The appellate court found this "alternative means" conviction to be acceptable, so long as there was adequate evidence of each theory of murder. Is this approach consistent with the requirement of *Winship*that the factfinder must be convinced of each element of the offense beyond a reasonable doubt?

Murder v. Manslaughter

N.Y. Penal Law 125.25:
A person is guilty of murder in the second degree when:
1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

N.Y. Penal Law 125.20(2):
A person is guilty of manslaughter in the first degree when:
… 2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance

constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

Gordon G. PATTERSON, Jr., Appellant

v.

State of NEW YORK

432 U.S. 197
Supreme Court of the United States

Decided June 17, 1977

Mr. Justice WHITE delivered the opinion of the Court.

I

…After a brief and unstable marriage, the appellant, Gordon Patterson, Jr., became estranged from his wife, Roberta. Roberta resumed an association with John Northrup, a neighbor to whom she had been engaged prior to her marriage to appellant. On December 27, 1970, Patterson borrowed a rifle from an acquaintance and went to the residence of his father-in-law. There, he observed his wife through a window in a state of semiundress in the presence of John Northrup. He entered the house and killed Northrup by shooting him twice in the head.

Patterson was charged with second-degree murder. In New York there are two elements of this crime: (1) "intent to cause the death of another person"; and (2) "caus(ing) the death of such person or of a third person." N.Y. Penal Law s 125.25. Malice aforethought is not an element of the crime. In addition, the State permits a person accused of murder to raise an affirmative defense that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse."

New York also recognizes the crime of manslaughter. A person is guilty of manslaughter if he intentionally kills another person "under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance." Appellant confessed before trial to killing Northrup, but at trial he raised the defense of extreme emotional disturbance. … The jury found appellant guilty of murder. …

II

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

In determining whether New York's allocation to the defendant of proving the mitigating circumstances of severe emotional disturbance is consistent with due process, it is therefore relevant to note that this defense is a considerably expanded version of the common-law defense of heat of passion on sudden provocation and that at common law the burden of proving the latter, as well as other affirmative defenses indeed, "all . . . circumstances of justification, excuse or alleviation" rested on the defendant….

III

… [I]n revising its criminal code, New York provided the affirmative defense of extreme emotional disturbance, a substantially expanded version of the older heat-of-passion concept; but it was willing to do so only if the facts making out the defense were established by the defendant with sufficient certainty. The State was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state. It has been said that the new criminal code of New York contains some 25 affirmative defenses which exculpate or mitigate but which must be established by the defendant to be operative. The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment.

The requirement of proof beyond a reasonable doubt in a criminal case is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re *Winship* (Harlan, J., concurring). The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is thus an increased risk that the guilty will go free. While it is clear that our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits; and Mr. Justice Harlan's aphorism provides little guidance for determining what those limits are. Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person. Punishment of those found guilty by a jury, for example, is not forbidden merely because there is a remote possibility in some instances that an innocent person might go to jail.

It is said that the common-law rule permits a State to punish one as a murderer when it is as likely as not that he acted in the heat of passion or under severe emotional distress and when, if he did, he is guilty only of manslaughter. But this has always been the case in those jurisdictions adhering to the traditional rule. It is also very likely true that fewer convictions of murder would occur if New York were required to negative the affirmative defense at issue here. But in each instance of a murder conviction under the present law New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, an act which it is not disputed the State may constitutionally criminalize and punish. If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonably certainty…. We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.

This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard. "(I)t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

…

IV

It is urged that *Mullaney v. Wilbur* necessarily invalidates Patterson's conviction. In *Mullaney* the charge was murder, which the Maine statute defined as the unlawful killing of a human being "with malice aforethought, either express or implied." The trial court instructed the jury that the words "malice aforethought" were most important because "malice aforethought is an essential and indispensable element of the crime of murder." Malice, as the statute indicated and as the court instructed, could be implied and was to be implied from "any deliberate, cruel act committed by one person against another suddenly . . . or without a considerable provocation," in which event an intentional killing was murder unless by a preponderance of the evidence it was shown that the act was committed "in the heat of passion, on sudden provocation." The instructions emphasized that "malice aforethought and heat of passion on sudden provocation are two inconsistent things; thus, by proving the latter the defendant would negate the former."

Wilbur's conviction, which followed, was affirmed. The Maine Supreme Judicial Court held that murder and manslaughter were varying degrees of the crime of felonious homicide and that the presumption of malice arising from the unlawful killing was a mere policy presumption operating to cast on the defendant the burden of proving provocation if he was to be found guilty of manslaughter rather than murder — a burden which the Maine law had allocated to him at least since the mid-1800's.

The Court of Appeals [held] that the presumption unconstitutionally shifted to the defendant the burden of proof with respect to an essential element of the crime…. This Court, accepting the Maine court's interpretation of the Maine law, unanimously agreed with the Court of Appeals that Wilbur's due process rights had been invaded by the presumption casting upon him the burden of proving by a preponderance of the evidence that he had acted in the heat of passion upon sudden provocation.

Mullaney's holding, it is argued, is that the State may not permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt. In our view, the *Mullaney* holding should not be so broadly read….

The Maine Supreme Judicial Court made it clear that malice aforethought, which was mentioned in the statutory definition of the crime, was not equivalent to premeditation and that the presumption of malice traditionally arising in intentional homicide cases carried no factual meaning insofar as premeditation was concerned. Even so, a killing became murder in Maine when it resulted from a deliberate, cruel act committed by one person against another, "suddenly without any, or without a considerable provocation." Premeditation was not within the definition of murder; but malice, in the sense of the absence of provocation, was

part of the definition of that crime. Yet malice, i.e., lack of provocation, was presumed and could be rebutted by the defendant only by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation. In *Mullaney* we held that however traditional this mode of proceeding might have been, it is contrary to the Due Process Clause as construed in *Winship*.

As we have explained, nothing was presumed or implied against Patterson; and his conviction is not invalid under any of our prior cases. The judgment of the New York Court of Appeals is

Affirmed.

Mr. Justice POWELL, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

In the name of preserving legislative flexibility, the Court today drains *In re Winship* (1970) of much of its vitality. Legislatures do require broad discretion in the drafting of criminal laws, but the Court surrenders to the legislative branch a significant part of its responsibility to protect the presumption of innocence. …

New York's present homicide laws had their genesis in lingering dissatisfaction with certain aspects of the common-law framework that this Court confronted in *Mullaney*. Critics charged that the archaic language tended to obscure the factors of real importance in the jury's decision. Also, only a limited range of aggravations would lead to mitigation under the common-law formula, usually only those resulting from direct provocation by the victim himself. It was thought that actors whose emotions were stirred by other forms of outrageous conduct, even conduct by someone other than the ultimate victim, also should be punished as manslaughterers rather than murderers. Moreover, the common-law formula was generally applied with rather strict objectivity. Only provocations that might cause the hypothetical reasonable man to lose control could be considered. And even provocations of that sort were inadequate to reduce the crime to manslaughter if enough time had passed for the reasonable man's passions to cool, regardless of whether the actor's own thermometer had registered any decline….

The American Law Institute took the lead in moving to remedy these difficulties. As part of its commendable undertaking to prepare a Model Penal Code, it endeavored to bring modern insights to bear on the law of homicide. The result was a proposal to replace "heat of passion" with the moderately broader concept of "extreme mental or emotional disturbance." The proposal first appeared in a tentative draft published in 1959, and it was accepted by the Institute and included [in] the 1962 Proposed Official Draft.

At about this time the New York Legislature undertook the preparation of a new criminal code, and the Revised Penal Law of 1967 was the ultimate result. The new code adopted virtually word for word the ALI formula for distinguishing murder from manslaughter. Under current New York law, those who kill intentionally are guilty of murder. But there is an affirmative defense left open to a defendant: If his act was committed "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse," the crime is reduced to manslaughter. The supposed defects of a formulation like Maine's have been removed. Some of the rigid objectivity of the common law is relieved, since reasonableness is to be determined "from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." The New York law also permits mitigation when emotional disturbance results from situations other than direct provocation by the victim. And the last traces of confusing archaic language have been removed. There is no mention of malice aforethought, no attempt to give a name to the state of mind that exists when extreme emotional disturbance is not present. The statute is framed in lean prose modeled after the ALI approach, giving operative descriptions of the crucial factors rather than attempting to attach the classical labels.

Despite these changes, the major factor that distinguishes murder from manslaughter in New York "extreme emotional disturbance" is undeniably the modern equivalent of "heat of passion." The ALI drafters made this abundantly clear. They were not rejecting the notion that some of those who kill in an emotional outburst deserve lesser punishment; they were merely refining the concept to relieve some of the problems with the classical formulation. The New York drafters left no doubt about their reliance on the ALI work….

But in one important respect the New York drafters chose to parallel Maine's practice precisely, departing markedly from the ALI recommendation. Under the Model Penal Code the prosecution must prove the absence of emotional disturbance beyond a reasonable doubt once the issue is properly raised. In New York, however, extreme emotional disturbance constitutes an affirmative defense rather than a simple defense. Consequently the defendant bears not only the burden of production on this issue; he has the burden of persuasion as well.

Mullaney held invalid Maine's requirement that the defendant prove heat of passion. The Court today, without disavowing the unanimous holding of *Mullaney*, approves New York's requirement that the defendant prove extreme emotional disturbance. The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's. It does so on the basis of distinctions in language that are formalistic rather than substantive.

This result is achieved by a narrowly literal parsing of the holding in *Winship*: "(T)he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The only "facts" necessary to constitute a crime are said to be those that appear on the face of the statute as a part of the definition of the crime….

The test the Court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime. The sole requirement is that any references to the factor be confined to those sections that provide for an affirmative defense….

With all respect, this type of constitutional adjudication is indefensibly formalistic. A limited but significant check on possible abuses in the criminal law now becomes an exercise in arid formalities. What *Winship* and *Mullaney* had sought to teach about the limits a free society places on its procedures to safeguard the liberty of its citizens becomes a rather simplistic lesson in statutory draftsmanship. Nothing in the Court's opinion prevents a legislature from applying this new learning to many of the classical elements of the crimes it punishes.

For example, a state statute could pass muster under the only solid standard that appears in the Court's opinion if it defined murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable mens rea. The State, in other words, could be relieved altogether of responsibility for proving anything regarding the defendant's state of mind, provided only that the fact of the statute meets the Court's drafting formulas.

To be sure, it is unlikely that legislatures will rewrite their criminal laws in this extreme form. The Court seems to think this likelihood of restraint is an added reason for limiting review largely to formalistic examination. But it is completely foreign to this Court's responsibility for constitutional adjudication to limit the scope of judicial review because of the expectation however reasonable that legislative bodies will exercise appropriate restraint.

It would be preferable, if the Court has found reason to reject the rationale of *Winship* and *Mullaney*, simply and straightforwardly to overrule those precedents….

Notes and questions on *Patterson*

1. *Patterson* is a very difficult case. It requires you to think carefully about definitions of crimes, affirmative defenses, and allocations of burdens of proof. Murder in New York was defined as intentionally causing the death of another person, but the New York statute also included an affirmative defense. An affirmative defense can provide relief from criminal liability not because the prosecution didn't prove the elements of the statutory offense, but on the basis of some other consideration that has been recognized as a reason not to convict and punish the defendant. Self-defense and insanity are two examples of affirmative defenses. To begin to understand how affirmative defenses work, imagine a statute that defines murder as "the intentional killing of another human being." Now imagine a person who is threatened by an armed assailant and who shoots and kills that assailant. This person might raise a claim of self-defense rather than contest the elements of the murder statute. That is, our imaginary defendant does not deny that she intentionally killed her assailant. Rather, her affirmative defense is that, while she did intentionally kill the assailant, she did so to protect her own life from an unlawful deadly threat. You'll study affirmative defenses in much more detail in Chapter Ten. For now, the notes below will give you helpful background on the particular affirmative defense of "provocation" that gives rise to the arguments in *Patterson*.
2. At common law, provocation doctrine arose as a way of distinguishing among different types of intentional killings. To common law courts, some intentional killings seemed worse than others. Premeditated, planned, cold-blooded killings seemed worse than inflamed, impulsive killings "in the heat of passion." The person who killed in the heat of passion still killed intentionally, but, the courts decided, this person might not kill with "malice." Courts held that a killing was manslaughter, not murder, if it was in response to provocation. In this regard, provocation was a partial defense rather than a complete one: a

successful claim of provocation didn't relieve the defendant of all criminal liability, but merely reduced the severity of the charges. To show provocation and reduce a murder charge to manslaughter, a defendant had to show 1) adequate provocation(something that would cause a reasonable man to become sufficiently inflamed to kill); 2) that the provocationcaused the defendant to kill the victim; and 3) no cooling-off period: the killing must have followed the provocation closely enough in time that a reasonable man would not have "cooled off" or regained his composure and self-control. Courts often took a categorical approach to provocation, meaning that they recognized certain types of acts as "adequate" provocation, but excluded all other acts. Standard categories of adequate provocation included a physical attack, a threat of death or great bodily injury to the defendant or to a third party close to the defendant, such as a child; discovery of infidelity; and illegal arrest.

3. The drafters of the Model Penal Code decided to include in their proposed homicide statute a defense similar to common law provocation, but broader. The Model Penal Code provides

   (1) Criminal homicide constitutes manslaughter when:

   (a) it is committed recklessly; or

   (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

   Model Penal Code § 210.3.

4. Now consider the New York homicide statute applied in *Patterson*. The New York legislature used the MPC language not in its manslaughter statute, but in its murder statute, and it explicitly characterized the consideration of extreme mental or emotional disturbance as an affirmative defense. What difference does that make, according to the Supreme Court?
5. In the dissenting opinion, Justice Powell suggests that the majority's approach allows states to circumvent the requirements of *Winship*that the prosecution prove all elements of an offense beyond a reasonable doubt. He suggests that under the Court's approach, a state would be permitted to define murder as "mere physical contact between the defendant and victim leading to the victim's death." All mental state considerations, including whether the defendant intended to kill or acted recklessly with regard to death, could be characterized as affirmative defenses. Thus the prosecution would have no burden to prove mens rea for the crime of murder. Do you agree that the majority approach leaves open this possibility? After *Patterson*, does *Winship*remain a meaningful constraint on enforcement and adjudication decisions?

Check Your Understanding (6-2)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Recklessness and Homicide

Kentucky Rev. Stat. 507.040: Manslaughter in the second degree

(1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including but not limited to situations where the death results from the person's:

(a) Operation of a motor vehicle;

(b) Leaving a child under the age of eight (8) years in a motor vehicle under circumstances which manifest an extreme indifference to human life and which create a grave risk of death to the child, thereby causing the death of the child; or

(c) Unlawful distribution for remuneration of a Schedule I or II controlled substance when the controlled substance is the proximate cause of death.

Shawnta ROBERTSON, Appellant

v.

COMMONWEALTH of Kentucky, Appellee

Supreme Court of Kentucky
82 S.W.3d 832

Aug. 22, 2002

COOPER, Justice.

Michael Partin, a police officer employed by the city of Covington, Kentucky, was killed when he fell through an opening between the roadway and the walkway of the Clay Wade Bailey Bridge and into the Ohio River while in foot pursuit of Appellant Shawnta Robertson. Following a trial by jury in the Kenton Circuit Court, Appellant was convicted of manslaughter in the second degree for wantonly causing Partin's death, KRS 507.040(1), and was sentenced to imprisonment for six years. The Court of Appeals affirmed, and we granted discretionary review…

At about 2:00 a.m. on January 4, 1998, Officer Brian Kane of the Kenton County Police Department attempted to arrest Appellant in Covington for possession of marijuana. Appellant broke free of Kane's grasp and began running north on Fourth Street toward the Clay Wade Bailey Bridge which spans the Ohio River between Covington and Cincinnati, Ohio. Kane radioed for assistance and pursued Appellant on foot "at a sprint." When Appellant reached the bridge, he vaulted over the concrete barrier between the roadway and the walkway and began running north on the walkway toward Cincinnati. Kane, who, at that point, was running on top of the concrete barrier jumped down to the walkway and continued his pursuit.

Meanwhile, Partin and two other Covington police officers, Steve Sweeney and Cody Stanley, responded to Kane's request for assistance and arrived at the bridge almost simultaneously in three separate vehicles…. Partin's vehicle was the first of the three police cruisers to reach the bridge. He stopped in the right northbound lane just beyond where Appellant was running on the walkway. Stanley stopped his vehicle directly behind Partin's vehicle, and Sweeney stopped in the left northbound lane, also behind Partin's vehicle. Sweeney and Stanley testified that they did not see either Appellant or Kane on the walkway and stopped only because Partin had done so. Both saw Partin exit his vehicle, proceed to the concrete barrier, place his left hand on the barrier, then vault over the barrier "as if he had done it a million times before," and disappear. The concrete barrier was thirty-two inches high. The railing of the walkway was forty-three inches high. There was a forty-one-inch-wide open space between the concrete barrier and the walkway railing. Partin fell through the open space into the river ninety-four feet below. His body was recovered four months later.

[When Partin's vehicle had arrived on the bridge, Appellant had reversed course and ran toward Kane, who ordered him to "get down." Appellant complied and was placed under arrest for marijuana possession. After Partin's body was recovered, appellant was charged with manslaughter.]

No one will ever know why Partin fell through the opening between the concrete barrier and the pedestrian walkway. Perhaps, he did not realize the opening was there. Perhaps, he knew it was there and miscalculated his vault. Either way, however, his death resulted from his own volitional act and not from any force employed against him by Appellant. Whether Appellant's act of resisting arrest by unlawful flight from apprehension was a legal cause of Partin's death requires application of the provisions of KRS 501.020(3) (definition of "wantonly"), KRS 501.020(4) (definition of "recklessly"), and KRS 501.060 ("causal relationships").

KRS 501.020(3) defines "wantonly" as follows:

A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense *when he is aware of and consciously disregards a substantial and unjustifiable risk* that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that *a reasonable person* would observe in the situation…. (Emphasis added.)

KRS 501.020(4) defines "recklessly" as follows:

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense *when he fails to perceive a substantial and unjustifiable risk that the result will occur* or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that *a reasonable person* would observe in the situation. (Emphasis added.)

Thus, wantonness is the awareness of and conscious disregard of a risk that a reasonable person in the same situation would not have disregarded, and recklessness is the failure to perceive a risk that a reasonable person in the same situation would have perceived.

KRS 501.060 provides in pertinent part:

(1) Conduct is the cause of a result when it is an antecedent without which the result in question would not have occurred.

…

(3) When wantonly or recklessly causing a particular result is an element of the offense, the element is not established if the actual result is *not within the risk of which the actor is aware or, in the case of recklessness, of which he should be aware unless:*

(a) The actual result differs from the probable result only in the respect that *a different person* or different property *is injured or affected* or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) The actual result involves the same kind of injury or harm as the probable result and *occurs in a manner which the actor knows or should know is rendered substantially more probable by his conduct.*

(4) The question of whether an actor knew or should have known the result he caused was rendered substantially more probable by his conduct is an issue of fact.

(Emphasis added.)

Obviously, Appellant's unlawful act of resisting arrest by fleeing from apprehension was a "but for" cause of Partin's fatal attempt to pursue him by vaulting from the roadway of the bridge to the walkway. As noted by the 1974 Commentary to KRS 501.060, the issue then becomes primarily one of *mens rea*.

Once an act is found to be a cause in fact of a result and a substantial factor in bringing about that result, it is recognized as the proximate cause unless another cause, independent of the first, intervenes between the first and the result. And even then the first cause is treated as the proximate cause if the harm or injury resulting from the second is deemed to have been reasonably foreseeable by the first actor.

Thus, the fact that Partin vaulted over the concrete barrier of his own volition does not exonerate Appellant if Partin's act was either foreseen or foreseeable by Appellant as a reasonably probable result of his own unlawful act of resisting arrest by fleeing from apprehension. …[I]t is immaterial that it was Partin, as opposed to Kane or one of the other police officers, who fell from the bridge if such was a reasonably foreseeable consequence of the pursuit.

In *Phillips v. Commonwealth* (2000), we [upheld] the wanton murder conviction of a defendant who fired shots at an intended victim from inside a vehicle and thereby induced the intended victim to return fire and kill a passenger in the defendant's vehicle. We held that it was reasonably foreseeable that, if shots were fired at another person from inside a vehicle, the other person would return fire in the direction of the vehicle, thus endangering the lives of its other occupants. Also illustrative is the pre-code case of *Sanders v. Commonwealth* (1932), which upheld the manslaughter conviction of a defendant who had threatened his wife with a deadly weapon while they were in a moving vehicle, causing her to jump from the vehicle to her death—clearly a volitional act by the victim but a probable and reasonably foreseeable consequence of the unlawful act of the defendant.

In both *Phillips* and *Sanders*, a defendant applied unlawful *force* against another whose volitional response to that force caused the victim's death. The case *sub judice* is conceptually more similar to *Lofthouse v. Commonwealth* (2000), which reversed the reckless homicide conviction of a defendant who applied no force against the victim but supplied cocaine and heroin to the victim whose self-ingestion of those drugs caused his death. The result reached by the plurality opinion in *Lofthouse* did not turn on the fact that the victim died as a result of his own volitional act. Rather, in reversing the conviction, the opinion emphasized the absence of any evidence that the defendant knew or should have known that ingestion of those drugs under those circumstances would probably cause the victim's death. Here, as in *Lofthouse*, Appellant's *mens rea*, *i.e.*, what he knew or should have known with respect to the probable consequences of his conduct, is crucial to determining the issue of his criminal liability.

Analogous to this set of facts is the case where a person pursued by the police in a high speed motor vehicle chase is held criminally liable for the death of an innocent bystander accidentally struck by a pursuing police vehicle. In *People v. Schmies* (Cal. 1996), the California Court of Appeal directly addressed the effect of the police officers' conduct vis-a-vis the criminal liability of the defendant.

[T]he negligence or other fault of the officers is not a defense to the charge against defendant. The fact that the officers may have shared responsibility or fault for the accident does nothing to exonerate defendant for his role. In short, whether the officers' conduct could be described with such labels as negligent, careless, tortious, cause for discipline, or even criminal, in an action against them, is not at issue with respect to the defendant here. In this sense the "reasonableness" of the officers' conduct, focused upon their point of view and their blameworthiness for the death, is not relevant.

The issue with respect to defendant focuses upon his point of view, that is, whether the harm that occurred was a reasonably foreseeable consequence of his conduct at the time he acted. Since the officers' conduct was a direct and specific response to defendant's conduct, the claim that their conduct was a superseding cause of the accident can be supported only through a showing that their conduct was so unusual, abnormal, or extraordinary that it could not have been foreseen.

Schmies (emphasis added). Although California does not have a statutory equivalent of KRS 501.060, this common law analysis of causation is consistent with the principles embodied in our statute. Did the defendant commit an illegal act that induced the officer's response? If so, was that response reasonably foreseeable by the defendant at the time that he acted? The fault or negligence of the officer is not determinative of the defendant's guilt. However, the reasonableness of the officer's response is relevant in determining whether the response was foreseeable by the defendant. The more reasonable the response, the more likely that the defendant should have foreseen it. It is immaterial that the ultimate victim was the officer, himself, as opposed to an innocent bystander.

Here, the conduct that supports Appellant's conviction is not, as the Commonwealth suggests, his own act of vaulting over the concrete barrier. Partin was not present when that act occurred; thus, it was not reasonably foreseeable that he would have vaulted over the barrier in reliance on the fact that Appellant had done so without incident. (That analysis might have been appropriate if Officer Kane had fallen from the bridge when he followed Appellant onto the walkway.) The conduct that supports Appellant's conviction is the continuation of his unlawful flight when he obviously knew that Partin intended to pursue him (as evidenced by the fact that when he saw Partin's vehicle stop, he reversed course and began running in the opposite direction), and that, to do so, Partin would be required to cross the open space between the roadway and the walkway and thereby risk falling to his death. "The question of whether [Appellant] knew or should have known [that Partin's death] was rendered substantially more probable by his conduct is an issue of fact." KRS 501.060(4). There was sufficient evidence in this case to present that fact to a jury….

GRAVES, Justice, concurring.

… I write separately concerning Appellant's culpability.

Whether the act of running from an officer when one has been detained, standing alone if it results in the officer's death, would support a second-degree manslaughter conviction is a question we leave until another day. The act of vaulting the gap between the roadway and the sidewalk is sufficiently wanton to support the jury's verdict in this case. Appellant was aware of the danger of the gap and consciously disregarded it when he jumped. Knowing he was being pursued by at least one officer on foot, Appellant had to assume any pursuing officer would attempt to follow him, also becoming susceptible to the risk. A gap of nearly 4 feet across a drop of 94 feet into moving water cannot be described as anything but a substantial unjustifiable risk. It is certainly logical for the jury to conclude that, when Appellant disregarded this risk to which he was subjecting those lawfully pursuing him, he grossly deviated from the standard of conduct that a reasonable person would observe.

[Dissenting opinion of Justice KELLER omitted.]

Notes and questions on *Robertson*

1. Although Kentucky's terminology is somewhat unconventional, this case can help you learn the general distinction between recklessness and negligence in criminal law. It may be helpful to start with the Model Penal Code's definitions of those terms, since the MPC is more representative on this particular issue. Here are the MPC definitions.
   (c) **Recklessly.**
   A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
   (d) **Negligently.**A person acts negligently with respect to a material element of an offense when he should be aware of a

substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

MPC § 2.02 (c)-(d).

Notice that recklessness, as defined in the Model Penal Code, requires awareness of risk: the defendant must "consciously disregard" a risk. Negligence does not require actual knowledge of risk. Instead, a negligent defendant should be aware of the risk, but instead fails to perceive it.

2. Now compare the Model Penal Code definitions with Kentucky's definitions of the terms "wantonly" and "recklessly," discussed within the *Robertson*opinion. To act "wantonly" in Kentucky is approximately equivalent to acting "recklessly" under the MPC: a conscious disregard of a (known) substantial and unjustifiable risk. And to act "recklessly" in Kentucky is approximately equivalent to acting "negligently" under the MPC: a failure to perceive a substantial and unjustifiable risk. The variations in criminal law terminology by jurisdiction can be confusing, but it helps to let go of the expectation of consistency! It's always wise to check your own jurisdiction's definitions of key terms. It's also helpful to be aware of usual practice. The Model Penal Code's definition of recklessness as conscious disregard of a substantial and unjustifiable risk is fairly common, and Kentucky's approach is unusual.
3. Shawnta Robertson's appeal does not focus directly on evidence of his mental state, but rather on the issue of causation. Like many jurisdictions, though, Kentucky links causation to mental states. KRS 501.060, quoted within the court's opinion, sets forth causation requirements of Kentucky law for crimes with a mens rea of either "wantonly" or "recklessly." Try to articulate clearly the defendant's argument about causation here, and the prosecution's response. Which argument seems more compelling to you?
4. Beyond the law, we sometimes think of cause-and-effect relationships as scientific or empirical questions: does smoking cause lung cancer? Does human behavior cause global warming? It is important to see that in criminal law, causation analysis often involves normative judgments about whether a defendant should be held responsible for an effect that is in some way linked to the defendant's actions. A dissenting opinion in *Robertson*, not included above, emphasized this moral dimension to causation analysis. But-for causation can be interpreted very broadly, the dissent noted; a person who chooses to bear a child is a but-for cause of that child's later death, since but-for the birth the death could not have occurred. "Legal cause" or "proximate cause" is a device to narrow legal liability based on judgments of a particular actor's culpability or blameworthiness. As the dissent explained,

   KRS 501.060 represents a legislative policy determination that "[w]hen the requirement of 'proximate causation' dissociates the actor's conduct from a result of which it is a but-for cause, … the actor's culpability with respect to the result … is such that it would be unjust to permit the result to influence his liability or the gravity of his offense." In other words, "legal causation," … now conceptualized by KRS 501.060 as an issue of *mens rea* or culpability, nevertheless operates to exclude criminal liability in cases where the defendant would otherwise have committed an offense, but "common sense notions of responsibility for the occurrence of results" dictate that the imposition of criminal liability is inappropriate.

   Robertson, 82 S.W.3d 832 at 844 (Keller, J., dissenting).

5. Suppose that while police officers were chasing Robertson, Robertson (rather than one of the officers) had fallen off the bridge and drowned. Would the officers then be liable for manslaughter of Robertson? It's unlikely. Doctrines of "law enforcement justification" empower police officers to engage in many actions that would otherwise violate criminal statutes. "State and federal law generally prohibit assault, battery, use of deadly force, … damage to property, weapons possession, and so forth; all of these prohibitions contain exceptions for police officers on terms not applicable to ordinary citizens." *Stokes v. City of Chicago*, 744 F. Supp. 183, 188 n. 4 (N.D. Ill. 1990). Although law enforcement justifications set ostensible limits to police use of force and other conduct that would otherwise violate criminal laws, the question whether police have exceeded those limits is often controversial. As you are no doubt aware, many police killings of unarmed suspects are not prosecuted, even when some observers find the use of deadly force to be unwarranted. For additional discussion of these cases, see the section entitled "When Killing Isn't Criminal" later in this chapter. For now, notice that an inquiry into the justifiability of risky conduct is built into Kentucky's definition of "wantonly." To act wantonly is to disregard "a substantial and unjustifiable risk." Even if

Robertson had fallen and drowned, a prosecutor deciding whether criminal charges are appropriate might conclude that the risks that police took in chasing this suspect were justifiable ones.

6. Across the Kansas, New York, and Kentucky homicide statutes you've seen so far, there are offenses of first degree murder, second degree murder, first degree manslaughter, and second degree manslaughter. States that retain the death penalty often have a separate offense of "capital murder." Pennsylvania and Florida also each define a crime of third degree murder, and many states define still other homicide offenses, such as vehicular homicide or criminally negligent homicide. None of these terms has a universal definition that applies across all jurisdictions; each state decides how to divide homicide into more narrowly defined offenses. But it is useful to notice that each state does divide criminal homicides into categories, with "murder" typically being a more severe offense that carries more severe penalties than "manslaughter," and with a "first degree" offense typically carrying more severe penalty than a second degree (or third degree) one. What are the reasons that a state might want to divide homicide into multiple, more narrowly defined offenses? What aspects of a killing should be used to distinguish more severe offense from less severe ones, in your view?
7. As noted earlier in this chapter, the actus reus of most homicide offenses is the same – causing the death of a human being. The different types of homicide listed in the previous note are usually distinguished by mens rea standards. A defendant's state of mind can be difficult to ascertain or "prove," as we have seen; mental state elements are frequently established by arguments from circumstantial evidence. When deciding which homicide offense to charge, prosecutors could seek a conviction for the most severe offense that they think the evidence warrants, or they could propose a plea to a lesser homicide offense. It's important to see that prosecutors have choices; the proliferation of different types of homicide is another source of prosecutorial discretion. And as you have seen in other contexts, the exercise of discretion often produces patterns of racial disparities. For example, in both capital murder cases and non-capital homicide cases, empirical researchers have found that black defendants who kill white victims are likely to be charged with a more severe homicide offense than other defendant-victim racial combinations. See, e.g., Yoav Sapir, *Neither Intent Nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal* , 19 Harv. BlackLetter L.J. 130-131 (2003).

Check Your Understanding (6-3)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Negligence and Homicide

Massachusetts G.L. c. 90, 24G(b):

Whoever, upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of .08 or greater, or while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants or stimulant substances…, or whoever operates a motor vehicle negligently so that the lives or safety of the public might be endangered and by any such operation causes the death of another person, shall be guilty of homicide by a motor vehicle and shall be punished by imprisonment in a jail or house of correction for not less than 30 days nor more than 2 ½ years, or by a fine of not less than $300 nor more than $3,000 dollars, or both.

Mass. G.L. c. 265, 13:

Whoever commits manslaughter shall, except as hereinafter provided, be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail or a house of correction for not more than two and one half years.

COMMONWEALTH

v.

Sandra CARLSON

Supreme Judicial Court of Massachusetts, Worcester
849 N.E.2d 790

Decided June 21, 2006

Opinion by GREANEY, J.

We transferred this case here on our own motion to consider the scope of criminal liability for the negligent operation of a motor vehicle that results, in the circumstances described below, in death. A jury … convicted the defendant on a complaint charging motor vehicle homicide by negligent operation. The evidence at trial demonstrated that Carol Suprenant (victim) was hospitalized with chest and lung injuries suffered as a result of an accident caused by the defendant's negligent operation of an automobile and died of respiratory failure four days later after her doctors, at her request, removed her from a ventilator that allowed her to breathe and might have ensured her survival. The defendant appeals from her conviction, challenging (as she did at trial) the sufficiency of the evidence proving causation and claiming (for the first time on appeal) that the trial judge's instructions to the jury on the concept of superseding causes were inadequate. We affirm the conviction.

The jury could have found the following facts. On July 4, 2002, the victim and her husband, Robert Suprenant, left their home in Spencer to attend a cookout… At about noon, the Suprenants were traveling south on Mechanic Street and had just entered the intersection of Mechanic and Chestnut Streets, when their automobile was struck on the passenger side by an automobile traveling east on Chestnut Street operated by the defendant. The force of impact pushed the Suprenant's automobile a distance of approximately fifteen to twenty feet, across the road, over a sidewalk, and into a chain link fence. Traffic entering the intersection from the defendant's direction was controlled by both a stop sign and blinking red light. A jury could infer that the defendant had failed to stop (or yield the right of way) at the intersection and, thus, was negligent. The victim was transferred from the accident scene by emergency medical personnel to [a hospital].

As a result of the accident, the victim suffered multiple chest wall fractures, including fractures of the ribs and sternum and a lung contusion. The victim had suffered for several years prior to the accident from chronic obstructive pulmonary disease (COPD), a condition which makes it difficult to breathe and, thus, to supply oxygen to the bloodstream, and had required the use of an oxygen tank in her home to assist in her breathing.[1] The trauma to her chest compromised her ability to breathe as she had before the accident, to the point where she could no longer oxygenate her blood by normal breathing. That night in the intensive care unit, the victim was intubated and placed on a ventilator. The next morning, the doctors removed the victim from the ventilator, and she was transferred from the intensive care unit to a medical floor in the hospital.

Over the next few days, the victim's breathing difficulties increased. Three doctors separately advised the victim of the need to reintubate her and place her again on a ventilator in order to assist her breathing. At first the victim, who had in the past repeatedly told her daughter-in-law (and health proxy) that she never wanted to be kept alive by a ventilator, refused permission for the doctors to do so. After speaking with family members and her doctors, however, the victim acquiesced and allowed herself to be reintubated, at least temporarily, in order to determine if her health would improve.

The next morning the victim's kidneys began to fail, and doctors advised the victim that her worsening condition would require dialysis. At this point, the victim stated that she no longer wished to be attached to a ventilator. Two doctors on the medical staff of the hospital met separately with the victim to discuss the nature of the circumstances facing her and the probable consequences of forgoing mechanical ventilation. The victim's personal physician also spoke with her at great length about her decision and encouraged her to remain on the breathing tube and ventilator to allow her situation time to improve. The victim understood (a jury could infer) that her death was probable if she did not allow intubation and that, conversely, her injuries were potentially survivable if she remained on the ventilator. The victim was adamant that she did not want to be intubated. On July 8, she was taken off the ventilator and the intubation tube was removed. She died a few hours later from respiratory failure.

At trial one doctor testified that, if the accident had not happened, the victim probably would not have needed a ventilator and could have continued being on home oxygen in her usual fragile state of health, but that the chest injuries suffered in the accident "tipped the scales against her." He also opined that the victim's decision not to be intubated "likely played a role in her death." Another doctor stated his opinion "to a reasonable degree of medical certainty" that the victim would have survived her injuries if she had agreed to mechanical ventilatory support, and might even have returned to the state she was in before the accident, but conceded as well that the victim might have required "chronic and continuous ventilatory support." The victim's daughter-in-law assessed the situation as follows: "We all knew that it was a possibility that she might not make it, but [the doctors] couldn't give us a guarantee that she would make it without … hav[ing] to be on a [ventilator] for the rest of her life, and she didn't want to live like that, and we couldn't force her to do that." The victim's primary care physician testified, "I do think her mind was made up."

The judge denied the defendant's motions for the entry of a required finding of not guilty presented at the close of the Commonwealth's case and at the close of all the evidence. The defendant argues that the Commonwealth's proof was insufficient to sustain the conviction because no rational jury could have determined, beyond a reasonable doubt, that the victim's death from respiratory failure was proximately caused by the defendant's negligence.[2] The defendant asserts that the victim's death was a direct result of her independent decision not to undertake medical procedures that could be considered appropriate for a person in her condition and that would, in all probability, have allowed her to survive the accident. The defendant concedes that the victim had the right to make an informed decision to forgo life support, but argues that the victim's choice broke the chain of causation and relieved the defendant of criminal responsibility for the victim's death. We disagree.

… The standard of causation under G.L. c. 90, § 24G, is the same as that employed in tort law. …Conduct is a proximate cause of death if the conduct, "by the natural and continuous sequence of events, causes the death and without which the death would not have occurred." There is no question that the defendant's negligent failure to stop, or yield the right of way, at the intersection (for which the defendant accepts responsibility in this appeal) set in motion a chain of events that resulted in the victim's death. The victim's injuries from the accident exacerbated serious preexisting health problems and required her to be intubated and placed on the ventilator. Her ultimate decision to be removed from life support was not an independent occurrence but the final step in the continuous sequence of events that began with the defendant's negligent operation of her automobile. "But for" the negligence, the accident would not have occurred, and the victim would not have been forced into the position of having to make what was, in retrospect, a true life-or-death decision.

The general rule is that intervening conduct of a third party will relieve a defendant of culpability for antecedent negligence only if such an intervening response was not reasonably foreseeable…. "This is just another way of saying that an intervening act of a third party that was not reasonably foreseeable in the circumstances would prevent the victim's death from following naturally and continuously from the defendant's conduct." *Commonwealth v. Askew* (1989). Whether an intervening act was reasonably foreseeable and, thus, followed naturally from the defendant's conduct, or unforeseeable and, thus, broke the chain of causation as matter of law, is a question of fact for the jury to decide based on an assessment of the circumstances. See Restatement (Second) of Torts § 453 comment b (1965) (if either facts or reasonable foreseeability of intervening act are subject to reasonable difference of opinion, question of proximate cause must go to jury).

Here, the victim's choice was between invasive life support that might have assured her survival, but could also have led to a life of ventilator dependence (and, we may assume, continued pain and suffering), or acceptance of "comfort measures" only. The record shows that the victim was intelligent and coherent at all times. She had an absolute right to make the decision that she did. Modern medicine can sometimes prolong or sustain life by way of invasive procedures, but it is common knowledge that some patients will refuse to consent to such procedures. The jury were warranted in determining, in the circumstances of this case, that the victim's decision to forgo invasive life support was reasonably foreseeable.[3]

The defendant poses the question: "In the realm of crimes of negligence, should the tort concept of 'you take your victim as you find him' apply … even though, by pure chance and coincidence, it has the effect of turning an act of simple negligence into a serious crime?" The answer to this question is "yes."

Through the enactment of G.L. c. 90, § 24G (*b*), the Legislature has decided, as matter of social policy, to deter acts of reckless driving by making the killing of another human being by means of negligent operation of a motor vehicle an offense punishable by up to two and one-half years' imprisonment and a $3,000 fine. Prior to the statute's enactment, prosecutors presented with facts like those before us had to choose between prosecution of a misdemeanor, such as driving so as to endanger, G.L. c. 90, § 24(2) (*a*), or of the far more serious crime of involuntary manslaughter, G.L. c. 265, § 13, which carries a maximum penalty of twenty years' imprisonment. We have concluded that the Legislature intended the statute "to provide a middle ground between the felony of manslaughter and the misdemeanor of driving so as to endanger." A finding of ordinary negligence is sufficient to establish a violation of the statute. The defendant's insistence that this standard is not fair, or leaves "nothing to soften the blow," is irrelevant.

The defendant's suggestion that she should not be held accountable for the victim's death, because the same injuries would have been minor if inflicted on a healthy young person, has no merit. Our long-standing rule in Massachusetts, in criminal law as well as in tort, is that "the wrongdoer takes the victim as he or she finds him."

We now consider the defendant's argument that the judge's instructions to the jury on causation were so inadequate and confusing as to require a new trial. The defendant asserted no challenge to the judge's instructions at trial. She is entitled to relief only if she

demonstrates error in the instructions that created a substantial risk of a miscarriage of justice, namely, "a substantial danger that the jury was misled by [an] erroneous instruction, and that the instruction may have materially influenced their appraisal of the [evidence]."

The judge properly charged the jury on the elements of negligent motor vehicle homicide. He advised the jury that there may be more than one cause of a person's death, but that the Commonwealth is required to prove beyond a reasonable doubt that the defendant "directly and substantially set in motion a chain of events that produced the death in a natural and continuous sequence," and that the death would not have occurred without the defendant's actions. This is a correct statement of the law.

The judge instructed the jury on the law of intervening events and superseding causes, as set forth in the margin,[4] in accordance with what has been said in this opinion. The judge emphasized that the jury must acquit the defendant "if the death would not have occurred without the intervention of another person or event, and a reasonable person in the same circumstances would not have foreseen the likely possibility of such a result." There was no possibility that the jury did not understand that they must find beyond a reasonable doubt that the defendant's negligence directly set in motion a continuous chain of events that produced the death, and that they must acquit the defendant if the death would not have occurred without the intervention of some other person or event that was not reasonably foreseeable. The judge's instructions focused the jury's attention on the issue of causation and correctly left the issue of foreseeability to the jury.

…The judgment of conviction is affirmed.

So ordered.

Notes and questions on *Carlson*

1. *Carlson*, like the case before it, concerns causation, and the link between causation and the defendant's mental state. This appellate opinion is focused on the question whether there is adequate evidence that Sandra Carlson caused the victim's death. As the court points out in footnote 4, at trial the defendant raised two separate, alternative arguments: that her conduct was not negligent, and that her conduct (even if negligent) did not cause the victim's death. But only the causation issue was raised on appeal, for reasons not made clear in the appellate opinion. The court does not explain how negligence is defined in Massachusetts law, but it does identify the relevant evidence of negligence: Carlson failed to stop at a stop sign (or yield the right of way when she was obligated to do so).
2. Assuming Carlson was in fact negligent, the question becomes whether her negligent driving was the cause of Carol Suprenant's death. Carlson's argument on appeal focuses on proximate cause and, more specifically, the concept of an intervening or superceding cause. What is "proximate cause"? That term is often used to express the idea that the defendant's conduct must be sufficiently closely related to the result in question, or sufficiently influential on that result, to merit imposing liability on the defendant. But what does it mean for conduct to be "sufficiently" related to a result? Proximate cause analysis has frequently involved normative, subjective, and hard-to-express judgments about the defendant's culpability or blameworthiness. As the *Carlson*court explained in a footnote not included above,
   The term "proximate cause" has fallen into disfavor. Drafters of the Restatement (Third) of Torts: Liability for Physical Harm § 574 (Proposed Final Draft No. 1, 2005), make clear their dislike for the term as "an especially poor one to describe the idea to which it is connected," and have opted instead to use "scope of liability" as the umbrella term for the concept that, for liability to be imposed, the harm that occurred must be one that results from the hazards that made the defendant's conduct tortious. We continue to use the term as it has been used in the past, as shorthand for the principle that an actor's liability is limited to those physical harms that are within the foreseeable risks of the tortious conduct…. We thus leave for another day, in a case where the matter is appropriately briefed, the issue whether we should replace the term "proximate cause," as defined in our case law, with the term "scope of liability," as defined in the proposed Restatement (Third) of Torts, and the principles accompanying "scope of liability" set forth therein. The judge did not use the term "proximate cause" while instructing the jury.

   Carlson, 849 N.E.2d 790, 794 n. 5 (2006). Does the term "scope of liability" clarify matters? Or does it simply restate the underlying (and inevitably normative, subjective) question – do we think this defendant's actions are sufficiently linked to the bad result to make it appropriate to punish this defendant?
3. Whether a jurisdiction embraces the term "proximate cause" or not, it is fairly standard to consider intervening or superceding factors as part of causation analysis. The idea is often expressed in the metaphor used by Sandra Carlson here: certain

interventions will “break the chain” of causation, or sever the link between the defendant’s conduct and the relevant result. Here, Carlson argued that Carol Suprenant’s rejection of medical treatment broke the chain of causation, separating Carlson’s negligent driving from Suprenant’s eventual death. Why does the Massachusetts court reject this argument?

4. Back to negligence: we use appellate cases as case studies, and the facts of *Carlson*make it a great case study on issues of causation. However, because Massachusetts uses tort-law principles of negligence for its motor vehicle homicide statute, *Carlson*might leave you confused about the relationship between negligence in tort law and negligence in criminal law. Most jurisdictions (even if not Massachusetts) do distinguish between civil negligence (the tort standard) and criminal negligence. Here’s one way to think about the distinction. In tort, negligence is most often a description of someone’s conduct or actions: this person had a duty of care; he did not act in a way consistent with that duty; his failure to exercise some duty of care led to some bad result. Negligence in tort is not primarily about a person’s brain—it’s about what he did or didn’t do, rather than about what he was or wasn’t thinking. In criminal law, in contrast, negligence is most often a description of a mental state: it’s what you might call “culpable obliviousness.” To be sure, to have a crime, the mental state of negligence needs to go along with conduct – you need both mens rea and actus reus to get the crime. But when criminal law uses the word negligence, it’s asking you to think about the person’s state of mind. And usually, criminal negligence is not simply a state of mind of forgetfulness or unawareness, but a state of mind that can be characterized as a “gross deviation” from a reasonable person’s level of awareness or attentiveness. For a typical definition of criminal negligence, look again at Model Penal Code § 2.02(d), reprinted above after *Robertson*.

When Killing Isn’t Criminal

Sometimes, killing another person is not classified as a criminal act, even if the killing is intentional. An affirmative defense of self-defense or insanity could relieve the person who kills from criminal liability, as mentioned briefly above in the notes after *Patterson*, and as discussed in greater depth in Chapter Ten. Similarly, principles of law enforcement justification such as those discussed in the notes after *Robertson* often shield police officers from criminal liability for civilian deaths. Jurisdictions have some leeway in defining the scope of self-defense, insanity, or a law enforcement justification. The guidelines for police use of force are somewhat general, to the frustration of many critics: states often empower police to use as much force (including as much deadly force) as is “reasonable.”

Keep in mind that whether a given killing meets the legal standard for self-defense, insanity, or a law enforcement justification is a question that is not always subject to formal adjudication. If prosecutors simply decline to bring homicide charges (or any other type of criminal charge, for that matter), there is little that other parties can do to challenge that decision. On this point, you may wish to look again at *Inmates of Attica v. Rockefeller* in Chapter Three. Recall that prison officials killed more than 30 prisoners after a disturbance at a state prison. Despite allegations that at least some of the killings were retaliatory rather than defensive, state and federal prosecutors declined to charge the officials with homicide or other criminal offenses. The Second Circuit rejected the surviving prisoners’ efforts to compel prosecution.

Sexual Assault

New Jersey Stat. Ann. 2C:14–2c(1):

c. An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:

(1) The actor *uses physical force or coercion*, but the victim does not sustain severe personal injury;

(2) The victim is one whom the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated;

(3) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor’s legal, professional or occupational status;

(4) The victim is at least 16 but less than 18 years old and:

(a) The actor is related to the victim by blood or affinity to the third degree; or

(b) The actor has supervisory or disciplinary power over the victim; or

(c) The actor is a foster parent, a guardian, or stands in loco parentis within the household;

(5) The victim is at least 13 but less than 16 years old and the actor is at least 4 years older than the victim.

Sexual assault is a crime of the second degree.

STATE of New Jersey In the Interest of M.T.S.

Supreme Court of New Jersey
609 A.2d 1266

Decided July 30, 1992

The opinion of the Court was delivered by HANDLER, J.

Under New Jersey law a person who commits an act of sexual penetration using physical force or coercion is guilty of second-degree sexual assault. The sexual assault statute does not define the words "physical force." The question posed by this appeal is whether the element of "physical force" is met simply by an act of non-consensual penetration involving no more force than necessary to accomplish that result.

That issue is presented in the context of what is often referred to as "acquaintance rape." The record in the case discloses that the juvenile, a seventeen-year-old boy, engaged in consensual kissing and heavy petting with a fifteen-year-old girl and thereafter engaged in actual sexual penetration of the girl to which she had not consented. There was no evidence or suggestion that the juvenile used any unusual or extra force or threats to accomplish the act of penetration.

The trial court determined that the juvenile was delinquent for committing a sexual assault. The Appellate Division reversed…. We granted the State's petition for certification.

I

The issues in this case are perplexing and controversial. We must explain the role of force in the contemporary crime of sexual assault and then define its essential features. We then must consider what evidence is probative to establish the commission of a sexual assault. The factual circumstances of this case expose the complexity and sensitivity of those issues and underscore the analytic difficulty of those seemingly-straightforward legal questions.

On Monday, May 21, 1990, fifteen-year-old C.G. was living with her mother, her three siblings, and several other people, including M.T.S. and his girlfriend. A total of ten people resided in the three-bedroom town-home at the time of the incident. M.T.S., then age seventeen, was temporarily residing at the home with the permission of C.G.'s mother; he slept downstairs on a couch. C.G. had her own room on the second floor. At approximately 11:30 p.m. on May 21, C.G. went upstairs to sleep after having watched television with her mother, M.T.S., and his girlfriend. When C.G. went to bed, she was wearing underpants, a bra, shorts, and a shirt. At trial, C.G. and M.T.S. offered very different accounts concerning the nature of their relationship and the events that occurred after C.G. had gone upstairs. The trial court did not credit fully either teenager's testimony.

C.G. stated that earlier in the day, M.T.S. had told her three or four times that he "was going to make a surprise visit up in [her] bedroom." She said that she had not taken M.T.S. seriously and considered his comments a joke because he frequently teased her. She testified that M.T.S. had attempted to kiss her on numerous other occasions and at least once had attempted to put his hands inside of her pants, but that she had rejected all of his previous advances.

C.G. testified that on May 22, at approximately 1:30 a.m., she awoke to use the bathroom. As she was getting out of bed, she said, she saw M.T.S., fully clothed, standing in her doorway. According to C.G., M.T.S. then said that "he was going to tease [her] a little bit." C.G. testified that she "didn't think anything of it"; she walked past him, used the bathroom, and then returned to bed, falling into a "heavy" sleep within fifteen minutes. The next event C.G. claimed to recall of that morning was waking up with M.T.S. on top of her, her underpants and shorts removed. She said "his penis was into [her] vagina." As soon as C.G. realized what had happened, she said, she immediately slapped M.T.S. once in the face, then "told him to get off [her], and get out." She did not scream or cry out. She testified that M.T.S. complied in less than one minute after being struck; according to C.G., "he jumped right off of [her]." She said she did not know how long M.T.S. had been inside of her before she awoke.

C.G. said that after M.T.S. left the room, she "fell asleep crying" because "[she] couldn't believe that he did what he did to [her]." She explained that she did not immediately tell her mother or anyone else in the house of the events of that morning because she

was “scared and in shock.” According to C.G., M.T.S. engaged in intercourse with her “without [her] wanting it or telling him to come up [to her bedroom].” By her own account, C.G. was not otherwise harmed by M.T.S.

At about 7:00 a.m., C.G. went downstairs and told her mother about her encounter with M.T.S. earlier in the morning and said that they would have to “get [him] out of the house.” While M.T.S. was out on an errand, C.G.’s mother gathered his clothes and put them outside in his car; when he returned, he was told that “[he] better not even get near the house.” C.G. and her mother then filed a complaint with the police.

According to M.T.S., he and C.G. had been good friends for a long time, and their relationship “kept leading on to more and more.” He had been living at C.G.’s home for about five days before the incident occurred; he testified that during the three days preceding the incident they had been “kissing and necking” and had discussed having sexual intercourse. The first time M.T.S. kissed C.G., he said, she “didn’t want him to, but she did after that.” He said C.G. repeatedly had encouraged him to “make a surprise visit up in her room.”

M.T.S. testified that at exactly 1:15 a.m. on May 22, he entered C.G.’s bedroom as she was walking to the bathroom. He said C.G. soon returned from the bathroom, and the two began “kissing and all,” eventually moving to the bed. Once they were in bed, he said, they undressed each other and continued to kiss and touch for about five minutes. M.T.S. and C.G. proceeded to engage in sexual intercourse. According to M.T.S., who was on top of C.G., he “stuck it in” and “did it [thrust] three times, and then the fourth time [he] stuck it in, that’s when [she] pulled [him] off of her.” M.T.S. said that as C.G. pushed him off, she said “stop, get off,” and he “hopped off right away.”

According to M.T.S., after about one minute, he asked C.G. what was wrong; she replied with a back-hand to his face. He recalled asking C.G. what was wrong a second time, and her replying, “how can you take advantage of me or something like that.” M.T.S. said that he proceeded to get dressed and told C.G. to calm down, but that she then told him to get away from her and began to cry. Before leaving the room, he told C.G., “I’m leaving … I’m going with my real girlfriend, don’t talk to me … I don’t want nothing to do with you or anything, stay out of my life … don’t tell anybody about this … it would just screw everything up.” He then walked downstairs and went to sleep.

On May 23, 1990, M.T.S. was charged with conduct that if engaged in by an adult would constitute second-degree sexual assault of the victim, contrary to *N.J.S.A.* 2C:14–2c(1)….

Following a two-day trial on the sexual assault charge, M.T.S. was adjudicated delinquent. After reviewing the testimony, the court concluded that the victim had consented to a session of kissing and heavy petting with M.T.S. The trial court did not find that C.G. had been sleeping at the time of penetration, but nevertheless found that she had not consented to the actual sexual act. Accordingly, the court concluded that the State had proven second-degree sexual assault beyond a reasonable doubt. On appeal, following the imposition of suspended sentences on the sexual assault and the other remaining charges, the Appellate Division determined that the absence of force beyond that involved in the act of sexual penetration precluded a finding of second-degree sexual assault. It therefore reversed the juvenile’s adjudication of delinquency for that offense.

II

The New Jersey Code of Criminal Justice, *N.J.S.A.* 2C:14–2c(1), defines “sexual assault” as the commission “of sexual penetration” “with another person” with the use of “physical force or coercion.” An unconstrained reading of the statutory language indicates that both the act of “sexual penetration” and the use of “physical force or coercion” are separate and distinct elements of the offense. Neither the definitions section of 2C:14 nor the remainder of the Code of Criminal Justice provides assistance in interpreting the words “physical force.” The initial inquiry is, therefore, whether the statutory words are unambiguous on their face and can be understood and applied in accordance with their plain meaning. The answer to that inquiry is revealed by the conflicting decisions of the lower courts and the arguments of the opposing parties. The trial court held that “physical force” had been established by the sexual penetration of the victim without her consent. The Appellate Division believed that the statute requires some amount of force more than that necessary to accomplish penetration.

The parties offer two alternative understandings of the concept of “physical force” as it is used in the statute. The State would read “physical force” to entail any amount of sexual touching brought about involuntarily. A showing of sexual penetration coupled with a lack of consent would satisfy the elements of the statute. The Public Defender urges an interpretation of “physical force” to mean

force "used to overcome lack of consent." That definition equates force with violence and leads to the conclusion that sexual assault requires the application of some amount of force in addition to the act of penetration.

…Resort to common experience or understanding does not yield a conclusive meaning [of the term force]….

Thus, as evidenced by the disagreements among the lower courts and the parties, and the variety of possible usages, the statutory words "physical force" do not evoke a single meaning that is obvious and plain. Hence, we must pursue avenues of construction in order to ascertain the meaning of that statutory language. Those avenues are well charted. When a statute is open to conflicting interpretations, the court seeks the underlying intent of the legislature, relying on legislative history and the contemporary context of the statute. With respect to a law, like the sexual assault statute, that "alters or amends the previous law or creates or abolishes types of actions, it is important, in discovering the legislative intent, to ascertain the old law, the mischief and the proposed remedy." We also remain mindful of the basic tenet of statutory construction that penal statutes are to be strictly construed in favor of the accused. Nevertheless, the construction must conform to the intent of the Legislature.

…. The origin of the rape statute that the current statutory offense of sexual assault replaced can be traced to the English common law. Under the common law, rape was defined as "carnal knowledge of a woman against her will." Cynthia A. Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 *Geo.Wash.L.Rev.* 399, 401 (1988) (*Offender's Forceful Conduct*). American jurisdictions generally adopted the English view, but over time states added the requirement that the carnal knowledge have been forcible, apparently in order to prove that the act was against the victim's will. As of 1796, New Jersey statutory law defined rape as "carnal knowledge of a woman, forcibly and against her will." Crimes Act of March 18, 1796 § 8, [1821] *N.J.Rev.Laws* (Pennington) 246. Those three elements of rape—carnal knowledge, forcibly, and against her will—remained the essential elements of the crime until 1979. Leigh Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 *Women's Rts.L.Rep.* 170, 207 (1981) (Bienen, *Rape III*).

Under traditional rape law, in order to prove that a rape had occurred, the state had to show both that force had been used and that the penetration had been against the woman's will. Force was identified and determined not as an independent factor but in relation to the response of the victim, which in turn implicated the victim's own state of mind. "Thus, the perpetrator's use of force became criminal only if the victim's state of mind met the statutory requirement. The perpetrator could use all the force imaginable and no crime would be committed if the state could not prove additionally that the victim did not consent." National Institute of Law Enforcement and Criminal Justice, *Forcible Rape—An Analysis of Legal Issues* 5 (March 1978). Although the terms "non-consent" and "against her will" were often treated as equivalent, under the traditional definition of rape, both formulations squarely placed on the victim the burden of proof and of action. Effectively, a woman who was above the age of consent had actively and affirmatively to withdraw that consent for the intercourse to be against her will….

The presence or absence of consent often turned on credibility. To demonstrate that the victim had not consented to the intercourse, and also that sufficient force had been used to accomplish the rape, the state had to prove that the victim had resisted. According to the oft-quoted Lord Hale, to be deemed a credible witness, a woman had to be of good fame, disclose the injury immediately, suffer signs of injury, and cry out for help. 1 Matthew Hale, *History of the Pleas of the Crown* 633 (1st ed. 1847). Courts and commentators historically distrusted the testimony of victims, "assuming that women lie about their lack of consent for various reasons: to blackmail men, to explain the discovery of a consensual affair, or because of psychological illness." Evidence of resistance was viewed as a solution to the credibility problem; it was the "outward manifestation of nonconsent, [a] device for determining whether a woman actually gave consent." Note, *The Resistance Standard in Rape Legislation*, 18 *Stan.L.Rev.* 680, 689 (1966).

The resistance requirement had a profound effect on the kind of conduct that could be deemed criminal and on the type of evidence needed to establish the crime. Courts assumed that any woman who was forced to have intercourse against her will necessarily would resist to the extent of her ability. *People v. Barnes* (Cal. 1986) (observing that "[h]istorically, it was considered inconceivable that a woman who truly did not consent to sexual intercourse would not meet force with force"). In many jurisdictions the requirement was that the woman have resisted to the utmost. "Rape is not committed unless the woman oppose the man to the utmost limit of her power." *People v. Carey* (N.Y.1918). "[A] mere tactical surrender in the face of an assumed superior physical force is not enough. Where the penalty for the defendant may be supreme, so must resistance be unto the uttermost." *Moss v. State* (Miss. 1950). Other states followed a "reasonableness" standard, while some required only sufficient resistance to make non-consent reasonably manifest.

At least by the 1960s courts in New Jersey followed a standard for establishing resistance that was somewhat less drastic than the traditional rule. “The fact that a victim finally submits does not necessarily imply that she consented. Submission to a compelling force, or as a result of being put in fear, is not consent.” *State v. Harris* (N.J. 1961). Nonetheless, the “resistance” requirement remained an essential feature of New Jersey rape law. Thus, in 1965 the Appellate Division stated: “[W]e have rejected the former test that a woman must resist ‘to the uttermost.’ We only require that she resist as much as she possibly can under the circumstances.”

The judicial interpretation of the pre-reform rape law in New Jersey, with its insistence on resistance by the victim, greatly minimized the importance of the forcible and assaultive aspect of the defendant’s conduct. Rape prosecutions turned then not so much on the forcible or assaultive character of the defendant’s actions as on the nature of the victim’s response. Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 *Va.L.Rev.* 1500, 1505–07 (1975) (*Definition of Forcible Rape*). “[I]f a woman assaulted is physically and mentally able to resist, is not terrified by threats, and is not in a place and position that resistance would have been useless, it must be shown that she did, in fact, resist the assault.” *State v. Terry.* Under the pre-reform law, the resistance offered had to be “in good faith and without pretense, with an active determination to prevent the violation of her person, and must not be merely passive and perfunctory.” That the law put the rape victim on trial was clear.

The resistance requirement had another untoward influence on traditional rape law. Resistance was necessary not only to prove non-consent but also to demonstrate that the force used by the defendant had been sufficient to overcome the victim’s will. The amount of force used by the defendant was assessed in relation to the resistance of the victim. *See, e.g.,* Tex. Penal Code Ann. § 21.02 (1974) (repealed 1983) (stating that “the amount of force necessary to negate consent is a relative matter to be judged under all the circumstances, the most important of which is the resistance of the female”). In New Jersey the amount of force necessary to establish rape was characterized as “the degree of force sufficient to overcome any resistance that had been put up by the female.” *State v. Terry*. Resistance, often demonstrated by torn clothing and blood, was a sign that the defendant had used significant force to accomplish the sexual intercourse. Thus, if the defendant forced himself on a woman, it was her responsibility to fight back, because force was measured in relation to the resistance she put forward. Only if she resisted, causing him to use more force than was necessary to achieve penetration, would his conduct be criminalized. Indeed, the significance of resistance as the proxy for force is illustrated by cases in which victims were unable to resist; in such cases the force incident to penetration was deemed sufficient to establish the “force” element of the offense.

The importance of resistance as an evidentiary requirement set the law of rape apart from other common-law crimes, particularly in the eyes of those who advocated reform of rape law in the 1970s. *See, e.g.,* Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 *Am.Crim.L.Rev.* 335, 346 (1973). However, the resistance requirement was not the only special rule applied in the rape context. A host of evidentiary rules and standards of proof distinguished the legal treatment of rape from the treatment of other crimes. Many jurisdictions held that a rape conviction could not be sustained if based solely on the uncorroborated testimony of the victim. Often judges added cautionary instructions to jury charges warning jurors that rape was a particularly difficult charge to prove. Courts in New Jersey allowed greater latitude in cross-examining rape victims and in delving into their backgrounds than in ordinary cases. Rape victims were required to make a prompt complaint or have their allegations rejected or viewed with great skepticism. Some commentators suggested that there be mandatory psychological testing of rape victims. *E.g.,* 3A *Wigmore on Evidence* § 924a (Chadbourn rev. ed. 1970).

During the 1970s feminists and others criticized the stereotype that rape victims were inherently more untrustworthy than other victims of criminal attack…. Reformers condemned such suspicion as discrimination against victims of rape. *See, e.g., The Legal Bias against Rape Victims*, 61 *A.B.A.J.* 464 (1975). They argued that “[d]istrust of the complainant’s credibility [had] led to an exaggerated insistence on evidence of resistance,” resulting in the victim rather than the defendant being put on trial. *Toward a Consent Standard, supra* 43 *U.Chi.L.Rev.* at 626. Reformers also challenged the assumption that a woman would seduce a man and then, in order to protect her virtue, claim to have been raped. If women are no less trustworthy than other purported victims of criminal attack, the reformers argued, then women should face no additional burdens of proving that they had not consented to or had actively resisted the assault. *see* Linda Brookover Bourque, *Defining Rape* 110 (1989) (declaring objective of reform to “bring[ ] legal standards for rape cases in line with those used in other violent crimes by normalizing requirements for evidence”).

To refute the misguided belief that rape was not real unless the victim fought back, reformers emphasized empirical research indicating that women who resisted forcible intercourse often suffered far more serious injury as a result…. That research

discredited the assumption that resistance to the utmost or to the best of a woman's ability was the most reasonable or rational response to a rape.

The research also helped demonstrate the underlying point of the reformers that the crime of rape rested not in the overcoming of a woman's will or the insult to her chastity but in the forcible attack itself—the assault on her person. Reformers criticized the conception of rape as a distinctly sexual crime rather than a crime of violence. They emphasized that rape had its legal origins in laws designed to protect the property rights of men to their wives and daughters. Susan Brownmiller, *Against Our Will: Men, Women, and Rape* 377 (1975); *Acquaintance Rape: The Hidden Crime* 318 (Andrea Parrot & Laurie Bechhofer, eds. 1991). Although the crime had evolved into an offense against women, reformers argued that vestiges of the old law remained, particularly in the understanding of rape as a crime against the purity or chastity of a woman. *Definition of Forcible Rape*, *supra*. The burden of protecting that chastity fell on the woman, with the state offering its protection only after the woman demonstrated that she had resisted sufficiently.

That rape under the traditional approach constituted a sexual rather than an assaultive crime is underscored by the spousal exemption. According to the traditional reasoning, a man could not rape his wife because consent to sexual intercourse was implied by the marriage contract. Therefore, sexual intercourse between spouses was lawful regardless of the force or violence used to accomplish it. *Offender's Forceful Conduct*, *supra*; Note,*To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 *Harv.L.Rev.* 1255, 1258–60 (1986); *see also* Hale, *supra* (noting that "a 'ravished' woman could 'redeem' the convicted offender and save him from execution by marrying him").

Critics of rape law agreed that the focus of the crime should be shifted from the victim's behavior to the defendant's conduct, and particularly to its forceful and assaultive, rather than sexual, character. Reformers also shared the goals of facilitating rape prosecutions and of sparing victims much of the degradation involved in bringing and trying a charge of rape. There were, however, differences over the best way to redefine the crime. Some reformers advocated a standard that defined rape as unconsented-to sexual intercourse; others urged the elimination of any reference to consent from the definition of rape. Nonetheless, all proponents of reform shared a central premise: that the burden of showing non-consent should not fall on the victim of the crime. In dealing with the problem of consent the reform goal was not so much to purge the entire concept of consent from the law as to eliminate the burden that had been placed on victims to prove they had not consented.

Similarly, with regard to force, rape law reform sought to give independent significance to the forceful or assaultive conduct of the defendant and to avoid a definition of force that depended on the reaction of the victim. Traditional interpretations of force were strongly criticized for failing to acknowledge that force may be understood simply as the invasion of "bodily integrity." In urging that the "resistance" requirement be abandoned, reformers sought to break the connection between force and resistance.

III

The history of traditional rape law sheds clearer light on the factors that became most influential in the enactment of current law dealing with sexual offenses. The circumstances surrounding the actual passage of the current law reveal that it was conceived as a reform measure reconstituting the law to address a widely-sensed evil and to effectuate an important public policy. Those circumstances are highly relevant in understanding legislative intent and in determining the objectives of the current law.

In October 1971, the New Jersey Criminal Law Revision Commission promulgated a Final Report and Commentary on its proposed New Jersey Penal Code. New Jersey Criminal Law Revision Commission, *The New Jersey Penal Code, Vol. I: Report and Penal Code* (1971). The proposed Code substantially followed the American Law Institute's Model Penal Code (MPC) with respect to sexual offenses. *See M.P.C.* §§ 213.1 to 213.4. The proposed provisions did not present a break from traditional rape law. They would have established two principal sexual offenses: aggravated rape, a first-degree or second-degree crime involving egregious circumstances; and rape, a crime of the third-degree. 1971 *Penal Code*, § 2C:14–1(a)(1). Rape was defined as sexual intercourse with a female to which she was compelled to submit by any threat that would prevent resistance by a woman of ordinary resolution. *Id.* at § 14–1(b)(1). The comments to the MPC, on which the proposed Code was based, state that "[c]ompulsion plainly implies non-consent," and that the words "compels to submit" require more than "a token initial resistance."

The Legislature did not endorse the Model Penal Code approach to rape. Rather, it passed a fundamentally different proposal in 1978 when it adopted the Code of Criminal Justice. *L.*1978, *c.* 95 § 2C:14–1 to –7; *N.J.S.A.* 2C:14–1 to –7. The new statutory provisions covering rape were formulated by a coalition of feminist groups assisted by the National Organization of Women (NOW) National Task Force on Rape. Both houses of the Legislature adopted the NOW bill, as it was called, without major

changes and Governor Byrne signed it into law on August 10, 1978. The NOW bill had been modeled after the 1976 Philadelphia Center for Rape Concern Model Sex Offense Statute. The Model Sex Offense Statute in turn had been based on selected provisions of the Michigan Criminal Sexual Conduct Statute, Mich. Stat. Ann. § 28.788(4)(b) (Callaghan 1990), and on the reform statutes in New Mexico, Minnesota, and Wisconsin. The stated intent of the drafters of the Philadelphia Center's Model Statute had been to remove all features found to be contrary to the interests of rape victims. John M. Cannel, *New Jersey Criminal Code Annotated* 279 (1991). According to its proponents the statute would "normalize the law. We are no longer saying rape victims are likely to lie. What we are saying is that rape is just like other violent crimes."

Since the 1978 reform, the Code has referred to the crime that was once known as "rape" as "sexual assault." The crime now requires "penetration," not "sexual intercourse." It requires "force" or "coercion," not "submission" or "resistance." It makes no reference to the victim's state of mind or attitude, or conduct in response to the assault. It eliminates the spousal exception based on implied consent. It emphasizes the assaultive character of the offense by defining sexual penetration to encompass a wide range of sexual contacts, going well beyond traditional "carnal knowledge." Consistent with the assaultive character, as opposed to the traditional sexual character, of the offense, the statute also renders the crime gender-neutral: both males and females can be actors or victims.

The reform statute defines sexual assault as penetration accomplished by the use of "physical force" or "coercion," but it does not define either "physical force" or "coercion" or enumerate examples of evidence that would establish those elements. Some reformers had argued that defining "physical force" too specifically in the sexual offense statute might have the effect of limiting force to the enumerated examples. The task of defining "physical force" therefore was left to the courts.

That definitional task runs the risk of undermining the basic legislative intent to reformulate rape law. *See* Susan Estrich, *Real Rape* 60 (1987) (noting that under many modern formulations of rape "[t]he prohibition of force or 'forcible compulsion' ends up being defined in terms of a woman's resistance"). That risk was encountered by the Michigan Supreme Court in *People v. Patterson* (1987). That court considered the sufficiency of the evidence of force or coercion in the prosecution of a sexual contact charge against a defendant who had placed his hands on the genital area of a seventeen-year-old girl while she was sleeping. A majority of the court concluded that the defendant had not used force as required by the statute because there was "no evidence of physical overpowering … [and] there was no submission." Justice Boyle, in dissent, soundly criticized the majority's position as a distortion of the legislature's intent to protect the sexual privacy of persons from the use of force, coercion, or other undue advantage. Concluding that the statute did not require a showing of any extra force, Justice Boyle pointed out that in "defin[ing] force by measuring the degree of resistance by the victim," the majority had effectively "reintroduc[ed] the resistance requirement, when the proper focus ought to be on whether the contact was unpermitted."

Unlike the Michigan statute interpreted in *Patterson*, the New Jersey Code of Criminal Justice does not refer to force in relation to "overcoming the will" of the victim, or to the "physical overpowering" of the victim, or the "submission" of the victim. It does not require the demonstrated non-consent of the victim. As we have noted, in reforming the rape laws, the Legislature placed primary emphasis on the assaultive nature of the crime, altering its constituent elements so that they focus exclusively on the forceful or assaultive conduct of the defendant.

The Legislature's concept of sexual assault and the role of force was significantly colored by its understanding of the law of assault and battery. As a general matter, criminal battery is defined as "the unlawful application of force to the person of another." 2 Wayne LaFave & Austin Scott, *Criminal Law*, § 7.15 at 301 (1986). The application of force is criminal when it results in either (a) a physical injury or (b) an offensive touching. Any "unauthorized touching of another [is] a battery." Thus, by eliminating all references to the victim's state of mind and conduct, and by broadening the definition of penetration to cover not only sexual intercourse between a man and a woman but a range of acts that invade another's body or compel intimate contact, the Legislature emphasized the affinity between sexual assault and other forms of assault and battery.

The intent of the Legislature to redefine rape consistent with the law of assault and battery is further evidenced by the legislative treatment of other sexual crimes less serious than and derivative of traditional rape. The Code redefined the offense of criminal sexual contact to emphasize the involuntary and personally-offensive nature of the touching. N.J.S.A. 2C:14–1(d). Sexual contact is criminal under the same circumstances that render an act of sexual penetration a sexual assault, namely, when "physical force" or "coercion" demonstrates that it is unauthorized and offensive. N.J.S.A. 2C:14–3(b). Thus, just as any unauthorized touching is a crime under traditional laws of assault and battery, so is any unauthorized sexual contact a crime under the reformed law of criminal sexual contact, and so is any unauthorized sexual penetration a crime under the reformed law of sexual assault.

The understanding of sexual assault as a criminal battery, albeit one with especially serious consequences, follows necessarily from the Legislature's decision to eliminate non-consent and resistance from the substantive definition of the offense. Under the new law, the victim no longer is required to resist and therefore need not have said or done anything in order for the sexual penetration to be unlawful. The alleged victim is not put on trial, and his or her responsive or defensive behavior is rendered immaterial. We are thus satisfied that an interpretation of the statutory crime of sexual assault to require physical force in addition to that entailed in an act of involuntary or unwanted sexual penetration would be fundamentally inconsistent with the legislative purpose to eliminate any consideration of whether the victim resisted or expressed non-consent.

We note that the contrary interpretation of force—that the element of force need be extrinsic to the sexual act—would not only reintroduce a resistance requirement into the sexual assault law, but also would immunize many acts of criminal sexual *contact* short of penetration. The characteristics that make a sexual contact unlawful are the same as those that make a sexual penetration unlawful. An actor is guilty of criminal sexual contact if he or she commits an act of sexual contact with another using "physical force" or "coercion." *N.J.S.A.* 2C:14–3(b). That the Legislature would have wanted to decriminalize unauthorized sexual intrusions on the bodily integrity of a victim by requiring a showing of force in addition to that entailed in the sexual contact itself is hardly possible.

Because the statute eschews any reference to the victim's will or resistance, the standard defining the role of force in sexual penetration must prevent the possibility that the establishment of the crime will turn on the alleged victim's state of mind or responsive behavior. We conclude, therefore, that any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault. Therefore, physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful. The definition of "physical force" is satisfied under *N.J.S.A.* 2C:14–2c(1) if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration.

Under the reformed statute, permission to engage in sexual penetration must be affirmative and it must be given freely, but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances. Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.

Our understanding of the meaning and application of "physical force" under the sexual assault statute indicates that the term's inclusion was neither inadvertent nor redundant. The term "physical force," like its companion term "coercion," acts to qualify the nature and character of the "sexual penetration." Sexual penetration accomplished through the use of force is unauthorized sexual penetration. That functional understanding of "physical force" encompasses the notion of "unpermitted touching" derived from the Legislature's decision to redefine rape as a sexual assault. As already noted, under assault and battery doctrine, any amount of force that results in either physical injury or offensive touching is sufficient to establish a battery. Hence, as a description of the method of achieving "sexual penetration," the term "physical force" serves to define and explain the acts that are offensive, unauthorized, and unlawful.

That understanding of the crime of sexual assault fully comports with the public policy sought to be effectuated by the Legislature. In redefining rape law as sexual assault, the Legislature adopted the concept of sexual assault as a crime against the bodily integrity of the victim. Although it is possible to imagine a set of rules in which persons must demonstrate affirmatively that sexual contact is unwanted or not permitted, such a regime would be inconsistent with modern principles of personal autonomy. The Legislature recast the law of rape as sexual assault to bring that area of law in line with the expectation of privacy and bodily control that long has characterized most of our private and public law. In interpreting "physical force" to include any touching that occurs without permission we seek to respect that goal.

Today the law of sexual assault is indispensable to the system of legal rules that assures each of us the right to decide who may touch our bodies, when, and under what circumstances. The decision to engage in sexual relations with another person is one of the most private and intimate decisions a person can make. Each person has the right not only to decide whether to engage in sexual contact with another, but also to control the circumstances and character of that contact. No one, neither a spouse, nor a friend, nor an acquaintance, nor a stranger, has the right or the privilege to force sexual contact. See *Definition of Forcible Rape*, *supra*,

(arguing that "forcible rape is viewed as a heinous crime primarily because it is a violent assault on a person's bodily security, particularly degrading because that person is forced to submit to an act of the most intimate nature").

We emphasize as well that what is now referred to as "acquaintance rape" is not a new phenomenon. Nor was it a "futuristic" concept in 1978 when the sexual assault law was enacted. Current concern over the prevalence of forced sexual intercourse between persons who know one another reflects both greater awareness of the extent of such behavior and a growing appreciation of its gravity. Notwithstanding the stereotype of rape as a violent attack by a stranger, the vast majority of sexual assaults are perpetrated by someone known to the victim. One respected study indicates that more than half of all rapes are committed by male relatives, current or former husbands, boyfriends or lovers. Diana Russell, *The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females*, 7 *Victimology* 81 (1982). Similarly, contrary to common myths, perpetrators generally do not use guns or knives and victims generally do not suffer external bruises or cuts. Although this more realistic and accurate view of rape only recently has achieved widespread public circulation, it was a central concern of the proponents of reform in the 1970s.

The insight into rape as an assaultive crime is consistent with our evolving understanding of the wrong inherent in forced sexual intimacy. It is one that was appreciated by the Legislature when it reformed the rape laws, reflecting an emerging awareness that the definition of rape should correspond fully with the experiences and perspectives of rape victims. Although reformers focused primarily on the problems associated with convicting defendants accused of violent rape, the recognition that forced sexual intercourse often takes place between persons who know each other and often involves little or no violence comports with the understanding of the sexual assault law that was embraced by the Legislature. Any other interpretation of the law, particularly one that defined force in relation to the resistance or protest of the victim, would directly undermine the goals sought to be achieved by its reform.

IV

In a case such as this one, in which the State does not allege violence or force extrinsic to the act of penetration, the factfinder must decide whether the defendant's act of penetration was undertaken in circumstances that led the defendant reasonably to believe that the alleged victim had freely given affirmative permission to the specific act of sexual penetration. Such permission can be indicated either through words or through actions that, when viewed in the light of all the surrounding circumstances, would demonstrate to a reasonable person affirmative and freely-given authorization for the specific act of sexual penetration.

In applying that standard to the facts in these cases, the focus of attention must be on the nature of the defendant's actions. The role of the factfinder is not to decide whether reasonable people may engage in acts of penetration without the permission of others. The Legislature answered that question when it enacted the reformed sexual assault statute: reasonable people do not engage in acts of penetration without permission, and it is unlawful to do so. The role of the factfinder is to decide not whether engaging in an act of penetration without permission of another person is reasonable, but only whether the defendant's belief that the alleged victim had freely given affirmative permission was reasonable.

In these cases neither the alleged victim's subjective state of mind nor the reasonableness of the alleged victim's actions can be deemed relevant to the offense. The alleged victim may be questioned about what he or she did or said only to determine whether the defendant was reasonable in believing that affirmative permission had been freely given. To repeat, the law places no burden on the alleged victim to have expressed non-consent or to have denied permission, and no inquiry is made into what he or she thought or desired or why he or she did not resist or protest.

In short, in order to convict under the sexual assault statute in cases such as these, the State must prove beyond a reasonable doubt that there was sexual penetration and that it was accomplished without the affirmative and freely-given permission of the alleged victim. As we have indicated, such proof can be based on evidence of conduct or words in light of surrounding circumstances and must demonstrate beyond a reasonable doubt that a reasonable person would not have believed that there was affirmative and freely-given permission. If there is evidence to suggest that the defendant reasonably believed that such permission had been given, the State must demonstrate either that defendant did not actually believe that affirmative permission had been freely-given or that such a belief was unreasonable under all of the circumstances. Thus, the State bears the burden of proof throughout the case.

In the context of a sexual penetration not involving unusual or added "physical force," the inclusion of "permission" as an aspect of "physical force" effectively subsumes and obviates any defense based on consent. *See N.J.S.A.* 2C:2–10c(3). The definition of "permission" serves to define the "consent" that otherwise might allow a defendant to avoid criminal liability. Because "physical force" as an element of sexual assault in this context requires the *absence* of affirmative and freely-given permission, the "consent"

necessary to negate such "physical force" under a defense based on consent would require the *presence* of such affirmative and freely-given permission. Any lesser form of consent would render the sexual penetration unlawful and cannot constitute a defense.

In this case, the Appellate Division concluded that non-consensual penetration accomplished with no additional physical force or coercion is not criminalized under the sexual assault statute. It acknowledged that its conclusion was "anomalous" because it recognized that "a woman has every right to end [physically intimate] activity without sexual penetration." Thus, it added to its holding that "[e]ven the force of penetration might … be sufficient if it is shown to be employed to overcome the victim's unequivocal expressed desire to limit the encounter."

The Appellate Division was correct in recognizing that a woman's right to end intimate activity without penetration is a protectable right the violation of which can be a criminal offense. However, it misperceived the purpose of the statute in believing that the only way that right can be protected is by the woman's unequivocally expressed desire to end the activity. The effect of that requirement would be to import into the sexual assault statute the notion that an assault occurs only if the victim's will is overcome, and thus to reintroduce the requirement of non-consent and victim-resistance as a constituent material element of the crime. Under the reformed statute, a person's failure to protest or resist cannot be considered or used as justification for bodily invasion.

We acknowledge that cases such as this are inherently fact sensitive and depend on the reasoned judgment and common sense of judges and juries. The trial court concluded that the victim had not expressed consent to the act of intercourse, either through her words or actions. We conclude that the record provides reasonable support for the trial court's disposition.

Accordingly, we reverse the judgment of the Appellate Division and reinstate the disposition of juvenile delinquency for the commission of second-degree sexual assault.

Notes and questions on *M.T.S.*

1. *M.T.S.* is a useful case because it both describes the traditional common law of rape and identifies the concerns that led advocates to push for statutory reform. Why was the common law definition of rape—"carnal knowledge of a woman, forcibly and against her will"—inadequate? Was the problem with the wording of the legal definition (the criminalization decision), or with the way that definition was used by prosecutors (the enforcement decision), or with the way that definition was applied by juries and trial courts (the adjudication decision)?
2. The New Jersey Supreme Court speaks sometimes of consent, sometimes of permission. And of course, the traditional common law definition spoke of neither, but did specify that the intercourse be "against [the] will" of the complainant. Is there any meaningful difference between consent, permission, or will? Consider whether criminal law should care about the actual mental state of the person who alleges rape, or instead about what that person communicates regarding sex. Does a concern for the victim's actual mental state invite courts to "put the victim on trial"? How does the New Jersey Supreme Court attempt to avoid that result?
3. Consider the different roles of factfinders and appellate courts. In principle, facts are to be found at the trial court level, and appellate courts should answer only questions of law. Given that distinction, think about the detailed account of the factual evidence in Part I of the New Jersey Supreme Court's opinion. Was it necessary to include the precise details of the encounter, as told both by C.G. and M.T.S.? Imagine that Part I included only one paragraph – the last paragraph that you see immediately before Part II, describing the trial court's findings and the subsequent appeals. Would readers react differently to this case? Why do you think the New Jersey Supreme Court included the detailed chronology of the encounter?
4. In *M.T.S.*, the New Jersey Supreme Court introduced an "affirmative consent" standard long before the concept of affirmative consent became widely embraced. Although you are likely to have encountered the term "affirmative consent" before reading this case, especially if you attended any training or received any materials as a college student about appropriate sexual contacts, affirmative consent is still largely unknown to criminal definitions of rape or sexual assault. That is, even though many universities and colleges (and some high schools) seek to instill in their students the idea that sex without affirmative consent is objectionable, most U.S. jurisdictions define rape (or sexual assault) in terms of force or non-consent without an explicit requirement of affirmative consent.
5. Is rape exceptional? Should the law view rape as "just like other violent crimes," to quote the New Jersey Supreme Court (which was itself quoting advocates for the New Jersey statute)? Should we think of the crime as "sexual assault," unwanted physical contact akin to the ordinary assaults studied at the outset of this chapter, but with a specific attendant circumstance: contact with sexual organs rather than other body parts? Or does "unwanted touching" take on a different character when sexual

organs are involved? Are there features of sexual activity that make it categorically different from other types of physical contact, so that rape law should be categorically different from assault law? Professor Aya Gruber addresses these questions in *Sex Exceptionalism in Criminal Law* (Stanford Law Review, forthcoming 2023).

6. Rape and race: Sexual offenses are another area of criminal law for which patterns of racial disparity have been extensively documented. First, as for homicide, "the racial composition of the defendant-victim dyad," or the respective racial identities of the defendant and victim, has a significant influence on enforcement and adjudication decisions: black men accused of raping white women are more likely to be charged with severe offenses and subjected to severe penalties. See, e.g., I. Bennett Capers, *The Unintentional Rapist*, 87 Wash. U. L. Rev. 1345, 1360-1364 (2010). The death penalty is no longer available as a penalty for the crime of rape, but one of the considerations that led the Supreme Court to prohibit the imposition of capital punishment for rape was the fact that this penalty was reserved almost exclusively for black men convicted of assaulting white women. Beyond these sentencing patterns, Professor Capers writes of a more general "white letter law of rape" that exists alongside the "black letter" law.

   > Most of the time … a type of unwritten law of race, what I have termed "white letter law"—suggesting near invisibility, something akin to laws "inscribed in white ink on white paper"—dictated whether the elements of the crime of rape had been satisfied; indeed, whether the elements were even capable of being satisfied. Even under Blackstone's definition that rape was "carnal knowledge of a woman forcibly and against her will," jurisdictions in this country applied a type of white letter law exemption. It was understood, for example, that the definition of rape did not prohibit the rape of black slaves, or, for that matter, slave children.
   >
   > The unwritten white letter law of rape held particular sway following ratification of the Reconstruction Amendments, when explicit distinctions based on race in criminal statutes risked invalidation under the Fourteenth Amendment's Equal Protection Clause. Evidence of this can be seen in the black letter law's initial requirement of proof that the victim resisted to the utmost before a conviction of rape would be sustained. Though the "utmost resistance" requirement was clear, what it meant in practice —in terms of which victims were believed, which men were prosecuted, and which defendants were found guilty—turned on what was often unsaid, i.e., the white letter law. As Susan Estrict aptly observed … resistance itself was color-dependent: "white women [were] not required to resist black men…."
   >
   > In short, though the black letter law was, at least on the books, "color-blind," the white letter law provided caveats and exceptions that were color-coded.

Capers, *The Unintentional Rapist*, 1357-1358.

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1. [Fn. 2 by the Court:] The victim's primary care physician testified at trial that the victim's condition would have gradually deteriorated over time and that the disease would have shortened her life. He opined that, based on the severity of her disease, the victim could have expected to enjoy only three to six more years of "good quality" life. ↵
2. [Fn. 4 by the Court:] Conviction under G.L. c. 90, § 24G(b), requires proof by the Commonwealth beyond a reasonable doubt that (1) the defendant operated a motor vehicle, (2) on a public way, (3) in a negligent manner to endanger lives and public safety, (4) thereby causing the death of another person. The focus at trial was on whether the defendant was negligent and whether her negligence caused the victim's death. Only the latter element is at issue in this appeal. ↵
3. [Fn. 6 by the Court:] The defendant's attempt to assign blame to the victim for her own death, because she "made the deliberate choice to ... engage in irrational and self-destructive behavior" is not persuasive. There is no contributory negligence in the law of motor vehicle homicide. We also reject the defendant's attempt to apply the tort doctrine of "avoidable consequences" to this criminal matter. ↵
4. [Fn. 8 by the Court:] "If the defendant's actions would not have brought about the death all by themselves without the intervention of some other person or event, the defendant is still held responsible as the cause of death if two conditions are met. First, the defendant's actions directly and substantially set in motion a natural, continuous sequence of events to cause the death. And second, a reasonable person in the defendant's position would have foreseen that her actions could easily result in serious injury or death to someone like the victim." ↵

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7.9: Dangerous Objects and Substances

Introduction

Many crimes are defined with reference to some prohibited (or highly regulated) object or substance. The two most familiar examples, and the focus of this chapter, are drug offenses and gun offenses. The simplest form of a prohibited-object offense is possession—possession of cocaine, for example—but the concept of possession is sometimes complicated, as explored in this chapter. Another common form of prohibited-object offenses combines possession with the intent to distribute. Other statutes criminalize the actual distribution, or the manufacture, transportation, or storage of prohibited substances or objects. Criminal regulations of drugs and guns generate an enormous number of cases on criminal court dockets. Indeed, more Americans are arrested for drug crimes than for any other general category of crimes, such as violent offenses or property crimes. Gun crimes do not generate nearly as large a share of the criminal court docket as drug offenses do, but they are a significant source of both criminal convictions and eventual prison sentences. And gun enhancements—an increase in the penalty for some other criminal conduct based on the defendant's possession of a gun—are an important contributing factor to the size of America's prisoner population.

The rationale for the criminalization of guns or drugs may seem self-evident: possession of the object is thought to be dangerous, and therefore the government wishes to deter possession. But note that this category of criminal law imposes punishment for the creation of a risk, rather than for the actual materialization of some harm. No one needs to experience adverse effects of drug use, or even to use drugs at all, for prosecutors to establish an offense of drug possession or distribution. Similarly, the weapons offenses addressed in this chapter typically involve guns that don't go off, but are seen as sufficiently risky that mere possession is criminalized. If a gun does go off – if it is used to shoot someone – criminal law typically addresses that actual harm through assault or homicide law. Thus, this chapter gives us the opportunity to think about the decision to criminalize risky conduct without requiring proof of an actual injury. How should policymakers determine that a given object or substance is dangerous enough to criminalize? What kinds of factors – such as empirical evidence, moral judgments, or political considerations – actually do influence these criminalization decisions?

Another distinctive feature of the crimes addressed in this chapter is that they typically involve consensual conduct. That is, the person who possesses drugs or a gun has often obtained the contraband by choice, from a willing seller; the person who distributes the prohibited object is usually doing so to a willing purchaser. The crimes addressed in this chapter are often called "victimless" crimes, in the sense that there is usually not a specific person who is directly injured by the prohibited activity and likely to complain to law enforcement about it. To be sure, many would argue that drug use and distribution, or widespread gun possession, do have indirect victims in that these practices destabilize communities and contribute to higher levels of violence. This chapter offers some background data on the connections between drugs and violence, and between guns and violence.

The notion that some objects are dangerous enough to be criminally regulated is an old idea. Various forms of weapons and liquor offenses have existed in state law since the earliest days of the American republic. But the experiment with nationwide alcohol prohibition early in the twentieth century proved very important to the later trajectory of American criminal law. Some scholars argue that we cannot fully understand the "War on Drugs" or the broader "War on Crime" without appreciating the ways those massive criminalization and enforcement initiatives were made possible by "the War on Alcohol." See Lisa McGirr, *The War on Alcohol: Prohibition and the Rise of the American State* (2016). The Eighteenth Amendment, which was ratified in 1919 and took effect in 1920, provided that "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." Again, many state and local laws had regulated or outright prohibited alcohol before 1919, but Prohibition was a nationwide ban, and it was understood to be such a novel use of federal authority that it required a constitutional amendment. President Herbert Hoover famously called Prohibition a "noble experiment," but by most accounts, the experiment was a failure. Consumption of alcohol decreased initially, then resumed and even increased. The criminalization of alcohol production and distribution created black markets and encouraged the development of organized crime. Liquor laws were selectively enforced, often along racial lines. The inconsistent enforcement of these laws was one of the major themes of critiques of Prohibition that led to the abandonment of the "noble experiment" and the repeal of the Eighteenth Amendment in 1933.

But as one historian puts it, "Prohibition is often described as a dead letter, but it was an extremely lively corpse." Lawrence Friedman, *Crime and Punishment in American History* 266 (1993). During Prohibition, extensive resources were devoted to the expansion of federal law enforcement capacities and, to a lesser degree, state law enforcement. Many of the institutions that are necessary for mass incarceration—the policing and surveillance capacities, the prosecuting agencies, the prisons—originated or were greatly expanded during Prohibition. Historian Lisa McGirr argues that Prohibition created both the institutional capacity and a moral precedent for the War on Drugs: "[In] today's colossal penal state, the most consequential harvest of the war on alcohol was the uniquely American cross-breeding of prohibitionary and punitive approaches toward illicit recreational narcotic substances…. The war against drugs was a smaller but longer-lived effort birthed simultaneously." McGirr, *The War on Alcohol*, at 250.

One feature of alcohol prohibition is also characteristic of contemporary drug and gun criminalization: the underlying conduct is fairly common, so common that law enforcement could not hope to detect and apprehend all who engage in it. At the same time, these prohibited-object offenses are usually relatively easy to prosecute. Once law enforcement seizes the prohibited object from a defendant, it is not difficult to obtain a conviction. The seized contraband, along with police testimony about how they obtained it, will usually be sufficient to establish the elements of the offense. Together, the frequency of violation and ease of prosecution for crimes of prohibition create expansive enforcement discretion: which drug users or sellers, or which gun carriers, will be subject to criminal interventions? Recall *United States v. Armstrong* in Chapter Three, in which the Supreme Court considered but ultimately rejected a claim that federal prosecutors were enforcing drug laws selectively on the basis of race. Moreover, since these "victimless" crimes are often detected through sting operations or other undercover efforts, enforcement officials play a significant role in shaping factual details that affect a defendant's criminal liability: what quantity of drugs does the undercover officer seek to buy? How many transactions with an undercover agent are staged before an arrest, and where do those transactions take place?

Patterns of racial disparity can be found in the enforcement of all the categories of crimes discussed in this book, but the patterns are particularly striking, and very extensively documented, with regard to drug offenses. Some scholars point to drug offenses as the most important source of racial disparities in mass incarceration. See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in an Age of Colorblindness* (2010). Others have questioned whether the War on Drugs is the central factor driving mass incarceration, noting that more people are imprisoned for "violent" offenses than for drug offenses. See, e.g., John Pfaff, *Locked In: The True Causes of Mass Incarceration—and How to Achieve Real Reform* (2017). The issue is complicated: we cannot fully measure the impact of drug criminalization by looking at prison sentences for drug offenses. The majority of drug offense convictions lead to a sentence other than prison time, such as probation or community supervision, but the fact of a prior conviction (even one not punished with prison time) can make it more likely that a given person will be sentenced to prison for a subsequent offense. That is, stark racial disparities in one area of criminal law can generate racial disparities in another area. We seem to see this with regard to gun possession offenses, where there is considerable evidence that "people of color bear the brunt of enforcement." Benjamin Levin, *Guns and Drugs*, 84 Fordham L. Rev. 2173, 2194 (2016). Unlike drug laws, which often categorically prohibit possession of a given substance by any member of the general public, a typical gun prohibition identifies certain categories of persons—such as those with felony convictions—who are barred from possessing guns. If persons of color are overrepresented among all persons with felony convictions, in part because of racial bias in enforcement of drug laws, then we should not be surprised to see persons of color overrepresented among those arrested for and convicted of weapons offenses. Still further disparity may be produced by enforcement choices with regard to gun laws, as this chapter will explore. The last section of this chapter looks in more detail at the role of drug and gun offenses in producing mass incarceration.

By the end of this chapter, you should understand the basic concepts used to criminalize dangerous objects and substances. You will learn legal definitions of possession and constructive possession, and the way that the legal concept of possession interacts with mental state requirements. In that regard, the cases in this chapter will help you further expand your understanding of mens rea analysis in criminal law. You will also see examples of ways that distribution and transportation (in the drug context) or various forms of "use" (in the gun context) are criminalized.

This chapter, like the rest of the book, uses appellate judicial opinions to teach key points of law. Earlier chapters have already discussed ways in which appellate caselaw can be misleading, and here it's especially important to keep that point in mind. The vast majority of drug and gun prosecutions are resolved with a guilty plea and never lead to appellate review. Even among the tiny fraction of drug and gun cases that do eventually gain appellate review, the issue on appeal is much more likely to concern specific enforcement actions, as when a defendant claims that the police discovered the contraband through an unconstitutional search or

seizure, than a question about the statutory definition of the offense. The judicial scrutiny of defendants' mental states that you see in the cases in this chapter is a useful teaching tool, but it is atypical in most areas of criminal law, and it is especially atypical within the world of gun and drug prosecutions. As always, read judicial opinions carefully but put them in context; be sure to read the surrounding notes carefully to gain a more complete understanding of drug and gun law in practice.

Drug Offenses: The Meaning of "Possession"

Louisiana Revised Statutes § 40:966(C). Possession [of narcotics].

It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance classified in Schedule I unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner [or as otherwise authorized…]

STATE of Louisiana

v.

Walter BOOTH

Court of Appeal of Louisiana, Fourth Circuit
745 So.2d 737

Oct. 20, 1999

MURRAY, Judge.

… Defendant Walter Booth, Jr., was charged by bill of information with possession of heroin, to which he pled not guilty. A twelve-person jury found him guilty as charged on February 19, 1998 [and] he was sentenced to five years at hard labor….

New Orleans Police Officer Travis McCabe testified that on October 20, 1997, he conducted an investigation of 2309 Sixth Street, Apartment 2, after he and Sergeant Steven Gaudet received information from a confidential informant. The officers later applied for and received a search warrant for the premises. He and Sgt. Gaudet, along with two other officers and a dog trained to search for drugs, executed the warrant [early in the morning on October 21, 1997]. [Mr. Booth and Gail Varnado were both at the apartment at the time it was searched.] Officer McCabe described the apartment as small, consisting of one bedroom, one bathroom, a living room, and a kitchen. The search dog located narcotics inside a wall-mounted heater. Officer McCabe opened the vent on the bottom and found a plastic package containing approximately twenty-seven aluminum foil packages of heroin. The officers also discovered on top of a curio cabinet, a large felt hat containing a syringe, a long piece of rubber, and a small plastic bag containing five additional small foil packages of heroin. Officer McCabe also recovered an Entergy electric bill in Mr. Booth's name, and a letter from a religious organization addressed to both him and Ms. Varnado, both of which were addressed to 2309 Sixth Street, Apartment "D." At that point, Mr. Booth and Ms. Varnado were advised of their rights and arrested.

On cross-examination, Officer McCabe admitted that none of the drugs was in plain view, and that initially the focus of the police investigation was Ms. Varnado. He said he had occasion to watch the apartment from a distance, and witnessed an informant make a purchase from Ms. Varnado with a marked twenty-dollar bill, although this marked twenty-dollar bill was not found during the search of the apartment….

Sergeant Steve Gaudet explained that he remained in the area of the apartment complex while Officer McCabe went to obtain the search warrant. He detained Ms. Varnado outside of the apartment as she was leaving, and took her inside, where Mr. Booth was seated in the front room, clad only in a pair of boxer shorts. He said the wall-mounted heater where the drugs were found was next to the sofa where Mr. Booth was seated. …

Mr. Booth testified in his own behalf, and stated that on October 20 and 21, 1997, he was living at the Sixth Street address, but Ms. Varnado, whom he stated was his fiancée, was not living there. In fact, Mr. Booth had no idea where Ms. Varnado was living at that time. He had agreed only that Ms. Varnado could stay at his apartment that particular night, in the front room. Mr. Booth claimed that when police found him he was sleeping in the bedroom, and they awakened him and asked where Ms. Varnado was. He denied knowledge of any drugs in the heater or in the hat.

On cross-examination, Mr. Booth again stated that Ms. Varnado was his fiancée, but said he and she "had a legal separation…" He again denied being awake sitting in the living room when police entered the apartment. Mr. Booth said the letter addressed to Ms. Varnado found in his apartment was brought with her from her jail cell. He explained that she recently had been paroled, and was

going to live with him, but they had an altercation and he put her out. He said she asked to stay in the front room for a couple of days, and that was how the letter got there. Mr. Booth admitted to a 1995 conviction for "having a gun," a conviction for possession of marijuana, a 1975 conviction for being a convicted felon in possession of a firearm, and a conviction for armed robbery. He denied or could not recall [other] prior convictions….

… Mr. Booth claims that the evidence is insufficient to sustain his conviction.

… "In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of act could have found the defendant guilty beyond a reasonable doubt…. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted…."

La.Rev.Stat. 40:966(C) makes it unlawful for any person to knowingly or intentionally possess heroin, a controlled dangerous substance classified in Schedule I. In *State v. Brady* (1999), this Court stated:

To support a conviction for possession of narcotics, the State must prove that a defendant knowingly possessed narcotics. The State need not prove that the defendant was in actual possession of the narcotics found; constructive possession is sufficient to support conviction. The mere presence of a defendant in the area where the narcotics were found is insufficient to prove constructive possession.

A person not in physical possession of narcotics may have constructive possession when the drugs are under that person's dominion and control. A person may be deemed to be in joint possession of a drug which is in the physical possession of a companion if he willfully and knowingly shares with the other the right to control it. Determination of whether a defendant had constructive possession depends on the circumstances of each case. Among the factors to consider in determining whether the defendant exercised dominion and control sufficient to constitute constructive possession are whether the defendant knew that illegal drugs were present in the area, the defendant's relationship to the person in actual possession of the drugs, whether there is evidence of recent drug use, the defendant's proximity to the drugs, and any evidence that the area is frequented by drug users.

Brady, 727 So.2d at 1268 [internal citations omitted].

In the instant case, police observed Ms. Varnado sell narcotics to an informant out of Mr. Booth's apartment. She was detained and taken inside of the apartment, where she admittedly was staying. Mr. Booth admitted that Ms. Varnado was his fiancée. Accepting the testimony of Officer McCabe, Mr. Booth was in the front room when police entered. Heroin was found in a wall-mounted heater next to where Mr. Booth was seated, and more heroin and drug paraphernalia was found in a curio cabinet in the living room. A letter found in the apartment was addressed to Mr. Booth and Ms. Varnado, at the apartment in question.

Mr. Booth's testimony conflicted with that of police officers in that he said he was sleeping in his bedroom when police entered the apartment and asked him where Ms. Varnado was. He disputed that the police took Ms. Varnado into custody outside, and brought her into the apartment when they entered. Mr. Booth denied any knowledge of the drugs in his apartment, and said his fiancée was only staying at his apartment temporarily. The jury knew that Mr. Booth had prior convictions for armed robbery, possession of marijuana, and being a convicted felon in possession of a firearm. The jury obviously did not believe that Mr. Booth was not aware of the heroin found in two locations in his apartment. The trier of fact's determination of credibility should not to be disturbed on appeal absent an abuse of discretion.

In *State v. Maresco* (La.1987), police served a search warrant on an apartment where Lori Wermuth and her fiancé, Gary Weaver, resided. Wermuth was at work when the warrant was served, but Weaver and Steven Maresco were in the apartment. Police found seven pounds of marijuana packaged in large and small plastic bags in the kitchen and on the dining room table, and a vinyl bag inside of a closed trunk in the bedroom containing over six thousand Valium pills. A scale was also recovered, along with mail addressed to Wermuth. In affirming Wermuth's conviction for possession with intent to distribute marijuana, this Court stated: "Although Lori Wermuth was not home when the warrant was executed, the marijuana was seized in her apartment…. The jury was satisfied that the State proved Wermuth … exercised sufficient control over the marijuana. Their conclusion was reasonable and there is no basis to hold otherwise."

In the instant case, viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that Mr. Booth knowingly exercised dominion and control over the heroin found in his apartment, and that all of the essential elements of the offense of possession of heroin were proven beyond a reasonable doubt….

For the foregoing reasons, we affirm Mr. Booth's conviction….

Notes and questions on *State v. Booth*

1. Consider the actus reus of possession offenses. Is possession an act? Do possession offenses violate the general requirement, discussed in Chapter Two, that criminal liability requires a voluntary act? (See *State v. Alvarado* and accompanying notes.) The acquisition of drugs or some other object is more easily identified as an act, but most jurisdictions don't criminalize "buying drugs" or "acquiring drugs" as a separate offense. Instead, mere possession is the basic offense, and then there are more serious offenses such as distribution (which includes selling), manufacture, and transportation of the prohibited substance. Did Walter Booth possess drugs simply by being near them? And if so, was his conviction based on a voluntary act?
2. Now consider the mens rea of possession offenses. Most jurisdictions address the above questions by linking possession to a specific mental state. If a defendant knowingly acquires or receives a controlled substance, or knows that a controlled substance in his control, he can be convicted of possession. This approach is reflected in the Model Penal Code's Section 2.01, which states, "Possession is an act … if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession." Here, it may be helpful to remember that criminal liability can be based on an omission, or a failure to act, in some circumstances. If there is a specific legal duty to act and a defendant fails to fulfill that duty, he or she may be criminally liable. (Omission liability is discussed briefly in Chapter Two and in more detail in Chapter Six.) One could (and courts do) characterize possession as either a knowing act or a knowing omission: either the defendant knowingly acquired the drugs (an act), or the defendant failed to "terminate his possession" even after becoming aware that he was in possession of a controlled substance.
3. Again, the usual view is that a possession statute both prohibits knowing acquisition and creates a duty to dispossess oneself of the prohibited object if one becomes aware that the object is in one's control. The concept of possession thus combines both act and mental state elements. Until 2021, the state of Washington was an outlier on this issue. Its courts had interpreted the state's possession of controlled substances statute as a strict liability offense, holding that the prosecution need not prove that the defendant knew that drugs were in his possession. Thus, a commercial truck driver who entered the state with marijuana hidden in pallets on his truck could be convicted, even in the absence of any evidence that he knew the marijuana was there. But the Washington Supreme Court found the strict liability statute unconstitutional in 2021, holding that the law impermissibly criminalized "wholly innocent nonconduct" when applied to a defendant who had no knowledge of possession. *State v. Blake*, 481 P.3d 521 (Wash. 2021).
4. A further wrinkle: what if a defendant is aware that she possesses a given object, but is mistaken about what the object is? What if she find a plastic bag left in the kitchen and believes that it holds baking powder, but the substance inside is really cocaine? The usual account of possession as knowing possession would require knowledge that the substance is a prohibited one. Of course, depending on the circumstances, a defendant may not be able to convince a factfinder that he or she was mistaken about the nature of the object possessed. And specific statutes may criminalize even some forms of mistaken possession. For more details, see *United States v. Jewell* and *State v. Freeman* in this chapter, and the accompanying notes for each case.
5. Notwithstanding the formal definition of possession as knowing possession in most jurisdictions, practitioners and commentators occasionally refer to possession offenses somewhat imprecisely as strict liability offenses. The strict liability characterization arises in part because the evidence that suffices to "prove" knowledge is often minimal, so that a possession offense operates like a strict liability offense. Once contraband is found on or near your person, that evidence is itself likely to be sufficient for a criminal conviction even if as a formal matter the statute requires proof of knowledge.
6. The *Booth* court refers to "actual possession," "physical possession," and "constructive possession." The terms actual possession or physical possession are often used interchangeably. In one typical jury instruction, "Actual possession means a) the object is in the hand of or on the person, or b) the object is in a container in the hand or on the person, or c) the object is so close as to be within ready reach and is under the control of the person." Fla. Std. Jury Instr. (Crim.) 10.15 (2017). For a similar instruction, see footnote 3 in *State v. Donaldson* in Chapter Five. As the *Donaldson* instruction makes clear, an object can be possessed by more than one person at a time. Thus, in the case you've just read, Walter Booth and Gail Varnado can each be convicted of possessing the same heroin.
7. What factors does the Booth court identify as relevant to establishing constructive possession? Could there ever be a case in which the resident of a home was not in constructive possession of any drugs found within that home? Most of the time, the homeowner or tenant is likely to be found in constructive possession, as suggested by the *Booth* court's discussion of *State v. Maresco*. [exclusive control v shared control] But there are occasional exceptions. In *State v. Cantabrana*, 921 P.2d 572 (Ct.

App. Wa. 1996), a state court found that it was error to instruct a jury that constructive possession could be established simply by the defendant's control over the premises, without showing control over the drugs themselves. In *State v. Hodge*, 781 So.2d 575 (Ct. App. La. 2001), a husband and wife were both prosecuted for drug offenses after their home was searched. During the search, police discovered marijuana in the husband's pockets, in the bag of another woman present at the house, and in the pockets of a men's jacket in a rear room. An additional bag of marijuana was found wrapped in a sweatshirt and inside a dryer in the backyard. The appellate court reversed the wife's conviction, finding that while a rational trier of fact could have concluded that Allison Hodge knew that her husband was selling marijuana from the residence, there was insufficient evidence that Mrs. Hodge herself "exercised dominion and control" over any of the marijuana.

8. Walter Booth had prior convictions for at least one drug offense, at least one weapon offense, and armed robbery. Are these convictions relevant to the adjudication of this heroin possession charge? What do they show? Why does the appellate court emphasize that the jury was aware of Booth's prior convictions?
9. There is a very close association of drugs with violence in public discourse and policy discussions. But what, precisely, is the connection? Does drug use tend to make people violent? Does drug addiction tend to make people willing to use violence to obtain drugs? Does the drug trade involve acts of violence to defend territory or avoid law enforcement? One comprehensive study has concluded that there is little evidence "to support the assumption that drugs cause violence." Shima Baradaran, *Drugs and Violence*, 88 S. Cal. L. Rev. 227, 233 (2015). "[C]ourts and scholars assume that drug crime may lead to at least two forms of violence: (1) violence associated with substance intoxication, and (2) violence arising from the transportation and sale of drugs. Violence arising from the transportation and sale of drugs is significantly more common, though still less common than assumed." Id. at 289. Defendants charged with drug offenses are less likely to commit crimes of violence than defendants charged with other categories of crime, Professor Baradaran reports. Among those in the drug trade, "drug violence is exaggerated and may be attributable to drug law enforcement and prohibition rather than drug use or the nature of the industry." Id. at 290.
10. How do police typically discover drug possession? In *Booth*, the police conducted surveillance on a home after receiving a tip from an informant. They witnessed conduct (by Gail Varnado) that led them to apply for a warrant to search the home. Most of the time, police discover drugs without needing to obtain a search warrant. Searches of individual persons and vehicles do not usually require a warrant, so long as police can identify some grounds of "reasonable suspicion," as discussed in Chapter Three. Recall also *Copenhaver* in Chapter One, where a traffic stop for an expired registration led the police to investigate the driver for intoxication, and then to search the vehicle and discover contraband.
11. Notice the court's description of Booth's sentence for the heroin possession offense: "five years at hard labor." Was Booth headed off to a chain gang or other forced labor setting? "At hard labor" is partly, but only partly, a matter of terminology. In Louisiana, which is the U.S. state with the highest incarceration rate, "imprisonment at hard labor" is the standard terminology used to describe any prison sentence. (A defendant sentenced to serve "without hard labor" will be sent to a parish jail rather than a state prison.) State law does allow prisons to require prisoners to work—and some jail detainees are also required to work, which is why the "at hard labor" language is partly just a matter of legal terminology. One Louisiana sheriff made the news in 2017 when he objected to new parole laws on the grounds that the state was releasing "the ones you can work." He explained, "In addition to the bad ones — in addition to them — they are releasing some good ones that we use every day to wash cars, to change the oil in our cars, to cook in the kitchen — to do all that where we save money." Many other states also use the labor of prisoners; for example, California's use of prisoners to fight forest fires has received substantial news coverage in recent years. Prisoners are typically paid some small amount for their labor, but the rates are often far below minimum wage; some jobs are paid at $0.20 / hour in Louisiana. These practices have so far survived constitutional challenges. The Thirteenth Amendment to the federal constitution declares, "*Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States…" (emphasis added).* For a recent overview of compelled and underpaid labor among American prisoners, see Michelle Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 Cornell L. Rev. 899 (2019).

Check Your Understanding (7-1)

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* * * * *

21 U.S.C. § 841. Prohibited acts.

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

UNITED STATES of America

v.

Charles Demore JEWELL

United States Court of Appeals, Ninth Circuit
532 F.2d 697

Feb. 27, 1976

BROWNING, Circuit Judge:

We took this case in banc to perform a simple but necessary "housekeeping" chore. The opinion in *United States v. Davis* (9th Cir. 1974), refers to possession of a controlled substance, prohibited by 21 U.S.C. s 841(a)(1), as a "general intent" crime. If this means that the mental state required for conviction under section 841(a)(1) is only that the accused intend to do the act the statute prohibits, the characterization is incorrect. The statute is violated only if possession is accompanied both by knowledge of the nature of the act and also by the intent "to manufacture, distribute, or dispense." The jury was so instructed in this case. We are unanimously of the view that this instruction reflects the only possible interpretation of the statute. The contrary language in *Davis* is disapproved.

This does not mean that we disapprove the holding in *Davis*. On the contrary, we are unanimously of the view that the panel in *Davis* properly held that "The government is not required to prove that the defendant actually knew the exact nature of the substance with which he was dealing." We restrict *Davis* to the principle that a defendant who has knowledge that he possesses a controlled substance may have the state of mind necessary for conviction even if he does not know which controlled substance he possesses.

In the course of in banc consideration of this case, we have encountered another problem that divides us….

It is undisputed that appellant entered the United States driving an automobile in which 110 pounds of marijuana worth $6,250 had been concealed in a secret compartment between the trunk and rear seat. Appellant testified that he did not know the marijuana was present. There was circumstantial evidence from which the jury could infer that appellant had positive knowledge of the presence of the marihuana, and that his contrary testimony was false. [In a footnote, the court explained that the appellant had testified that while he was visiting Mexico, a stranger had offered to sell him marijuana, then asked him to drive a car back into the United States. Appellant agreed to drive the car back for payment of $100.]

On the other hand there was evidence from which the jury could conclude that … although appellant knew of the presence of the secret compartment and had knowledge of facts indicating that it contained marijuana, he deliberately avoided positive knowledge of the presence of the contraband to avoid responsibility in the event of discovery. [From the court's footnote: The Drug Enforcement Administration agent testified that appellant stated "he thought there was probably something wrong and something illegal in the vehicle, but that he checked it over. He looked in the glove box and under the front seat and in the trunk, prior to driving it. He didn't find anything, and, therefore, he assumed that the people at the border wouldn't find anything either" (emphasis added). Appellant was asked at trial whether he had seen the special compartment when he opened the trunk. He responded, "Well, you know, I saw a void there, but I didn't know what it was." He testified that he did not investigate further….]

If the jury concluded the latter [possibility] was indeed the situation, and if positive knowledge is required to convict, the jury would have no choice consistent with its oath but to find appellant not guilty even though he deliberately contrived his lack of

positive knowledge. Appellant urges this view. The trial court rejected the premise that only positive knowledge would suffice, and properly so.

Appellant tendered an instruction that to return a guilty verdict the jury must find that the defendant knew he was in possession of marijuana. The trial judge rejected the instruction because it suggested that "absolutely, positively, he has to know that it's there." The court said, "I think, in this case, it's not too sound an instruction because we have evidence that if the jury believes it, they'd be justified in finding he actually didn't know what it was he didn't because he didn't want to find it."

[Instead,] the court told the jury that the government must prove beyond a reasonable doubt that the defendant "knowingly" brought the marihuana into the United States and that he "knowingly" possessed the marihuana… The court continued:

The Government can complete their burden of proof by proving, beyond a reasonable doubt, that if the defendant was not actually aware that there was marijuana in the vehicle he was driving when he entered the United States his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.

The legal premise of these instructions is firmly supported by leading commentators here and in England. Professor Rollin M. Perkins writes, "One with a deliberate antisocial purpose in mind . . . may deliberately 'shut his eyes' to avoid knowing what would otherwise be obvious to view. In such cases, so far as criminal law is concerned, the person acts at his peril in this regard, and is treated as having 'knowledge' of the facts as they are ultimately discovered to be." … Professor Glanville Williams states, on the basis both English and American authorities, "To the requirement of actual knowledge there is one strictly limited exception. . . . (T)he rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge."

The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable. The textual justification is that in common understanding one "knows" facts of which he is less than absolutely certain. To act "knowingly," therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, "positive" knowledge is not required.

This is the analysis adopted in the Model Penal Code. Section 2.02(7) states: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." …

…There is no reason to reach a different result under the statute involved in this case. Doing so would put this court in direct conflict with Courts of Appeals in two other circuits that have approved "deliberate ignorance" instructions in prosecutions under 21 U.S.C. s 841(a)… Nothing is cited from the legislative history of the Drug Control Act indicating that Congress used the term "knowingly" in a sense at odds with prior authority. Rather, Congress is presumed to have known and adopted the "cluster of ideas" attached to such a familiar term of art. *Morissette v. United States* (1952)….

Appellant's narrow interpretation of "knowingly" is inconsistent with the Drug Control Act's general purpose to deal more effectively "with the growing menace of drug abuse in the United States." Holding that this term introduces a requirement of positive knowledge would make deliberate ignorance a defense. It cannot be doubted that those who traffic in drugs would make the most of it. This is evident from the number of appellate decisions reflecting conscious avoidance of positive knowledge of the presence of contraband in the car driven by the defendant or in which he is a passenger, in the suitcase or package he carries, in the parcel concealed in his clothing….

It is no answer to say that in such cases the fact finder may infer positive knowledge. It is probable that many who performed the transportation function, essential to the drug traffic, can truthfully testify that they have no positive knowledge of the load they carry. Under appellant's interpretation of the statute, such persons will be convicted only if the fact finder errs in evaluating the credibility of the witness or deliberately disregards the law.

It begs the question to assert that a "deliberate ignorance" instruction permits the jury to convict without finding that the accused possessed the knowledge required by the statute. Such an assertion assumes that the statute requires positive knowledge. But the question is the meaning of the term "knowingly" in the statute. If it means positive knowledge, then, of course, nothing less will do. But if "knowingly" includes a mental state in which the defendant is aware that the fact in question is highly probable but consciously avoids enlightenment, the statute is satisfied by such proof.

It is worth emphasizing that the required state of mind differs from positive knowledge only so far as necessary to encompass a calculated effort to avoid the sanctions of the statute while violating its substance. "A court can properly find wilful blindness only where it can almost be said that the defendant actually knew." [G. Williams, supra.] In the language of the instruction in this case, the government must prove, "beyond a reasonable doubt, that if the defendant was not actually aware . . . his ignorance in that regard was solely and entirely a result of . . . a conscious purpose to avoid learning the truth."

… The conviction is affirmed.

ANTHONY M. KENNEDY, Circuit Judge, with whom ELY, HUFSTEDLER and WALLACE, Circuit Judges, join (dissenting).

…At the outset, it is arguable that the "conscious purpose to avoid learning the truth" instruction is inherently inconsistent with the additional mens rea required for [841(a), intent to distribute]. It is difficult to explain that a defendant can specifically intend to distribute a substance unless he knows that he possesses it. In any event, we would not approve the conscious purpose instruction in this case, because it falls short of the scienter independently required under both counts.

… The approach adopted in section 2.02(7) of the Model Penal Code clarifies, and, in important ways restricts, the English doctrine:

When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

This provision requires an awareness of a high probability that a fact exists, not merely a reckless disregard, or a suspicion followed by a failure to make further inquiry. It also establishes knowledge as a matter of subjective belief, an important safeguard against diluting the guilty state of mind required for conviction. It is important to note that section 2.02(7) is a definition of knowledge, not a substitute for it; as such, it has been cited with approval by the Supreme Court.

In light of the Model Penal Code's definition, the "conscious purpose" jury instruction is defective in three respects. First, it fails to mention the requirement that Jewell have been aware of a high probability that a controlled substance was in the car. It is not culpable to form "a conscious purpose to avoid learning the truth" unless one is aware of facts indicating a high probability of that truth. To illustrate, a child given a gift-wrapped package by his mother while on vacation in Mexico may form a conscious purpose to take it home without learning what is inside; yet his state of mind is totally innocent unless he is aware of a high probability that the package contains a controlled substance. Thus, a conscious purpose instruction is only proper when coupled with a requirement that one be aware of a high probability of the truth.

The second defect in the instruction as given is that it did not alert the jury that Jewell could not be convicted if he "actually believed" there was no controlled substance in the car. The failure to emphasize, as does the Model Penal Code, that subjective belief is the determinative factor, may allow a jury to convict on an objective theory of knowledge that a reasonable man should have inspected the car and would have discovered what was hidden inside….

Third, the jury instruction clearly states that Jewell could have been convicted even if found ignorant or "not actually aware" that the car contained a controlled substance. This is unacceptable because true ignorance, no matter how unreasonable, cannot provide a basis for criminal liability when the statute requires knowledge. A proper jury instruction based on the Model Penal Code would be presented as a way of defining knowledge, and not as an alternative to it….

Notes and questions on *United States v. Jewell*

1. Notice that the first two paragraphs of *Jewell* address one issue – the "housekeeping chore" – and the rest of the opinion addresses a different question. (Let this remind you to resist the temptation to reduce each case to a single issue or "takeaway.") What is the "housekeeping" issue? Use the first paragraph to refresh or refine your understanding of the term "general intent" crime. In what sense is the federal controlled substance statute here a "specific intent" crime rather than a general intent one?
2. Notice also that the majority distinguishes between knowledge that one possesses a controlled substance and knowledge of the particular type of controlled substance that one possesses. What if a defendant is in possession of one illegal drug, but mistakenly believes that he has a different illegal drug? That is a question about a mistake of fact, and as you have seen in other contexts, whether a mistake of fact matters to liability depends on the mens rea requirements of the relevant statute. Which mental state does 841(a) require? Look carefully at the second paragraph of the *Jewell* majority opinion. (The next section of this chapter further explores the relevance of drug type and quantity.)

3. Across jurisdictions, drug laws distinguish between "simple possession" (the offense charged in *Booth*, the first case in this chapter) and a more serious crime of possession with intent to distribute. Charles Jewell was charged with a federal "possession with intent to distribute" offense, but notice that this appellate opinion does not address the question whether Jewell did in fact intend to distribute marijuana. Why not? Is it possible to intend to distribute drugs without being certain that you have the drugs?
4. When courts do consider whether evidence is sufficient to prove intent to distribute, they often focus on the quantity of drugs involved, the way the drugs were packaged, and any other items in the defendant's possession that may suggest drug trafficking, such as a scale or a large amount of cash. If police seize a large quantity of drugs, it will be difficult for the defendant to avoid a distribution charge. But even when the total quantity of drugs is relatively small, prosecutors sometimes pursue and obtain distribution convictions. See, e.g., *Cotton v. State*, 686 S.E.2d 805 (Ct. App. Ga. 2009) (finding evidence sufficient to support conviction for possession with intent to distribute when police found four "nickel" bags of marijuana, with a total weight of 2.7 grams, and $60 in cash in defendant's car).
5. Consider carefully the distinctions between the actual jury instruction given in *Jewell* and the Model Penal Code instruction that the dissent would require. Would the evidence in this case have supported a conviction even under the MPC approach?
6. The *Jewell* majority uses legislative purpose to argue for a broader reading of the statute, referring to "the Drug Control Act's general purpose to deal more effectively 'with the growing menace of drug abuse in the United States.'" Should the general concern to address the "menace of drug abuse" always lead to the broadest interpretations of drug laws? Such an interpretive principle would be the inverse of a rule of lenity – a rule of severity with regard to drug offenses.

Drug Offenses: The Relevance of Type and Quantity

Iowa Code Ann. 204.401(2) [recodified; update reference]

[I]t is unlawful for a person to create, deliver, or possess with intent to deliver … a simulated controlled substance….

STATE of Iowa, Appellee

v.

Robert Eric FREEMAN, Appellant

Supreme Court of Iowa
450 N.W.2d 826

Jan. 24, 1990

McGIVERIN, Chief Justice.

The facts of this case are not disputed. The defendant, Robert Eric Freeman, agreed to sell a controlled substance, cocaine, to Keith Hatcher. Unfortunately for Freeman, Hatcher was cooperating with the government. Hatcher gave Freeman $200, and Freeman gave Hatcher approximately two grams of what was supposed to be cocaine. To everyone's surprise, the "cocaine" turned out to be acetaminophen. Acetaminophen is not a controlled substance.

Freeman was convicted at a bench trial of delivering a simulated controlled substance with respect to a substance represented to be cocaine, in violation of Iowa Code section 204.401(2)(a). The sole question presented by Freeman's appeal is whether he can be convicted of delivering a simulated controlled substance when, in fact, he believed he was delivering and intended to deliver cocaine….

I. *The statutory framework.* Iowa Code section 204.401(2) provides, in relevant part:

[I]t is unlawful for a person to create, deliver, or possess with intent to deliver … a simulated controlled substance….

The term "simulated controlled substance" is defined by Iowa Code section 204.101(27):

"*Simulated controlled substance* " means a substance *which is not a controlled substance but which is expressly represented to be a controlled substance, or* a substance which is not a controlled substance but which is *impliedly represented to be a controlled substance* and which because of its nature, packaging, or appearance would lead a reasonable person to believe it to be a controlled substance.

(Emphasis added.) Violation of section 204.401(2) with respect to a simulated controlled substance represented to be cocaine is a class "C" felony. Iowa Code § 204.401(2)(a).

II. *Scienter and the offense of delivery of a simulated controlled substance.* Our cases indicate that knowledge of the nature of the substance delivered is an imputed element of section 204.401(1) offenses. *See, e.g., State v. Osmundson* (Iowa 1976) (knowledge an imputed element of offense of delivery of a controlled substance); *Cf. State v. Duncan* (Iowa 1987) (knowledge an imputed element of delivery of an imitation controlled substance under Iowa Code chapter 204A). Proof of such knowledge has been required to separate those persons who innocently commit the overt acts of the offense from those persons who commit the overt acts of the offense with scienter, or criminal intent.

The Iowa Code prohibits delivery of [actual] controlled substances and imitation controlled substances, as well as delivery of counterfeit substances, in language nearly identical to that prohibiting delivery of simulated controlled substances [emphasis added]…. Seizing upon the similarity of the statutory prohibitions, Freeman argues that he cannot be convicted of delivering a simulated controlled substance because he mistakenly believed he was delivering and intended to deliver an actual controlled substance.

We disagree. Freeman's construction of section 204.401(2) would convert the offense of delivery of a simulated controlled substance into one requiring *knowing misrepresentation* of the nature of the substance delivered. The statute clearly does not require knowing misrepresentation of the nature of the substance delivered.

Reading sections 204.401(2) and 204.101(27) together shows that the gist of this offense is *knowing representation* of a substance to be a controlled substance and delivery of a noncontrolled substance, rather than *knowing misrepresentation* and delivery. As one court explained under similar circumstances, statutes like section 204.401(2) are designed "to discourage anyone from engaging or appearing to engage in the narcotics traffic rather than to define the contractual rights of the pusher and his victim…." *People v. Ernst* (Cal. 1975)…

Freeman's mistaken belief regarding the substance he delivered cannot save him from conviction. Mistake of fact is a defense to a crime of scienter or criminal intent only where the mistake precludes the existence of the mental state necessary to commit the crime. *See* Model Penal Code § 2.04(2) (1962) ("Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed."). In this case, Freeman would not be innocent of wrongdoing had the situation been as he supposed; rather, he would be guilty of delivering a controlled substance. His mistake is no defense. The scienter required to hold him criminally responsible for committing the overt acts of the charged offense is present regardless of the mistake. Freeman knowingly represented to Hatcher that the substance he delivered was cocaine.

In conclusion, we hold that a person who delivers a substance that is not a controlled substance, *but who knowingly represents the substance to be a controlled substance*, commits the offense of delivery of a simulated controlled substance regardless of whether the person believed that the substance was controlled or not controlled.

Delivery of a simulated controlled substance is not a consumer fraud offense. Freeman attempted and intended to sell cocaine. The fact that Freeman was fooled as much as his customer is no defense to the charge in this case.

Notes and questions on *State v. Freeman*

1. Do defendants convicted of drug offenses need to know which specific drug they have? As noted above in the discussion of *Jewell*, drug offenses typically require the defendant to know that he possesses "a controlled substance," but the defendant need not know which particular controlled substance he possesses. Thus, a defendant who believes he possesses heroin, but actually possesses a substance that turns out to be cocaine, can be convicted of possession of cocaine even if the penalties for cocaine possession are more severe. See, e.g., *United States v. Barbosa*, 271 F.3d 438, 450-451 (3rd Cir. 2001). For further review of mistakes of fact, you could look back at *United States v. Coffman* in Chapter Five. As noted there, whether a mistake of fact is relevant to criminal liability depends on the mens rea requirement of the particular crime that is charged.
2. *State v. Freeman* raises a slightly different issue from the confusion of cocaine and heroin: here the defendant thought that he possessed cocaine, but actually possessed something that was not a controlled substance at all. In many jurisdictions, this situation would lead to a charge of attempted possession of cocaine. (We consider attempt doctrine, including its application to

drug offenses, in more detail in the next chapter.) In Iowa, though, the simulated controlled substance law makes it unnecessary to rely on attempt doctrine.

3. The *Freeman* court refers to contract law claims, and to consumer fraud, to distinguish the Iowa simulated controlled substance offense from either of those areas of law. How do the underlying purposes of the simulated controlled substance law differ from those other types of law?
4. The sentences for different types and amounts of controlled substances can vary widely. How do legislatures and other policymakers decide how to punish different types of narcotics? One of the most controversial criminalization choices of American drug law concerned different penalties for crack cocaine and powder cocaine, discussed in Chapter Three in relation to *United States v. Armstrong*. Until 2010, federal sentencing law used a 100:1 ratio under which a defendant would need 100 times as much powder cocaine to receive the same mandatory minimum sentence that was imposed for crack cocaine. Because crack cocaine use and distribution was more prevalent among Black Americans, while powder cocaine had higher portions of white users and distributors, this stark difference in sentences had a significant impact on the racial composition of the U.S. prison population. Defenders of the 100:1 ratio argued that crack was more dangerous than powder cocaine, but the evidence of greater danger was contested, and in any case it is unclear how anyone could establish that crack is 100 times more dangerous. In 2010, Congress adjusted the ratio but did not entirely eliminate the more severe penalties for crack. The current crack-powder ratio is about 18:1.
5. Just as the *Freeman* court finds that the defendant need not know the exact nature of the substance he possessed, many courts find that defendants need not know the exact quantity of drugs to be convicted of possessing that amount. This approach is controversial, though, because sentences for drug crimes are typically linked to the quantity involved. In *Whitaker v. People*, 48 P.3d 555 (Co. 2002), the defendant was charged with possession of over 1000 grams of methamphetamine. Police had approached David Whitaker on a Greyhound bus in Colorado and asked to search a black bag near him. Whitaker denied ownership of the bag, but allowed police to search it. It contained 8.8 pounds of methamphetamine. Whitaker was convicted and sentenced to 20 years imprisonment based on the quantity of drugs. On appeal to the Colorado Supreme Court, he argued that the prosecution had failed to prove that he knew the quantity of drugs in the bag. The Colorado Supreme Court held that drug quantity was a sentencing factor, not an element of the offense. That distinction is important, because the prosecution's burden of proof as outlined in *Winship* generally extends only to elements of the offense and not to sentencing factors. (There are caveats and exceptions, about which you can learn more in a sentencing or advanced criminal procedure course.) As a result, in Colorado a possession conviction does not require the defendant to know the quantity of drugs possessed. "Any amount of drugs, even less than a usable quantity, can support a conviction" under the state's possession statute, the *Whitaker* court stated.
6. Measuring drug quantity may seem like a scientific, empirical question, but this aspect of drug law has produced some noteworthy disputes. In *Chapman v. United States*, 500 U.S. 353 (1991), the Supreme Court considered a federal statute that imposed a five-year mandatory minimum sentence on a person convicted of possessing one gram or more of "a mixture or substance containing" LSD. Pure LSD doesn't weigh very much, but the drug is typically sold mixed into a "carrier medium" such as blotter paper or sugar cubes. In *Chapman*, the defendants possessed only about 50 milligrams of LSD, but it was integrated into blotter paper that weighed about 5.7 grams. The defendants argued that their sentence should be based on the weight of the actual drug, not the drug plus the medium. The weights of different carriers vary widely, and to include the carrier could meant that those who possess large quantities of the pure substance are punished less than those who possess very small quantities of the substance in a carrier medium. The Court rejected this argument and held that the combined weight of the LSD and the carrier could be used to trigger the mandatory minimum.
7. The quantity of drugs involved in an offense can also depend on enforcement choices. For example, law enforcement officials working undercover can ask to purchase, or offer to sell, a given amount of drugs in order to trigger particular sentencing consequences. Or undercover agents may stage multiple "controlled buys" in order to charge multiple counts rather than a single charge.

Check Your Understanding (7-2)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Gun Offenses

Gun possession offenses sometimes involve categorical bans of a particular type of weapon. For example, “assault weapons,” or certain semi-automatic weapons, were banned under a 1994 federal law. That law had a ten-year time limit, and Congress allowed it to lapse in 2004. But more frequently, gun laws do not involve categorical bans; instead, they specify certain categories of people who are not allowed to possess weapons. Persons with prior criminal convictions (or specified types of convictions) are frequently prohibited from weapons possession; other restricted categories include children and persons with identified mental health issues. Another fairly standard regulatory approach is to require a license for weapon possession, and to impose criminal sanctions on persons who possess guns without the requisite license or permit. The first case below involves a statute structured as a general ban on (unlicensed) weapons possession, but with exceptions for various categories of person, including correctional officers. Penal codes can be complicated, as this case illustrates: at least four different statutes are relevant to the resolution of this case.

N.Y. Penal Law §265.02 [as of 1983; now revised]

A person is guilty of criminal possession of a weapon in the third degree when …

(4) [h]e possesses any loaded firearm….

N.Y. Penal Law § 265 .20 Exemptions

[Section 265.02 and other sections] shall not apply to:

- Possession of any of the weapons, instruments, appliances, or substances specified by…
- (c) peace officers as defined by … the criminal procedure law.

N.Y. Crim. Pro. Ch. 966, §1.20(33) [as of 1970; repealed 1980]

[A peace officer includes]

… [a]n attendant, or an official, or guard of any state prison or any penal correctional institution….

(A fourth statute relevant to the next case is included within the judicial opinion.)

People of the State of New York

v.

Julio MARRERO

Court of Appeals of New York
507 N.E.2d 1068

April 2, 1987

BELLACOSA, J.

The defense of mistake of law is not available to a Federal corrections officer arrested in a Manhattan social club for possession of a loaded .38 caliber automatic pistol who claimed he mistakenly believed he was entitled … to carry a handgun without a permit as a peace officer.

…Defendant was a Federal corrections officer in Danbury, Connecticut, and asserted that status at the time of his arrest in 1977. He claimed at trial that there were various interpretations of fellow officers and teachers, as well as the peace officer statute itself, upon which he relied for his mistaken belief that he could carry a weapon with legal impunity.

The starting point for our analysis is the New York mistake statute as an outgrowth of the dogmatic common-law maxim that ignorance of the law is no excuse. The central issue is whether defendant’s personal misreading or misunderstanding of a statute may excuse criminal conduct in the circumstances of this case.

… The revisors of New York’s Penal Law intended no fundamental departure from this common-law rule in Penal Law § 15.20, which provides in pertinent part:

“§ 15.20. *Effect of ignoranceor mistake upon liability.*

*** * ***

"2. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless such mistaken belief is founded upon an official statement of the law contained in (a) a statute or other enactment * * * (d) an interpretation of the statute or law relating to the offense, officially made or issued by a public servant, agency, or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law."

This section was added to the Penal Law … in 1965… When this provision was first proposed, commentators viewed the new language as codifying "the established common law maxim on mistake of law, while at the same time recognizing a defense when the erroneous belief is founded upon an 'official statement of the law.' " (Note, *Proposed Penal Law of New York,* 64 Colum L Rev 1469, 1486 [1964]).

The defendant claims as a first prong of his defense that he is entitled to raise the defense of mistake of law under section 15.20 (2) (a) because his mistaken belief that his conduct was legal was founded upon an official statement of the law contained in the statute itself. Defendant argues that his mistaken interpretation of the statute was reasonable in view of the alleged ambiguous wording of the peace officer exemption statute, and that his "reasonable" interpretation of an "official statement" is enough to satisfy the requirements of subdivision (2) (a)….

The prosecution … counters defendant's argument by asserting that one cannot claim the protection of mistake of law under section 15.20 (2) (a) simply by misconstruing the meaning of a statute but must instead establish that the statute relied on actually permitted the conduct in question and was only later found to be erroneous. To buttress that argument, the People analogize New York's official statement defense to the approach taken by the Model Penal Code (MPC). Section 2.04 of the MPC provides:

"Section 2.04. *Ignorance or Mistake.*

*** * ***

"(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when * * * (b) he acts in reasonable reliance upon an official statement of the law, *afterward determined to be invalid or erroneous*, contained in (i) a statute or other enactment" (emphasis added).

Although the drafters of the New York statute did not adopt the precise language of the Model Penal Code provision with the emphasized clause, it is evident and has long been believed that the Legislature intended the New York statute to be similarly construed. In fact, the legislative history of section 15.20 is replete with references to the influence of the Model Penal Code provision… New York's drafters may even have concluded that the extra clause in the MPC was mere surplusage in view of the clear exceptionability of the mistake authorization in the first instance….

It was early recognized that the "official statement" mistake of law defense was a statutory protection against prosecution based on reliance of a statute that did *in fact* authorize certain conduct. "It seems obvious that society must rely on some statement of the law, and that conduct which *is in fact* 'authorized' … should not be subsequently condemned. The threat of punishment under these circumstances can have no deterrent effect unless the actor doubts the validity of the official pronouncement–*a questioning of authority that is itself undesirable"* (Note, 64 Colum. L. Rev. at 1486 (emphasis added). While providing a narrow escape hatch, the idea was simultaneously to encourage the public to read and rely on official statements of the law, not to have individuals conveniently and personally question the validity and interpretation of the law and act on that basis. If later the statute was invalidated, one who mistakenly acted in reliance on the authorizing statute would be relieved of criminal liability. That makes sense and is fair. To go further does not make sense and would create a legal chaos based on individual selectivity.

In the case before us, the underlying statute never *in fact authorized* the defendant's conduct; the defendant only thought that the statutory exemptions permitted his conduct when, in fact, the primary statute clearly forbade his conduct. …[E]ven the exemption statute did not permit this defendant to possess the weapon. It would be ironic at best and an odd perversion at worst for this court now to declare that the same defendant is nevertheless free of criminal responsibility.

The "official statement" component in the mistake of law defense in both paragraphs (a) and (d) adds yet another element of support for our interpretation and holding. Defendant tried to establish a defense under Penal Law § 15.20 (2) (d) as a second prong. But the interpretation of the statute relied upon must be "officially made or issued by a public servant, agency or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law." …[N]one of the interpretations which defendant proffered meets the requirements of the statute….

It must also be emphasized that, while our construction of Penal Law § 15.20 provides for narrow application of the mistake of law defense, it does not, as the dissenters contend, "rule out *any* defense based on mistake of law." To the contrary, mistake of law is a viable exemption in those instances where an individual demonstrates an effort to learn what the law is, relies on the validity of that law and, later, it is determined that there was a *mistake in the law itself.*

The modern availability of this defense is based on the theory that where the government has affirmatively, albeit unintentionally, misled an individual as to what may or may not be legally permissible conduct, the individual should not be punished as a result. This is salutary and enlightened and should be firmly supported in appropriate cases. However, it also follows that where, as here, the government is not responsible for the error (for there is none except in the defendant's own mind), mistake of law should not be available as an excuse….

We recognize that some legal scholars urge that the mistake of law defense should be available more broadly where a defendant misinterprets a potentially ambiguous statute not previously clarified by judicial decision and reasonably believes in good faith that the acts were legal…. In this case, the forbidden act of possessing a weapon is clear and unambiguous, and only by the interplay of a double exemption does defendant seek to escape criminal responsibility, i.e., the peace officer statute and the mistake statute.

We conclude that the better and correctly construed view is that the defense should not be recognized, except where specific intent is an element of the offense or where the misrelied-upon law has later been properly adjudicated as wrong. Any broader view fosters lawlessness. It has been said in support of our preferred view in relation to other available procedural protections: "A statute … which is so indefinite that it 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law' and is unconstitutional. If the court feels that a statute is sufficiently definite to meet this test, it is hard to see why a defense of mistake of law is needed…." (Hall and Seligman, *Mistake of Law and Mens Rea*, 8 U Chi L Rev 641, 667 [1941]).

Strong public policy reasons underlie the legislative mandate and intent which we perceive in rejecting defendant's construction of New York's mistake of law defense statute. If defendant's argument were accepted, the exception would swallow the rule. Mistakes about the law would be encouraged, rather than respect for and adherence to law. There would be an infinite number of mistake of law defenses which could be devised from a good-faith, perhaps reasonable but mistaken, interpretation of criminal statutes, many of which are concededly complex. Even more troublesome are the opportunities for wrongminded individuals to contrive in bad faith solely to get an exculpatory notion before the jury…. Our holding comports with a statutory scheme which was not designed to allow false and diversionary stratagems to be provided for many more cases than the statutes contemplated. This would not serve the ends of justice but rather would serve game playing and evasion from properly imposed criminal responsibility.

Accordingly, the order of the Appellate Division should be affirmed.

HANCOCK, Jr., J., dissenting.

…The basic difference which divides the court may be simply put. Suppose the case of a man who has committed an act which is criminal not because it is inherently wrong or immoral but solely because it violates a criminal statute. He has committed the act in complete good faith under the mistaken but entirely reasonable assumption that the act does not constitute an offense because it is permitted by the wording of the statute. Does the law require that this man be punished? The majority says that it does and holds that (1) Penal Law § 15.20(2)(a) must be construed so that the man is precluded from offering a defense based on his mistake of law and (2) such construction is compelled by prevailing considerations of public policy and criminal jurisprudence. We take issue with the majority on both propositions.

There can be no question that under the view that the purpose of the criminal justice system is to punish blameworthiness or "choosing freely to do wrong", our supposed man who has acted innocently and without any intent to do wrong should not be punished… Since he has not knowingly committed a wrong there can be no reason for society to exact retribution. Because the man is law-abiding and would not have acted but for his mistaken assumption as to the law, there is no need for punishment to deter him from further unlawful conduct. Traditionally, however, under the ancient rule of Anglo-American common law that ignorance or mistake of law is no excuse, our supposed man would be punished.

The maxim "*ignorantia legis neminem excusat*" finds its roots in Medieval law when the "actor's intent was irrelevant since the law punished the *act itself.*" …Although the common law has gradually evolved from its origins in Anglo-Germanic tribal law (adding the element of intent *[mens rea]* and recognizing defenses based on the actor's mental state…) the dogmatic rule that

ignorance or mistake of law is no excuse has remained unaltered. Various justifications have been offered for the rule, but all are frankly pragmatic and utilitarian–preferring the interests of society (e.g., in deterring criminal conduct, fostering orderly judicial administration, and preserving the primacy of the rule of law) to the interest of the individual in being free from punishment except for intentionally engaging in conduct which he knows is criminal…

Today there is widespread criticism of the common-law rule mandating categorical preclusion of the mistake of law defense… The utilitarian arguments for retaining the rule have been drawn into serious question … but the fundamental objection is that it is simply wrong to punish someone who, in good-faith reliance on the wording of a statute, believed that what he was doing was lawful. …This basic objection to the maxim *"ignorantia legis neminem excusat"* may have had less force in ancient times when most crimes consisted of acts which by their very nature were recognized as evil *(malum in se)*. In modern times, however, with the profusion of legislation making otherwise lawful conduct criminal *(malum prohibitum)*, the "common law fiction that every man is presumed to know the law has become indefensible in fact or logic."…

With this background we proceed to a discussion of our disagreement with the majority's construction of Penal Law § 15.20(2)(a)….

It is difficult to imagine a case more squarely within the wording of Penal Law § 15.20 (2) (a) or one more fitted to what appears clearly to be the intended purpose of the statute than the one before us. For this reason it is helpful to discuss the statute and its apparent intended effect in the light of what defendant contends was his mistaken belief founded on an official statement of the law contained in a statute.

Defendant stands convicted after a jury trial of criminal possession of a weapon in the third degree for carrying a loaded firearm without a license. He concedes that he possessed the unlicensed weapon but maintains that he did so under the mistaken assumption that his conduct was permitted by law. Although at the time of his arrest he protested that he was a Federal corrections officer and exempt from prosecution under the statute, defendant was charged with criminal possession of a weapon in the third degree. On defendant's motion before trial the court dismissed the indictment, holding that he was a peace officer as defined [by state law] and, therefore, exempted … from prosecution… [The dissent explained in a footnote that state law defined "peace officers" to include "correction officers of any state correction facility or of any penal correctional institution."] The … Appellate Division reversed and reinstated the indictment, [holding that only State correction officers were exempted from prosecution under 265.02]…. [Defendant] was convicted and the Appellate Division has affirmed.

Defendant's mistaken belief that, as a Federal corrections officer, he could legally carry a loaded weapon without a license was based on the express exemption [for] "peace officers" … and on his reading of the statutory definition for "peace officer" … as meaning a correction officer "of *any* penal correctional institution" (emphasis added), including an institution not operated by New York State. Thus, he concluded erroneously that, as a corrections officer in a Federal prison, he was a "peace officer"… This mistaken belief, based in good faith … is, defendant contends, the precise sort of "mistaken belief … founded upon an official statement of the law contained in … a statute or other enactment" which gives rise to a mistake of law defense under Penal Law § 15.20(2)(a). He points out, of course, that when he acted in reliance on his belief he had no way of foreseeing that a court would eventually resolve the question of the statute's meaning against him….

The majority, however, has accepted the People's argument that to have a defense under Penal Law § 15.20 (2) (a) "a defendant must show that the statute *permitted his conduct*, not merely that he believed it did" (respondent's brief, at 26 [emphasis added]). Here, of course, defendant cannot show that the statute permitted his conduct. To the contrary, the question has now been decided by the Appellate Division and it is settled that defendant was not exempt under Penal Law § 265.20 (a) (1) (a). Therefore, the argument goes, defendant can have no mistake of law defense. While conceding that reliance on a statutory provision which is later found to be invalid would constitute a mistake of law defense *(see*, Model Penal Code § 2.04 [3] [b] [i]), the People's flat position is that "one's mistaken reading of a statute, no matter how reasonable or well intentioned, is not a defense" ….

[That view] leads to an anomaly: only a defendant who is *not mistaken* about the law when he acts has a mistake of law defense. In other words, a defendant can assert a defense under Penal Law § 15.20(2)(a) only when his reading of the statute is *correct–not mistaken*. such construction is obviously illogical; it strips the statute of the very effect intended by the Legislature in adopting the mistake of law defense. The statute is of no benefit to a defendant who has proceeded in good faith on an erroneous but concededly reasonable interpretation of a statute, as defendant presumably has. An interpretation of a statute which produces an unreasonable or incongruous result and one which defeats the obvious purpose of the legislation and renders it ineffective should be rejected…

Finally, the majority's disregard of the natural and obvious meaning of Penal Law § 15.20(2)(a) … amounts, we submit, to a rejection of the obvious legislative purposes and policies favoring jurisprudential reform underlying the statute's enactment. It is self-evident that in enacting Penal Law § 15.20(2) … the Legislature intended to effect a needed reform by abolishing what had long been considered the unjust archaic common-law rule totally prohibiting mistake of law as a defense. Had it not so intended it would simply have left the common-law rule intact. In place of the abandoned "*ignorantia legis*" common-law maxim the Legislature enacted a rule which permits *no defense for ignorance of law* but *allows a mistake of law defense* in specific instances, including the one presented here: when the defendant's erroneous belief is founded on an "official statement of the law" ….

The majority construes the statute, however, so as to rule out *any* defense based on mistake of law. In so doing, it defeats the only possible purpose for the statute's enactment and resurrects the very rule which the Legislature rejected….

Instead, the majority bases its decision on an analogous provision in the Model Penal Code and concludes that despite its totally different wording and meaning Penal Law § 15.20(2)(a) should be read as if it were Model Penal Code § 2.04 (3)(b)(i). But New York in revising the Penal Law did not adopt the Model Penal Code. As in New Jersey, which generally adopted the Model Penal Code but added one section which is substantially more liberal, New York followed parts of the Model Penal Code provisions and rejected others….

…In respect to the defense based upon an actor's reliance on an official statement of law contained in a statute the Model Penal Code and the New York statute are totally dissimilar…. The Model Penal Code *does not* permit a defense for someone who acts in good faith upon a *mistaken belief* that a specific statute authorizes his conduct. The defense is limited to an act in reliance on an official statement of law in a statute "afterward determined to be *invalid or erroneous.*" The New York statute, in contrast, specifically *permits* the defense when the actor proceeds under "a *mistaken belief*" that his conduct does not "constitute an offense" when that "*mistaken belief* is founded upon an official statement of the law contained in … a statute" ….

Thus, the precise phrase in the Model Penal Code limiting the defense … to reliance on a statute "afterward determined to be invalid or erroneous" … is omitted from Penal Law § 15.20(2)(a). How the Legislature can be assumed to have enacted the very language which it has specifically rejected is not explained….

As an alternate interpretation of Penal Law § 15.20(2)(a) the majority suggests that the Legislature intended that the statute should afford a defense only in cases involving acts *mala in se* … "where specific intent is an element of the offense"… Again such construction is at odds with the plain wording of Penal Law § 15.20(2)(a) and finds no support in the statutory history or the literature. There are, moreover, other fundamental objections to such construction which, we believe, rule out any possibility that the Legislature could have intended it. The essential quality of evil or immorality inherent in crimes *mala in se* (murder, robbery, kidnapping, etc.) is incompatible with the notion that the actor could have been operating "under a mistaken belief that [his conduct] [did] not, as a matter of law, constitute an offense." There are no policy or jurisprudential reasons for the Legislature to recognize a mistake of law defense to such crimes. On the contrary, it is not with such inherently evil crimes but with crimes which are *mala prohibita*–i.e., "the vast network of regulatory offenses which make up a large part of today's criminal law"–where reasons of policy and fairness call for a relaxation of the strict "*ignorantia legis*" maxim to permit a limited mistake of law defense.

…Any fair reading of the majority opinion, we submit, demonstrates that the decision to reject a mistake of law defense is based on considerations of public policy and on the conviction that such a defense would be bad, rather than on an analysis of CPL 15.20 (2) (a) under the usual principles of statutory construction….

We believe that the concerns expressed by the majority are matters which properly should be and have been addressed by the Legislature. We note only our conviction that a statute which recognizes a defense based on a man's good-faith mistaken belief founded on a well-grounded interpretation of an official statement of the law contained in a statute is a just law. The law embodies the ideal of contemporary criminal jurisprudence "that punishment should be conditioned on a showing of subjective moral blameworthiness"….

…We do not believe that permitting a defense in this case will produce the grievous consequences the majority predicts. The unusual facts of this case seem unlikely to be repeated. …

But these questions are now beside the point, for the Legislature has given its answer by providing that someone in defendant's circumstances should have a mistake of law defense. Because this decision deprives defendant of what, we submit, the Legislature

intended that he should have, we dissent.

Notes and questions on *Marrero*

1. *Marrero* is a complicated case! Don't worry if it takes some time to make sense of it. Part of the difficulty is that there are multiple statutes at stake: a New York law that bans weapons possession without a special license, a different state law that exempts "peace officers" from the general ban on unlicensed weapons possession, still another state law that defines the term "peace officers," and finally, a state statute that provides an affirmative defense for those who mistakenly believe that their conduct is not illegal, if the mistaken belief is "founded upon an official statement of law." The first three statutes just listed are representative of one major aspect of American gun regulation: gun laws tend to identify categories of people who may, or (more often) may not, possess guns. In contrast to prohibitions of controlled substances, which are usually generally applicable to all persons, prohibitions of guns are often directed to specific groups, such as persons with felony convictions or persons with mental illness.
2. The mistake of law arguments are where things get much more complicated. Julio Marrero mistakenly believed that he was a "peace officer" under New York law and thus permitted to carry a gun. But was his mistake "founded upon an official statement of law"? Under the majority's approach, could any misunderstanding of a statute count as a belief "founded upon an official statement of law"? Under the dissent's approach, is every misunderstanding of a statute "founded upon an official statement of law"?
3. The dissent in *Marrero* noted in passing that the New Jersey had adopted a mistake of law defense "more liberal" than the Model Penal Code. In a footnote, the dissent elaborated: "In addition to permitting defenses based on ignorance of the law and reasonable reliance on official statements afterward determined to be invalid or erroneous, the New Jersey statute provides a defense, under the following broad provision, when: '(3) The actor otherwise diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances in which a law-abiding and prudent person would also so conclude.'" Would Marrero have been able to avoid conviction for weapons possession if the New Jersey mistake of law defense applied to him?
4. The dissenting opinion refers to the "unusual facts of this case." You can learn more of those unusual facts in a detailed student note published shortly after the decision: David De Gregorio, People v. Marrero *and Mistake of Law*, 54 Brook. L. Rev. 229 (1988). Julio Marrero was at a nightclub with his girlfriend when police arrived in response to a report of a man at the club carrying a pistol. One officer reportedly noticed a bulge under Marrero's jacket and approached him with his own weapon drawn. (Marrero testified that he first became aware of the officers when he saw not one but three guns pointed at him; there were apparently only two arresting officers, and it is unclear whether there really were three guns aimed at Marrero.) Marrero moved toward the officers, possibly reaching for his own gun, and the officers then arrested him and seized his pistol. They found a second gun in Marrero's girlfriend's purse, and an imitation weapon in the possession of a friend of Marrero who was also present. Marrero testified that he regularly carried a gun because he feared for his life after being threatened by prisoners or former prisoners. He had taken several criminal justice courses at Hostos College in the Bronx, and had concluded that as a federal corrections officer he qualified as a "peace officer" under New York state law.

   Which of these facts, if any, do you think the dissent found "unusual"? Do any of the above facts make a difference to the way this case should have turned out, in your view?

5. As noted in the introduction to this chapter, there is evidence that criminal regulations of guns have a disproportionate impact on persons of color. Disparities in other areas of law have contributed to an overrepresentation of persons of color among those who have criminal convictions, and this group is frequently banned from weapons possession. Moreover, police may simply be more likely to discover a weapon when it is possessed by a Black or brown person, since these groups are disproportionately targeted for police investigative activity. When a New York gun restriction was challenged before the Supreme Court recently, a group of Black defense lawyers filed an amicus brief, urging the Court to overturn the New York law due to its racially disproportionate impact. See Brief of the Black Attorneys of Legal Aid, et al, in *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022).
6. In other cases involving Second Amendment challenges to gun regulations, the Court has alluded to southern states' selective disarmament of Black Americans after the Civil War as a reason to treat gun control laws with suspicion. *McDonald v. City of Chicago*, 561 U.S. 724 (2010). At the same time, the Court has made clear that the Second Amendment right to bear arms does not extend to persons with felony convictions. Under existing constitutional doctrine, a state could not directly prohibit gun

possession only among a given racial group, but a felon-in-possession ban is acceptable even if it disproportionately impacts persons of color, so long as there is no proof of an intent to discriminate by race.

Check Your Understanding (7-3)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

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26 U.S.C. § 5861 . Prohibited acts

It shall be unlawful for any person—

… d) to receive or possess a firearm which is not registered to him in the National Firearms and Transfer Record….

26 U.S.C. § 5845. Definitions

(a) Firearm.—The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun …

(b) Machinegun.–The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

Harold E. STAPLES, III, Petitioner

v.

UNITED STATES

Supreme Court of the United States
511 U.S. 600

Decided May 23, 1994

Justice THOMAS delivered the opinion of the Court.

…

I

The National Firearms Act (Act) imposes strict registration requirements on statutorily defined "firearms." The Act includes within the term "firearm" a machinegun, and further defines a machinegun as "any weapon which shoots, … or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." Thus, any fully automatic weapon is a "firearm" within the meaning of the Act.[1] Under the Act, all firearms must be registered in the National Firearms Registration and Transfer Record maintained by the Secretary of the Treasury. Section 5861(d) makes it a crime, punishable by up to 10 years in prison, for any person to possess a firearm that is not properly registered.

Upon executing a search warrant at petitioner's home, local police and agents of the Bureau of Alcohol, Tobacco and Firearms (BATF) recovered, among other things, an AR–15 rifle. The AR–15 is the civilian version of the military's M–16 rifle, and is, unless modified, a semiautomatic weapon. The M–16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire. Many M–16 parts are interchangeable with those in the AR–15 and can be used to convert the AR–15 into an automatic weapon. No doubt to inhibit such conversions, the AR–15 is manufactured with a metal stop on its receiver that will prevent an M–16 selector switch, if installed, from rotating to the fully automatic position. The metal stop on petitioner's rifle, however, had been filed away, and the rifle had been assembled with an M–16 selector switch and several other M–16 internal parts, including a hammer, disconnector, and trigger. Suspecting that the AR–15 had been modified to

be capable of fully automatic fire, BATF agents seized the weapon. Petitioner subsequently was indicted for unlawful possession of an unregistered machinegun in violation of § 5861(d).

At trial, BATF agents testified that when the AR–15 was tested, it fired more than one shot with a single pull of the trigger. It was undisputed that the weapon was not registered… Petitioner testified that the rifle had never fired automatically when it was in his possession. He insisted that the AR–15 had operated only semiautomatically, and even then imperfectly, often requiring manual ejection of the spent casing and chambering of the next round. According to petitioner, his alleged ignorance of any automatic firing capability should have shielded him from criminal liability for his failure to register the weapon. He requested the District Court to instruct the jury that, to establish a violation of § 5861(d), the Government must prove beyond a reasonable doubt that the defendant "knew that the gun would fire fully automatically."

The District Court rejected petitioner's proposed instruction and instead charged the jury as follows:

"The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation." Tr. 465.

Petitioner was convicted and sentenced to five years' probation and a $5,000 fine….

II

Whether or not § 5861(d) requires proof that a defendant knew of the characteristics of his weapon that made it a "firearm" under the Act is a question of statutory construction. As we observed in *Liparota v. United States* (1985), "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." Thus, we have long recognized that determining the mental state required for commission of a federal crime requires "construction of the statute and … inference of the intent of Congress." *United States v. Balint* (1922).

The language of the statute, the starting place in our inquiry, provides little explicit guidance in this case. Section 5861(d) is silent concerning the *mens rea* required for a violation. It states simply that "[i]t shall be unlawful for any person … to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal. See *Balint*, *supra*. On the contrary, we must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded. As we have observed, "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo–American criminal jurisprudence." …[W]e have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.

According to the Government, however, the nature and purpose of the Act suggest that the presumption favoring *mens rea* does not apply to this case. The Government argues that Congress intended the Act to regulate and restrict the circulation of dangerous weapons. Consequently, in the Government's view, this case fits in a line of precedent concerning what we have termed "public welfare" or "regulatory" offenses, in which we have understood Congress to impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal. In construing such statutes, we have inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense.

For example, in *Balint*, we concluded that the Narcotic Act of 1914, which was intended in part to minimize the spread of addictive drugs by criminalizing undocumented sales of certain narcotics, required proof only that the defendant knew that he was selling drugs, not that he knew the specific items he had sold were "narcotics" within the ambit of the statute. … As we [later] explained…, *Balint* dealt with "a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing."

Such public welfare offenses have been created by Congress, and recognized by this Court, in "limited circumstances." Typically, our cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items. In such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him "in responsible relation to a public danger," he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to "ascertain at his peril whether [his conduct] comes within the inhibition of the statute." Thus, we essentially have relied on the nature of the statute and the particular character of the items regulated to

determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements.

The Government argues that … all guns, whether or not they are statutory "firearms," are dangerous devices that put gun owners on notice that they must determine at their hazard whether their weapons come within the scope of the Act. On this understanding, the District Court's instruction in this case was correct, because a conviction can rest simply on proof that a defendant knew he possessed a "firearm" in the ordinary sense of the term.

The Government seeks support for its position from our decision in *United States v. Freed* (1971), which involved a prosecution for possession of unregistered grenades under § 5861(d). [A grenade is a type of "firearm" under the Act.] The defendant knew that the items in his possession were grenades, and we concluded that § 5861(d) did not require the Government to prove the defendant also knew that the grenades were unregistered. …[W]e suggested that the Act "is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act." Grenades, we explained, "are highly dangerous offensive weapons, no less dangerous than the narcotics involved in *United States v. Balint.*" But that reasoning provides little support for dispensing with *mens rea* in this case.

As the Government concedes, *Freed* did not address the issue presented here. In *Freed*, we decided only that § 5861(d) does not require proof of knowledge that a firearm is *unregistered.* The question presented by a defendant who possesses a weapon that is a "firearm" for purposes of the Act, but who knows only that he has a "firearm" in the general sense of the term, was not raised or considered. And our determination that a defendant need not know that his weapon is unregistered suggests no conclusion concerning whether § 5861(d) requires the defendant to know of the features that make his weapon a statutory "firearm"; different elements of the same offense can require different mental states. Moreover, our analysis in *Freed* likening the Act to the public welfare statute in *Balint* rested entirely on the assumption that the defendant *knew* that he was dealing with hand grenades—that is, that he knew he possessed a particularly dangerous type of weapon (one within the statutory definition of a "firearm"), possession of which was not entirely "innocent" in and of itself. The predicate for that analysis is eliminated when, as in this case, the very question to be decided is *whether* the defendant must know of the particular characteristics that make his weapon a statutory firearm.

…In glossing over the distinction between grenades and guns, the Government ignores the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would "criminalize a broad range of apparently innocent conduct." In *Liparota*, we considered a statute that made unlawful the unauthorized acquisition or possession of food stamps. We determined that the statute required proof that the defendant knew his possession of food stamps was unauthorized, largely because dispensing with such a *mens rea* requirement would have resulted in reading the statute to outlaw a number of apparently innocent acts. Our conclusion that the statute should not be treated as defining a public welfare offense rested on the commonsense distinction that a "food stamp can hardly be compared to a hand grenade."

Neither, in our view, can all guns be compared to hand grenades. Although the contrast is certainly not as stark as that presented in *Liparota*, the fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country. Such a tradition did not apply to the possession of hand grenades in *Freed* or to the selling of dangerous drugs that we considered in *Balint.* In fact, in *Freed* we construed § 5861(d) under the assumption that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." Here, the Government essentially suggests that we should interpret the section under the altogether different assumption that "one would hardly be surprised to learn that owning a gun is not an innocent act." That proposition is simply not supported by common experience. Guns in general are not "deleterious devices or products or obnoxious waste materials," that put their owners on notice that they stand "in responsible relation to a public danger."

The Government protests that guns, unlike food stamps, but like grenades and narcotics, are potentially harmful devices…. But that an item is "dangerous," in some general sense, does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. As suggested above, despite their potential for harm, guns generally can be owned in perfect innocence. Of course, we might surely classify certain categories of guns—no doubt including the machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation—as items the ownership of which would have the same quasi-suspect character we attributed to owning hand grenades…. But precisely because guns falling outside those categories traditionally have been widely accepted as lawful possessions, their destructive potential, while perhaps even greater than that of some items we would classify along with narcotics and hand grenades, cannot be said to put gun owners

sufficiently on notice of the likelihood of regulation to justify interpreting § 5861(d) as not requiring proof of knowledge of a weapon's characteristics.

On a slightly different tack, the Government suggests that guns are subject to an array of regulations at the federal, state, and local levels that put gun owners on notice that they must determine the characteristics of their weapons and comply with all legal requirements. But regulation in itself is not sufficient to place gun ownership in the category of the sale of narcotics in *Balint.* The food stamps at issue in *Liparota* were subject to comprehensive regulations, yet we did not understand the statute there to dispense with a *mens rea* requirement. Moreover, despite the overlay of legal restrictions on gun ownership, we question whether regulations on guns are sufficiently intrusive that they impinge upon the common experience that owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm of some sort, and in the vast majority of States, buying a shotgun or rifle is a simple transaction that would not alert a person to regulation any more than would buying a car.

If we were to accept as a general rule the Government's suggestion that dangerous and regulated items place their owners under an obligation to inquire at their peril into compliance with regulations, we would undoubtedly reach some untoward results. Automobiles, for example, might also be termed "dangerous" devices and are highly regulated at both the state and federal levels. Congress might see fit to criminalize the violation of certain regulations concerning automobiles, and thus might make it a crime to operate a vehicle without a properly functioning emission control system. But we probably would hesitate to conclude on the basis of silence that Congress intended a prison term to apply to a car owner whose vehicle's emissions levels, wholly unbeknownst to him, began to exceed legal limits between regular inspection dates.

Here, there can be little doubt that, as in *Liparota*, the Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent. …[I]n the Government's view, any person who has purchased what he believes to be a semiautomatic rifle or handgun, or who simply has inherited a gun from a relative and left it untouched in an attic or basement, can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be an automatic.

We concur in the Fifth Circuit's conclusion on this point: "It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten-year term of imprisonment if … what they genuinely and reasonably believed was a conventional semi-automatic [weapon] turns out to have worn down into or been secretly modified to be a fully automatic weapon." As we noted in *Morissette*, the "purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction." We are reluctant to impute that purpose to Congress where, as here, it would mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regulation….

The potentially harsh penalty attached to violation of § 5861(d)—up to 10 years' imprisonment—confirms our reading of the Act. Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*. Certainly, the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary. …

Our characterization of the public welfare offense … hardly seems apt … for a crime that is a felony, as is violation of § 5861(d). After all, "felony" is, as we noted in distinguishing certain common-law crimes from public welfare offenses, "as bad a word as you can give to man or thing." Close adherence to the early cases described above might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea.*

We need not adopt such a definitive rule of construction to decide this case, however. Instead, we note only that where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply.

III

…We emphasize that our holding is a narrow one. As in our prior cases, our reasoning depends upon a commonsense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may

legitimately have in dealing with the regulated items…. As we noted in *Morissette:* "Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." We attempt no definition here, either. We note only that our holding depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect.

Justice GINSBURG, with whom Justice O'CONNOR joins, concurring in the judgment.

…The question before us is not *whether* knowledge of possession is required, but what level of knowledge suffices: (1) knowledge simply of possession of the object; (2) knowledge, in addition, that the object is a dangerous weapon; (3) knowledge, beyond dangerousness, of the characteristics that render the object subject to regulation, for example, awareness that the weapon is a machinegun.

…The Nation's legislators chose to place under a registration requirement only a very limited class of firearms, those they considered especially dangerous…. Only the third reading, then, suits the purpose of the *mens rea* requirement—to shield people against punishment for apparently innocent activity….

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

To avoid a slight possibility of injustice to unsophisticated owners of machineguns and sawed-off shotguns, the Court has substituted its views of sound policy for the judgment Congress made when it enacted the National Firearms Act (or Act). Because the Court's addition to the text of 26 U.S.C. § 5861(d) is foreclosed by both the statute and our precedent, I respectfully dissent.

The Court is preoccupied with guns that "generally can be owned in perfect innocence." This case, however, involves a semiautomatic weapon that was readily convertible into a machinegun—a weapon that the jury found to be "a dangerous device of a type as would alert one to the likelihood of regulation." These are not guns "of some sort" that can be found in almost "50 percent of American homes." [Only about 15 percent of all the guns in the United States are semiautomatic.] They are particularly dangerous—indeed, a substantial percentage of the unregistered machineguns now in circulation are converted semiautomatic weapons.

The question presented is whether the National Firearms Act imposed on the Government the burden of proving beyond a reasonable doubt not only that the defendant knew he possessed a dangerous device sufficient to alert him to regulation, but also that he knew it had all the characteristics of a "firearm" as defined in the statute….

The National Firearms Act unquestionably is a public welfare statute. *United States v. Freed* (1971) (holding that this statute "is a regulatory measure in the interest of the public safety"). Congress fashioned a legislative scheme to regulate the commerce and possession of certain types of dangerous devices, including specific kinds of weapons, to protect the health and welfare of the citizenry. To enforce this scheme, Congress created criminal penalties for certain acts and omissions. The text of some of these offenses—including the one at issue here—contains no knowledge requirement.

…[E]ven assuming that the Court is correct that the mere possession of an ordinary rifle or pistol does not entail sufficient danger to alert one to the possibility of regulation, that conclusion does not resolve this case. Petitioner knowingly possessed a semiautomatic weapon that was readily convertible into a machinegun. The "character and nature" of such a weapon is sufficiently hazardous to place the possessor on notice of the possibility of regulation. No significant difference exists between imposing upon the possessor a duty to determine whether such a weapon is registered, *Freed*, and imposing a duty to determine whether that weapon has been converted into a machinegun. …

The enforcement of public welfare offenses always entails some possibility of injustice. Congress nevertheless has repeatedly decided that an overriding public interest in health or safety may outweigh that risk when a person is dealing with products that are sufficiently dangerous or deleterious to make it reasonable to presume that he either knows, or should know, whether those products conform to special regulatory requirements. The dangerous character of the product is reasonably presumed to provide sufficient notice of the probability of regulation to justify strict enforcement against those who are merely guilty of negligent, rather than willful, misconduct. …

This case presents no dispute about the dangerous character of machineguns and sawed-off shotguns. Anyone in possession of such a weapon is "standing in responsible relation to a public danger." In the National Firearms Act, Congress determined that the serious threat to health and safety posed by the private ownership of such firearms warranted the imposition of a duty on the

owners of dangerous weapons to determine whether their possession is lawful. Semiautomatic weapons that are readily convertible into machineguns are sufficiently dangerous to alert persons who knowingly possess them to the probability of stringent public regulation. The jury's finding that petitioner knowingly possessed "a dangerous device of a type as would alert one to the likelihood of regulation" adequately supports the conviction.

Accordingly, I would affirm the judgment of the Court of Appeals.

Notes and questions on *Staples*

1. The *Staples* Court starts its analysis with a reiteration of a preference for mens rea requirements over strict liability: the Court says that the fact that the statute does not specifically mention a mens rea standard should not be taken to indicate that Congress intended to dispense with a mens rea requirement. But did the government's interpretation of the statute, or the interpretation used by the trial court, dispense with a mens rea requirement? In other words, did the trial court treat this federal offense as a "strict liability" offense?
2. To answer the previous question, it may help to think in more detail about this one: what counts as a "strict liability" offense? Think about the mens rea question in *Staples* in relation to the mens rea issues discussed in the drug cases above. Drug possession statutes typically require "knowing possession," but what specific knowledge is required? As you have seen, courts typically find the mental state aspect of drug possession to be satisfied if the defendant has knowledge of possession of a controlled substance; the defendant need not know which particular controlled substance he or she possesses. Thus drug possession is not technically a strict liability offense, though it is sometimes characterized as such because the requisite knowledge (knowledge of possession of a controlled substance) is usually inferred from the circumstances of possession.

   Now consider Mr. Staples. He knew that he had a weapon. On his account, he did not know that the specific type of weapon – he did not know that it was an automatic weapon rather than a semiautomatic weapon. If the federal statute required knowledge that one possesses a weapon, but not knowledge of the specific type of weapon, would it be correct to call it a "strict liability offense"? In many situations, it may be more precise to speak of strict liability elements rather than strict liability offenses. One element of the federal crime is the fact that the gun involved is an automatic weapon. If this element is a strict liability element, then the defendant need not be aware of this fact in order to commit the offense. Even then, the overall offense may still involve some mens rea requirement, such as awareness that one possesses a gun of some type. A broader lesson here is that you should do mens rea analysis with respect to individual elements. For each act or attendant circumstance that is an element of the offense, ask, is there a given mental state that the defendant must hold with regard to this particular element?
3. How does the Supreme Court distinguish *United States v. Freed* ? What is the critical distinction between guns and grenades, in the Court's analysis?
4. The *Staples* majority opinion says that "guns generally can be owned in perfect innocence," and also that "owning a gun is usually licit and blameless conduct." Of course, whether one may own a gun (or more narrowly, a "firearm") innocently or blamelessly is within Congress's power to decide, if Congress has the power to criminalize gun possession or firearm possession. When *Staples* was decided in 1994, the prevailing interpretation of the Second Amendment was that it protected a right to bear arms as part of a state militia, but not an individual right to bear arms. Fourteen years after *Staples*, the Court declared for the first time that the Second Amendment protected an individual right to bear arms. See *District of Columba v. Heller*, 554 U.S. 570 (2008). Justice Thomas, the author of the majority opinion in *Staples*, was one member of the five-Justice majority in *Heller*. To what degree does the analysis in Staples depend on an underlying assumption that gun ownership is constitutionally protected conduct?
5. Harold E. Staples III, the defendant in *Staples*, appeared often in the local news in Oklahoma – and in the courts. He served as "the key prosecution witness" in a 1989 federal prosecution of a man accused of illegal wiretapping. He gained further local notoriety when he allowed the Ku Klux Klan to hold rallies on the land where he lived, telling a local newspaper that he wouldn't send his children away for the rally, and stating, "These are absolutely nice people… [T]hey won't hear anything offensive coming from these people." Almost twenty years after the Supreme Court issued the decision you've just read, Staples was charged again, this time with conspiracy to distribute methamphetamine. He died while those charges were still pending. See David Harper, *Newsmaker in Local Courtrooms Dies*, Tulsa World, June 12, 2013, page A14.

Check Your Understanding (7-4)

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Guns, Drugs, and Mass Incarceration

As noted in the introduction to this chapter, experts have debated the role of drug and gun offenses in producing mass incarceration. Of course, to determine what has caused mass incarceration, we need to know what that term means. Sometimes "mass incarceration" is used to describe the very high incarceration rates that have existed in the United States for several decades now. In other instances, "mass incarceration" or a related term such as "hyper-incarceration" is used to signify the racial impact of more severe sentences. Whether we are thinking of the overall increase in American prisoners or the racial patterns in that increase, penalties for drug and gun offenses seem to be an important part of the explanation. Drug and gun crimes offer an opportunity to reflect on the interaction of criminalization, enforcement, and adjudication decisions, and to add to this picture a closer look at the importance of sentencing decisions.

After criminalization, enforcement, and adjudication decisions have been made – for example, marijuana possession has been defined as criminal, police have identified and arrested a particular person for this offense, and the person has pled guilty – there often remains the question of punishment: how (much) should the defendant be punished? Depending on the jurisdiction, the appropriate sentence could be a question within the discretion of the trial court, or it could be defined by "sentencing guidelines" or by statute. When a statute sets a required sentence and does not leave judges the authority to impose a different sentence, the sentence is said to be "mandatory." Some of the most severe "mandatory minimum" sentences arise in the context of drug offenses, gun offenses, or the potent combination of drugs and guns. The next case involves a challenge to one of the most significant federal "mandatory minimums."

18 U.S.C. § 924(c) [as of 1994; later amended]

(1)(A) Whoever, during and in relation to any crime of violence or drug trafficking crime … for which he may be prosecuted in a court of the United States, uses or carries a firearm… shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, [be sentenced to imprisonment for five years]. …

(1)(C) In the case of a second or subsequent conviction under this subsection, the person shall … be sentenced to a term of imprisonment of not less than 25 years…

UNITED STATES of America, Plaintiff

v.

Weldon ANGELOS, Defendant

United States District Court, D. Utah, Central Division
345 F. Supp. 2d 1227

Nov. 16, 2004

CASSELL, District Judge.

Defendant Weldon Angelos stands now before the court for sentencing. He is a twenty-four–year-old first offender who is a successful music executive with two young children. Because he was convicted of dealing marijuana and related offenses, both the government and the defense agree that Mr. Angelos should serve about six to eight years in prison. But there are three additional firearms offenses for which the court must also impose sentence. Two of those offenses occurred when Mr. Angelos carried a handgun to two $350 marijuana deals; the third when police found several additional handguns at his home when they executed a search warrant. For these three acts of possessing (not using or even displaying) these guns, the government insists that Mr. Angelos should essentially spend the rest of his life in prison. Specifically, the government urges the court to sentence Mr. Angelos to a prison term of no less than 61 ½ years—six years and a half (or more) for drug dealing followed by 55 years for three counts of possessing a firearm in connection with a drug offense. In support of its position, the government relies on a statute—18 U.S.C. § 924(c)—which requires the court to impose a sentence of five years in prison the first time a drug dealer carries a gun and twenty-five years for each subsequent time. Under § 924(c), the three counts produce 55 years of additional punishment for carrying a firearm.

The court believes that to sentence Mr. Angelos to prison for the rest of his life is unjust, cruel, and even irrational. Adding 55 years on top of a sentence for drug dealing is far beyond the roughly two-year sentence that the congressionally-created expert agency (the United States Sentencing Commission) believes is appropriate for possessing firearms under the same circumstances. The 55–year sentence substantially exceeds what the jury recommended to the court. It is also far in excess of the sentence imposed for such serious crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. It exceeds what recidivist criminals will likely serve under the federal "three strikes" provision. At the same time, however, this 55–year additional sentence is decreed by § 924(c).

The court's role in evaluating § 924(c) is quite limited. The court can set aside the statute only if it is irrational punishment without any conceivable justification or is so excessive as to constitute cruel and unusual punishment in violation of the Eighth Amendment. After careful deliberation, the court reluctantly concludes that it has no choice but to impose the 55-year sentence. While the sentence appears to be cruel, unjust, and irrational, in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties. Under the controlling case law, the court must find either that a statute has no conceivable justification or is so grossly disproportionate to the crime that no reasonable argument can be made its behalf. If the court is to fairly apply these precedents in this case, it must reject Mr. Angelos' constitutional challenges. Accordingly, the court sentences Mr. Angelos to a prison term of 55 years and one day, the minimum that the law allows.

To correct what appears to be an unjust sentence, the court also calls on the President—in whom our Constitution reposes the power to correct unduly harsh sentences—to commute Mr. Angelos' sentence to something that is more in accord with just and rational punishment. In particular, the court recommends that the President commute Mr. Angelos' sentence to no more than 18 years in prison, the average sentence that the jurors in this case recommended. In addition, the court also calls on Congress to modify § 924(c) so that its harsh provisions for 25–year multiple sentences apply only to true recidivist drug offenders—those who have been sent to prison and failed to learn their lesson. Because of the complexity of these conclusions, the court will set out their basis at some length.

I. Factual Background

Weldon Angelos is twenty-four years old. He was born on July 16, 1979, in Salt Lake City, Utah. He was raised in the Salt Lake City area by his father … with only minimal contact with his mother. Mr. Angelos has two young children … six–year-old Anthony and five-year-old Jessie. Before his arrest Mr. Angelos had achieved some success in the music industry. He started Extravagant Records, a label that produces rap and hip hop music. He had worked with prominent hip hop musicians, including Snoop Dogg, on the "beats" to various songs and was preparing to record his own album.

The critical events in this case are three "controlled buys" of marijuana by a government informant from Mr. Angelos. On May 10, 2002, Mr. Angelos met with the informant, Ronnie Lazalde, and arranged a sale of marijuana. On May 21, 2002, Mr. Angelos completed a sale of [eight ounces] of marijuana to Lazalde for $350. Lazalde observed Mr. Angelos' Glock pistol by the center console of his car. This drug deal formed the basis for the first § 924(c) count.

During a second controlled buy with Lazalde, on June 4, 2002, Mr. Angelos lifted his pant leg to show him the Glock in an ankle holster. Lazalde again purchased approximately eight ounces of marijuana for $350. This deal formed the basis for the second § 924(c) count.

A third controlled buy occurred on June 18, 2002, with Mr. Angelos again selling Lazalde eight ounces of marijuana for $350. There was no direct evidence of a gun at this transaction….

On November 15, 2003, police officers arrested Mr. Angelos at his apartment pursuant to a warrant. Mr. Angelos consented to a search. The search revealed a briefcase which contained $18,040, a handgun, and two opiate suckers. [Police also found] approximately three pounds of marijuana [and] two other guns in a locked safe…. Searches at other locations, including the apartment of Mr. Angelos' girlfriend, turned up several duffle bags with marijuana residue, two more guns, and additional cash.

The original indictment issued against Mr. Angelos contained three counts of distribution of marijuana, one § 924(c) count for the firearm at the first controlled buy, and two other lesser charges. Plea negotiations began between the government and Mr. Angelos. On January 20, 2003, the government told Mr. Angelos, through counsel, that if he pled guilty to the drug distribution count and the § 924(c) count, the government would agree to drop all other charges, not supersede the indictment with additional counts, and recommend a prison sentence of 15 years. The government made clear to Mr. Angelos that if he rejected the offer, the government

would obtain a new superseding indictment adding several § 924(c) counts that could lead to Mr. Angelos facing more than 100 years of mandatory prison time. In short, Mr. Angelos faced the choice of accepting 15 years in prison or insisting on a trial by jury at the risk of a life sentence. Ultimately, Mr. Angelos rejected the offer and decided to go to trial. The government then obtained two superseding indictments, eventually charging twenty total counts, including five § 924(c) counts which alone carried a potential minimum mandatory sentence of 105 years. The five § 924(c) counts consisted of two counts for the Glock seen at the two controlled buys, one count for three handguns found at his home, and two more counts for the two guns found at the home of Mr. Angelos' girlfriend.

Perhaps recognizing the gravity of the situation, Mr. Angelos tried to reopen plea negotiations…. The government refused his offer, and the case proceeded to trial. The jury found Mr. Angelos guilty on sixteen counts, including three § 924(c) counts: two counts for the Glock seen at the two controlled buys and a third count for the … handguns at Mr. Angelos' home. The jury found him not guilty on three counts—including the two additional § 924(c) counts….

Mr. Angelos' sentence is presumptively governed by the Federal Sentencing Guidelines…. The prescribed Guidelines' sentence for Mr. Angelos for everything but the § 924(c) counts is 78 to 97 months. After the Guideline sentence is imposed, however, the court must then add the § 924(c) counts. Section 924(c) prescribes a five-year mandatory minimum for a first conviction, and 25 years for each subsequent conviction…. In addition, § 924(c) mandates that these 55 years run consecutively to any other time imposed. As a consequence, the minimum sentence that the court can impose on Mr. Angelos is 61 ½ years—6 ½ years (78 months) for the 13 counts under the Guidelines and 55 consecutive years for the three § 924 convictions. The federal system does not provide the possibility of parole, but instead provides only a modest "good behavior" credit of approximately 15 percent of the sentence. Assuming good behavior, Mr. Angelos' sentence will be reduced to "only" 55 years, meaning he could be released when he is 78 years old.

Mr. Angelos [argues] that § 924(c) is unconstitutional as applied to him, either because the additional 55–year sentence is irrational punishment that violates equal protection principles or is cruel and unusual punishment that violates the Cruel and Unusual Punishment Clause….

II. Legislative History and Judicial Interpretation of § 924(c)

Before turning to Mr. Angelos' specific challenges to § 924(c), it is helpful to understand the history of the statute. [The original statute] was proposed and enacted in a single day as an amendment to the Gun Control Act of 1968 enacted following the assassinations of Martin Luther King, Jr. and Robert F. Kennedy. Congress intended the Act to address the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime." Because § 924(c) was offered as a floor amendment, there are no congressional hearings or committee reports regarding its original purpose….

As originally enacted, § 924(c) gave judges considerable discretion in sentencing and was not nearly as harsh as it has become. … In the 36 years since its passage, the penalties attached to § 924(c) have been made continually harsher either by judicial interpretation or congressional action.… [I]f the original version of § 924(c) governed Mr. Angelos' sentencing, the court could impose three separate one-year enhancements, adding a total of three years to his sentence. However, after 36 years of judicial interpretation and congressional modifications, the court is now left with a version of § 924(c) that requires a sentence of 55 years on top of a tough Guidelines sentence for drug dealing.

III. Mr. Angelos ' Equal Protection Challenge to the Statute

Mr. Angelos first contends that 18 U.S.C. § 924(c) makes arbitrary classifications and irrationally treats him far more harshly than criminals guilty of other much more serious crimes. He raises this claim as an equal protection challenge. …Under equal protection principles, the court's review is quite limited. …[U]nless a law infringes upon a fundamental right or classifies along suspect lines such as race, the court's review is limited to determining whether there is a rational basis for the law.

… Before turning to the merits … it is important to understand the length of the sentence that the government is asking the court to impose. [Because Angelos is 24 and] [t]he average life expectancy for males in the United States is about 74 years of age[,] … if the court imposes the sentence sought by the government, Mr. Angelos will effectively receive a sentence of life.

… [Section] 924(c) imposes punishment in this case far beyond that called for by the congressionally-created expert agency on sentencing, by the jurors who heard the evidence, by the Utah state system, or by any of the other state systems. If the court is to take seriously the directive that it should impose "just punishment" with its sentences, then it should impose sentences that are

viewed as appropriate by the citizens of this state and of this country. The court concludes that placing Mr. Angelos in prison for 61 ½ years is not "just punishment" for his crimes. This factor suggests the irrationality of § 924(c).

… Mr. Angelos [also] contends that his § 924(c) sentence is not only unjust but also irrational when compared to the punishment imposed for other more serious federal crimes. … In evaluating [these claims], the court starts from the premise that Mr. Angelos committed serious crimes. Trafficking in illegal drugs runs the risk of ruining lives through addiction and the violence that the drug trade spawns. As the government properly argued, when a defendant engages in a drug-trafficking operation and "carries and possesses firearms to aid in that venture, as was the case here, the actual threat of violence always exists, even it if does not actually occur."[83] But do any of these general rationales provide a rational basis for punishing the *potential* violence which § 924(c) is meant to deter more harshly than *actual* violence that harms a victim in its wake? In other words, is it rational to punish a person who *might* shoot someone with a gun he carried far more harshly than the person who actually *does* shoot or harm someone?

As applied in this case, the classifications created by § 924(c) are simply irrational. Section 924(c) imposes on Mr. Angelos a sentence 55 years or 660 months. Added to the minimum 78–month Guidelines sentence for a total sentence of 738 months, Mr. Angelos is facing a prison term which more than doubles the sentence of, for example, an aircraft hijacker (293 months), a terrorist who detonates a bomb in a public place (235 months), a racist who attacks a minority with the intent to kill and inflicts permanent or life-threatening injuries (210 months), a second-degree murderer, or a rapist….

… Amazingly, Mr. Angelos' sentence under § 924(c) is still far more severe than criminals who committed, for example, three aircraft hijackings, three second-degree murders, three kidnappings, or three rapes…. Mr. Angelos will receive a longer sentence than any three-time criminal, with the sole exception of a marijuana dealer who shoots three people. The irrationality of these differences is manifest and can be objectively proven. In the Eighth Amendment context, the Supreme Court has instructed that "[c]omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender." In contrast to the serious violent felonies listed [above], the crimes committed by Mr. Angelos had the *potential* for violence, but no *actual* violence occurred. This is not to say that trafficking in illegal drugs is somehow a non-violent offense. Indeed, in *Harmelin*, Justice Kennedy quite properly called such an assertion "false to the point of absurdity." *Harmelin* involved the potential distribution of approximately 32,500 doses of cocaine, a highly addictive drug that was linked to many of the homicides in Detroit. Justice Kennedy's concurrence equated the crime in *Harmelin* with "felony murder without specific intent to kill."

In this case, however, Mr. Angelos will be completely punished for his marijuana trafficking by the 78–97 month Guidelines sentence he receives… Section 924(c) punishes Angelos more harshly for crimes that threaten potential violence than for crimes that conclude in actual violence to victims (e.g., aircraft hijacking, second-degree murder, racist assaults, kidnapping, and rape). This factor, therefore, also suggests the irrationality of § 924(c).

Mr. Angelos also argues that § 924(c) is irrational in failing to distinguish between the recidivist and the first-time offender. Section 924(c) increases penalties for a "second or subsequent conviction under this subsection." This language can be interpreted in two different ways. One construction would be that an offender who is convicted of a § 924(c) violation, serves his time, and then commits a subsequent violation is subject to an enhanced penalty. This was the construction that the Tenth Circuit (among other courts) originally gave to the statute.

…. In 1993 in *Deal v. United States*, the Supreme Court adopted [a more expansive] construction, [allowing] the "second or subsequent" language in § 924(c) to apply … to [a] defendant who is convicted of multiple § 924(c) counts in the same proceeding stemming from a single indictment. The Court concluded (over the dissents of three Justices) that the unambiguous phrase "subsequent conviction" in the statute permitted no distinction between the time at which the convictions took place. In addition, all time imposed for each § 924(c) count must run consecutively to any other sentence. This is what is known as "count stacking."

When multiple § 924(c) counts are stacked on top of each other, they produce lengthy sentences that fail to distinguish between first offenders (like Mr. Angelos) and recidivist offenders. … Other true recidivist statutes do not operate this way. Instead, they graduate punishment (albeit only roughly) between first offenders and subsequent offenders….

For the reasons outlined in the previous section, § 924(c) imposes unjust punishment and creates irrational classifications between different offenses and different offenders. To some, this may seem like a law professor's argument—one that may have some validity in the classroom but little salience in the real world. After all, the only issue in this case is the extent of punishment for a man justly convicted of serious drug trafficking offenses. So what, some may say, if he spends more years in prison than might be theoretically justified? It is common wisdom that "if you can't do the time, don't do the crime."

The problem with this simplistic position is that it overlooks other interests that are inevitably involved in the imposition of a criminal sentence. For example, crime victims expect that the penalties the court imposes will fairly reflect the harms that they have suffered. When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their pain and suffering counts for less than some abstract "war on drugs."

… Another reason for concern is that the unjust penalties imposed by § 924(c) can be expected to attract public notice…. Perhaps in the short term, no ill effects will come from the difference between public expectations and actual sentences. But in the longer term, the federal criminal justice system will suffer. Most seriously, jurors may stop voting to convict drug dealers in federal criminal prosecutions if they are aware that unjust punishment may follow. It only takes a single juror who is worried about unjust sentencing to "hang" a jury and prevent a conviction. …

Justifications for § 924(c)

Given these many problems with § 924(c) as applied to this case—its imposition of unjust punishment, its irrational classifications between offenses and offenders, and its demeaning of victims of actual criminal violence—what can be said on behalf of the statute? The Sentencing Commission has catalogued the six rationales that are said to undergird mandatory sentencing schemes….

(1) Assuring "just" (i.e. appropriately severe) punishment, (2) elimination of sentence disparities, (3) judicial economies resulting from increased pressure on defendants to plead guilty, (4) stronger inducements for knowledgeable offenders to cooperate in the investigation of others, (5) more effective deterrence, and (6) more effective incapacitation of the serious offender.

…[In this case, the government has not relied on the first or second rationale identified above.] The government has also not advanced the third rationale—judicial economies resulting from increased pressure on defendants to plead guilty. Here again, it is possible to understand the government's reluctance. While it is constitutionally permissible for the government to threaten to file enhanced charges against a defendant who fails to plead guilty, there is always the nagging suspicion that the practice is unseemly. In this case, for example, the government initially offered Mr. Angelos a plea bargain in which he would receive a fifteen-year-sentence under one § 924(c) count. When he had the temerity to decline, the government filed superseding indictments adding four additional § 924(c) counts. So far as the court can determine, the superseding indictment rested not on any newly-discovered evidenced but rather solely on the defendant's unwillingness to plead guilty. …[I]t is understandable that the government would not want to publicly defend § 924(c) with the plea-inducing argument, even though given the realities of overworked prosecutors this may provide a true justification for the statute. Nor has the government argued that § 924(c) is needed to provide incentives for drug traffickers to inform on others in their organization. Instead, the rationale advanced by government is deterrence and incapacitation: the draconian provisions of § 924(c) are necessary to deter drug dealers from committing crimes with those firearms and to prevent Mr. Angelos from doing so in the future.

The deterrence argument rests on a strong intuitive logic. Sending a message to drug dealers that they will serve additional time in prison if they are caught with firearms may lead some to avoid firearms entirely and others to leave their firearms at home…. Generally criminologists believe that an increase in prison populations will reduce crime through both a deterrent and incapacitative effect. The consensus view appears to be that each 10% increase in the prison population produces about a 1% to 3% decrease in serious crimes. … While offenders "substituted" into less harmful property crimes, the overall reduction in crime was significant. While no specific study has examined § 924(c), it is reasonable to assume—and Congress is entitled to assume—that it has prevented some serious drug and firearms offenses.

The problem with the deterrence argument, however, is that it proves too much. A statute that provides mandatory life sentences for jaywalking or petty theft would, no doubt, deter those offenses. But it would be hard to view such hypothetical statutes as resting on rational premises. Moreover, a mandatory life sentence for petty theft, for example, would raise the question of why such penalties were not in place for aircraft hijacking, second-degree murder, rape, and other serious crimes. Finally, deterrence comes at a price. Given that holding a person in federal prison costs about $23,000 per year, the 61–year–sentence the court is being asked to impose in this case will cost the taxpayers (even assuming Mr. Angelos receives good time credit and serves "only" 55–years) about $1,265,000. Spending more than a million dollars to incarcerate Mr. Angelos will prevent future crimes by him and may well deter some others from being involved with drugs and guns. But that money could also be spent on other law enforcement or social programs that in all likelihood would produce greater reductions in crime and victimization.

If the court were to evaluate these competing tradeoffs, it would conclude that stacking § 924(c) counts on top of each other for first-time drug offenders who have merely possessed firearms is not a cost-effective way of obtaining deterrence. It is not enough to

simply be “tough” on crime. Given limited resources in our society, we also have to be “smart” in the way we allocate our resources. But these tradeoffs are the subject of reasonable debate. It is not the proper business of the court to second-guess the congressional judgment that § 924(c) is a wise investment of resources. Instead, in conducting rational basis review of the statute, the court is only to determine whether “any ground can be conceived to justify [the statutory scheme] as rationally related to a legitimate government interest.” “Where there are ‘plausible reasons’ for Congress’ action, [the court’s] inquiry is at an end.” …

Accordingly, the court reluctantly concludes that § 924(c) survives rational basis scrutiny. While it imposes unjust punishment and creates irrational classifications, there is a “plausible reason” for Congress’ action. As a result, this court’s obligation is to follow the law and to reject Mr. Angelos’ equal protection challenge to the statute.

IV. Cruel and Unusual Punishment

In addition to raising an equal protection argument, Mr. Angelos also argues that his 55–year sentence under § 924(c) violates the Eighth Amendment’s prohibition of cruel and unusual punishment. In this argument, he is joined in an *amicus* brief filed by a distinguished group of 29 former United States District Judges, United States Circuit Court Judges, and United States Attorneys, who draw on their expertise in federal criminal law and federal sentencing issues to urge that the sentence is unconstitutional as disproportionate to the offenses at hand.

Mr. Angelos and his supporting *amici* are correct in urging that controlling Eighth Amendment case law places an outer limit on punishments that can be imposed for criminal offenses, forbidding penalties that are grossly disproportionate to any offense. … [In] the … fractured 1991 decision in *Harmelin v. Michigan*, … the Court held that imposition of a life sentence without possibility of parole for possession of 650 grams of cocaine did not violate the Eighth Amendment. Then, last year, the Supreme Court confirmed that the gross disproportionality principle—“the precise contours of which are unclear”—is applicable to sentences for terms of years; that there was a “lack of clarity” in its precedents; that it had “not established a clear or consistent path for courts to follow;” and that the proportionality principles from Justice Kennedy’s *Harmelin* concurrence “guide our application of the Eighth Amendment.” …

In light of these controlling holdings, the court must engage in a proportionality analysis guided by factors outlined in Justice Kennedy’s *Harmelin* concurrence. In particular, the court must examine (1) the nature of the crime and its relation to the punishment imposed, (2) the punishment for other offenses in this jurisdiction, and (3) the punishment for similar offenses in other jurisdictions.

Before turning to these *Harmelin* factors, it is important to emphasize that the criminal conduct at issue is solely that covered by the three § 924(c) counts. Mr. Angelos will be fully and appropriately punished for all other criminal conduct from the sentence on these other counts. Thus, the proportionality question … boils down to whether the 55–year sentence is disproportionate to the offense of carrying or possessing firearms three times in connection with dealing marijuana.

A. Mr. Angelos ’ Offenses and the Contemplated Penalty

The first *Harmelin* factor requires the court to compare the seriousness of the three § 924(c) offenses to the harshness of the contemplated penalty to determine if the penalty would be grossly disproportionate to such offenses. In weighing the gravity of the offenses, the court should consider the offenses of conviction and the defendant’s criminal history, as well as “the harm caused or threatened to the victim or society, and the culpability of the offender.” Simply put, “[d]isproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender.”

The criminal history in this case is easy to describe. Mr. Angelos has no prior adult criminal convictions and is treated as a first-time offender under the Sentencing Guidelines.

The sentence-triggering criminal conduct in this case is also modest. Here, on two occasions while selling small amounts of marijuana, Mr. Angelos possessed a handgun under his clothing, but he never brandished or used the handgun. … Mr. Angelos did not engage in force or violence, or threats of force or violence, in furtherance of or in connection with the offenses for which he has been convicted. No offense involved injury to any person or the threat of injury to any person. It is well-established that crimes marked by violence or threat of violence are more serious and that the absence of direct violence affects the strength of society’s interest in punishing a particular criminal.

… Comparing a recommended sentence of two years to the 55–year enhancement the court must impose strongly suggests not merely disproportionality, but gross disproportionality.

B. Comparison to Penalties for Other Offenses

The next *Harmelin* factor requires comparing Mr. Angelos' sentence with the sentences imposed on other criminals in the federal system. Generally, "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." This factor points strongly in favor of finding that the sentence in this case is excessive. As shown … earlier in this opinion, Mr. Angelos will receive a far longer sentence than those imposed in the federal system for such major crimes as aircraft hijacking, second-degree murder, racial beating inflicting life-threatening injuries, kidnapping, and rape. Indeed, Mr. Angelos will receive a far longer sentence than those imposed for three aircraft hijackings, three second-degree murders, three racial beatings inflicting life-threatening injuries, three kidnappings, and three rapes….

C. Comparison to Other Jurisdictions

The final *Harmelin* factor requires the court to examine "sentences imposed for the same crime in other jurisdictions." Evaluating this factor is also straightforward. Mr. Angelos sentence is longer than he would receive in any of the fifty states. The government commendably concedes this point in its brief, pointing out that in Washington State Mr. Angelos would serve about nine years and in Utah would serve about five to seven years. Accordingly, the court finds that the third factor is satisfied.

D. Application of the *Harmelin* Factors in Light of *Davis*

Having analyzed the three *Harmelin* factors, the court believes that they lead to the conclusion that Mr. Angelos' sentence violates the Eighth Amendment. But before the court declares the sentence unconstitutional, there is one last obstacle to overcome. The court is keenly aware of its obligation to follow precedent from superior courts—specifically the Tenth Circuit and, of course, the Supreme Court. The Supreme Court has considered one case that might be regarded as quite similar to this one. In *Hutto v. Davis* (1982), the Supreme Court held that two consecutive twenty-year sentences—totaling forty years—for possession of nine ounces of marijuana said to be worth $200 did not violate the Eighth Amendment. If *Davis* remains good law, it is hard see how the sentence in this case violates the Eighth Amendment. Here, Mr. Angelos was involved in at least two marijuana deals involving $700 and approximately sixteen ounces (one pound) of marijuana. Perhaps currency inflation could equate $700 today with $200 in the 1980's. But as a simple matter of arithmetic, if 40 years in prison for possessing nine ounces marijuana does not violate the Eighth Amendment, it is hard to see how 61 years for distributing sixteen ounces (or more) would do so.

… [T]he Court apparently continues to view *Davis* as part of the fabric of the law. … In light of these continued references to *Davis*, the court believes it is it obligated to follow its holding here. …. Under *Davis*, Mr. Angelos' sentence is not cruel and unusual punishment. Therefore, his Eighth Amendment challenge must be rejected.

V. Calculating the Sentence

With Mr. Angelos' constitutional challenges to the 55–year sentence on § 924(c) counts resolved, the remaining issue before the court is the sentence to be imposed on the other counts…. If the sentence on these thirteen counts was the only sentence that Mr. Angelos would serve, a sentence of about 78–97 months might well be appropriate. But the court cannot ignore the reality that Mr. Angelos will also be sentenced to 55 years on the § 924(c) counts, far in excess of what is just punishment for all of his crimes. In light of this 55–year sentence, and having considered all of the relevant factors listed in the Sentencing Reform Act, the court will impose a sentence of one day in prison for all offenses other than the § 924(c) counts. Lest anyone think that this is a "soft" sentence, in combination with the § 924(c) counts, the result is that Mr. Angelos will not walk outside of prison until after he reaches the age of 70….

VI. Recommendations to Other Branches of Government

Having disposed of the legal arguments in this case, it seems appropriate to make some concluding, personal observations. I have been on the bench for nearly two-and-half years now. During that time, I have sentenced several hundred offenders under the Sentencing Guidelines and federal mandatory minimum statutes. By and large, the sentences I have been required to impose have been tough but fair. In a few cases, to be sure, I have felt that either the Guidelines or the mandatory minimums produced excessive punishment. But even in those cases, the sentences seemed to be within the realm of reason.

This case is different. It involves a first offender who will receive a life sentence for crimes far less serious than those committed by many other offenders—including violent offenders and even a murderer—who have been before me. For the reasons explained in my opinion, I am legally obligated to impose this sentence. But I feel ethically obligated to bring this injustice to the attention of those who are in a position to do something about it.

CONCLUSION

The 55–year sentence mandated by § 924(c) in this case appears to be unjust, cruel, and irrational. But our constitutional system of government requires the court to follow the law, not its own personal views about what the law ought to be. Perhaps the court has overlooked some legal point, and that the appellate courts will find Mr. Angelos' sentence invalid. But applying the law as the court understands it, the court sentences Mr. Angelos to serve a term of imprisonment of 55 years and one day. The court recommends that the President commute this unjust sentence and that the Congress modify the laws that produced it. The Clerk's Office is directed to forward a copy of this opinion with its commutation recommendation to the Office of Pardon Attorney and to the Chair and Ranking Member of the House and Senate Judiciary Committees.

Notes and questions on *Angelos*

1. Judge Paul Cassell, the author of the opinion you've just read, argued that a 55-year sentence for this offender was unjust, cruel, and irrational. But Judge Cassell imposed that sentence anyway. Why? A simple answer might be, the judge believed that the law required him to impose the sentence. If so, which law? Consider the different laws involved in this case. There is a federal statute, 18 U.S.C. § 924(c). There is also the federal constitution, which prohibits states from denying "equal protection" of law, and also prohibits "cruel and unusual punishments." Why doesn't the federal constitution prohibit the mandatory minimum sentence in this case, according to Judge Cassell?
2. This case gives you a chance to think about the roles of different official decisionmakers in expanding America's prison population. If Weldon Angelos were to spend his life in prison for a marijuana offense, which institutions or officials bear responsibility for that decision?
3. Note the many contrasts that the court draws between "actual violence" and the offense for which Weldon Angelos is punished. For example, Judge Cassell writes, "When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their pain and suffering counts for less than some abstract 'war on drugs.'" Just a few years after this decision, Judge Cassell resigned from the bench and returned to law school teaching. He said that he wanted to engage in more advocacy than a judicial post allowed, and that the Angelos case was one factor in his decision. However, Cassell's post-bench advocacy has focused primarily on victims' rights, including the ability of victims to advocate for longer sentences. But notice also that some argue for severe penalties for gun crimes, or drug crimes, or drugs + gun crimes, precisely because they associate drugs and guns with violence. (Judge Cassell also concedes, "This is not to say that trafficking in illegal drugs is somehow a non-violent offense.") This case invites us to think about what counts as "violence," and the way that ideas about violence have shaped official decisions about what and who to punish, and how much punishment to impose.
4. As it turned out, Weldon Angelos did not spend the rest of his life in prison. His case drew attention even at the trial stage; Judge Cassell's opinion notes that 29 former federal prosecutors and judges filed a brief arguing that the mandatory sentence was unconstitutional. Celebrities (including Snoop Dogg) and others continued to advocate on behalf of Angelos even after he entered prison. After Angelos had served about 12 years, President Obama commuted his sentence, and Angelos was released in 2016. A commutation can shorten a sentence, but it does not reverse the underlying conviction. In December 2020, President Trump pardoned Angelos, suggesting that the injustice of his conviction and sentence are a rare point of bipartisan agreement in highly polarized times. Since his release, Angelos has worked as an advocate for clemency and criminal law reform. So many defendants, including defendants of color, have been imprisoned for long terms under § 924(c) that it is worth asking what made Angelos a distinctively sympathetic prisoner. Was it the lack of prior convictions? The image of Angelos as a family man, a devoted father of young children? Snoop Dogg?
5. Weldon Angelos was eventually released, and Congress did eventually amend § 924(c). The statute still imposes lengthy mandatory minimums, but as of June 2022, the 25-year penalty for a "second or subsequent" violation applies only to a defendant whose first § 924(c) conviction became final before the subsequent violation took place. In other words, the amended law would not allow the "count stacking" that was used against Angelos, but it does enable prosecutors to threaten very severe sentences against anyone with a prior § 924(c) conviction. The new statutory text is reproduced below.

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18 U.S.C. § 924 (as amended by First Step Act, effective June 25, 2022)

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime … for which the person may be

prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

…

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall–

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

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1. [Fn. 1 by the Court:] As used here, the terms “automatic” and “fully automatic” refer to a weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted. Such weapons are “machineguns” within the meaning of the Act. We use the term “semiautomatic” to designate a weapon that fires only one shot with each pull of the trigger, and which requires no manual manipulation by the operator to place another round in the chamber after each round is fired. ↵

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7.10: Inchoate Offenses

Introduction

The previous three chapters have focused on different types of crime, but they share the same basic model of criminal liability: a statute defines conduct as criminal, and liability requires proof of (or the defendant's admission to) all elements of the crime. This chapter and the next examine an array of doctrines that expand criminal liability to reach persons who plan, begin, encourage, or assist criminal activity without necessarily completing all elements of the target crime. These doctrines of expansion can be roughly divided into two categories, but there is some overlap between the two. First, the term *inchoate offenses* is often applied to crimes of beginning-but-not-finishing: persons who begin conduct designed to complete a crime, but then fail to complete all elements of the target crime, might be liable for an inchoate offense such as attempt [to commit x offense] or solicitation [to commit x offense]. For example, if I plan a bank robbery and drive to the bank with masks and guns, but then I am prevented from entering the building by savvy security guards, I may be liable for attempted bank robbery. Second, doctrines of *group criminality*, such as accomplice liability, allow persons to be convicted and punished based in part on the actions of other persons. If I provide support and encouragement to someone who commits bank robbery, accomplice liability could allow me to be convicted of the crime of bank robbery, even if I never set foot in a bank or took any money.

Again, there is some overlap between doctrines of inchoate offenses and doctrines of group criminality, and neither category is crisply defined. The term "conspiracy" can be especially confusing, since it is used to describe both an inchoate offense (e.g., conspiracy to distribute narcotics) and a doctrine of group criminality that allows one member of a conspiracy to be punished for offenses committed by another member of the conspiracy. This chapter focuses on the inchoate offenses of attempt and solicitation. Conspiracy in both senses just described will be addressed along with accomplice liability in the following chapter.

Like several of the offenses we have already studied, such as assault, murder, or burglary, the concept of a criminal attempt originated in common law courts but is today usually defined by statute. We will see two different kinds of attempt statutes in this chapter. Some attempt statutes refer to a specific type of criminal conduct. For example, the first case in this chapter concerns a prosecution under a statute that makes it a crime to attempt to commit a federal drug offense. But most American jurisdictions also have a general attempt statute that does not refer to any specific offense or category of offenses. A general attempt statute makes it a crime to attempt to commit any act designated as criminal elsewhere in the law. If a defendant is prosecuted under a general attempt statute, the prosecution will also need to identify which other offense—sometimes called "the target offense"—the defendant was attempting to commit. After the first case of this chapter, all the other cases involve prosecutions under general attempt statutes (in conjunction with the statutes that define the relevant target offense).

Attempt doctrine is thus usually "trans-substantive," in that the general definition of an attempt can be paired with any type of criminal conduct. This chapter and the next do include several more cases on drug crimes, however, since inchoate offenses (and group criminality) are widely used in that context. But it is important to remember that a general attempt statute can be paired with almost any kind of offense. This chapter also includes one case involving attempted murder charges and one involving attempted distribution of pornography.

We have seen often the claim that a criminal conviction requires proof of all elements of an offense. Do inchoate offenses subvert that principle by allowing conviction for defendants who satisfy some but not all elements of the underlying offense? One recurring concern about inchoate crimes is the worry that this category of offenses are more or less "thought crimes"—the defendant is punished for intending to engage in some criminal act, even though he did not in fact engage in the specified conduct. In an effort to avoid punishing people for thoughts alone (and assuming we can discern and "prove" those thoughts), courts have struggled at length to define the kind of conduct that is sufficient to prove an attempt. How a jurisdiction defines a criminal attempt can depend upon why it is choosing to define attempts as criminal; this chapter will explore some possible rationales for punishing attempts and other inchoate offenses. As you consider those questions, it is also important to consider ways in which expansions of criminal liability increase the discretion of state officials. With discretion comes the possibility of discrimination. The role of inchoate offenses in producing racial disparities in convictions and imprisonment is an important but neglected topic for which there is relatively little empirical data available. But in this chapter and the next, look for ways in which efforts to expand criminal liability and enforcement authority have created opportunities for racialized enforcement.

This chapter should give you a basic understanding of the concept of a criminal attempt, both as that term was defined at common law and as it is now typically defined in contemporary statutes. The chapter also explores the separate inchoate offense of solicitation, which is basically the crime of asking someone else to commit a crime. You should also learn two principles that are invoked occasionally as limitations on attempt liability – impossibility and renunciation. Finally, attempt doctrine will give you a chance to revisit the interactions among criminalization choices, enforcement choices, and adjudication choices. The last section of this chapter offers a case study to help you apply attempt doctrine and review earlier material. This concluding section also offers a chance to explore further the questions raised in the previous paragraph: how are inchoate offenses and related expansions of criminal law connected to patterns of racial disparity in the American criminal legal system?

A. Preparation, Solicitation, Attempt

21 U.S.C. § 846. Attempt and conspiracy.

Any person who attempts or conspires to commit any offense defined in this subchapter [drug offenses] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

UNITED STATES of America, Plaintiff-Appellee

v.

Roy MANDUJANO, Defendant-Appellant

United States Court of Appeals, Fifth Circuit
499 F.2d 370

Aug. 19, 1974

RIVES, Circuit Judge:

Mandujano appeals from the judgment of conviction and fifteen-year sentence imposed by the district court, based upon the jury's verdict finding him guilty of attempted distribution of heroin in violation of 21 U.S.C. § 846. We affirm.

I.

The government's case rested almost entirely upon the testimony of Alfonso H. Cavalier, Jr., a San Antonio police officer assigned to the Office of Drug Abuse Law Enforcement. Agent Cavalier testified that, at the time the case arose, he was working in an undercover capacity and represented himself as a narcotics trafficker. At about 1:30 P.M. on the afternoon of March 29, 1973, pursuant to information Cavalier had received, he and a government informer went to the Tally-Ho Lounge, a bar located … in San Antonio. Once inside the bar, the informant introduced Cavalier to Roy Mandujano. …Mandujano asked the informant if he was looking for 'stuff.' Cavalier said, 'Yes.' Mandujano then questioned Cavalier about his involvement in narcotics. Cavalier answered Mandujano's questions, and told Mandujano he was looking for an ounce sample of heroin to determine the quality of the material. Mandujano replied that he had good brown Mexican heroin for $650.00 an ounce, but that if Cavalier wanted any of it he would have to wait until later in the afternoon when the regular man made his deliveries. Cavalier said that he was from out of town and did not want to wait that long. Mandujano offered to locate another source, and made four telephone calls in an apparent effort to do so. The phone calls appeared to be unsuccessful, for Mandujano told Cavalier he wasn't having any luck contacting anybody. Cavalier stated that he could not wait any longer. Then Mandujano said he had a good contact, a man who kept narcotics around his home, but that if he went to see this man, he would need the money 'out front.' To reassure Cavalier that he would not simply abscond with the money, Mandujano stated, 'You are in my place of business. My wife is here. You can sit with my wife. I am not going to jeopardize her or my business for $650.00.' Cavalier counted out $650.00 to Mandujano, and Mandujano left the premises of the Tally-Ho Lounge at about 3:30 P.M. About an hour later, he returned and explained that he had been unable to locate his contact. He gave back the $650.00 and told Cavalier he could still wait until the regular man came around. Cavalier [left], but arranged to call back at 6:00 P.M. When Cavalier called at 6:00 and again at 6:30, he was told that Mandujano was not available. Cavalier testified that he did not later attempt to contact Mandujano, because, 'Based on the information that I had received, it would be unsafe for either my informant or myself to return to this area.'

II.

Section 846 of Title 21, entitled 'Attempt and conspiracy,' provides that,

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

The theory of the government in this case is straightforward: Mandujano's acts constituted an attempt to distribute heroin; actual distribution of heroin would violate 21 U.S.C. § 841(a)(1); therefore, Mandujano's attempt to distribute heroin comes within the terms of § 846 as an attempt to commit an offense defined in the subchapter.

Footnote by the court: [Section 841(a)(1) provides:] '(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

'(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.'

Under subsection 802(11) the term 'distribute' means 'to deliver (other than by administering or dispensing) a controlled substance.' Subsection 802(8) defines the terms 'deliver' or 'delivery' to mean 'the actual, constructive or attempted transfer of a controlled substance, whether or not there exists an agency relationship.'

Mandujano urges that his conduct as described by agent Cavalier did not rise to the level of an attempt to distribute heroin…. He claims that at most he was attempting to acquire a controlled substance, not to distribute it; that it is impossible for a person to attempt to distribute heroin which he does not possess or control; that his acts were only preparation, as distinguished from an attempt; and that the evidence was insufficient to support the jury's verdict. [There was a stipulation that no heroin had exchanged hands in this case.]

Apparently there is no legislative history indicating exactly what Congress meant when it used the word 'attempt' in § 846. There are two reported federal cases which discuss the question of what constitutes an attempt under this section. In *United States v. Noreikis* (7th Cir. 1973) … the court commented that,

'While it seems to be well settled that mere preparation is not sufficient to constitute an attempt to commit a crime, it seems equally clear that the semantical distinction between preparation and attempt is one incapable of being formulated in a hard and fast rule. The procuring of the instrument of the crime might be preparation in one factual situation and not in another. The matter is sometimes equated with the commission of an overt act, the 'doing something directly moving toward, and bringing him nearer, the crime he intends to commit.'

In *United States v. Heng Awkak Roman* (S.D.N.Y. 1973), where the defendants' actions would have constituted possession of heroin with intent to distribute in violation of § 841 if federal agents had not substituted soap powder for the heroin involved in the case, the court held that the defendants' acts were an attempt to possess with intent to distribute. The district court in its opinion acknowledged that … "there is no comprehensive statutory definition of attempt in federal law." The court concluded, however, that it was not necessary in the circumstances of the case to deal with the "complex question of when conduct crosses the line between 'mere preparation' and 'attempt.'"

The courts in many jurisdictions have tried to elaborate on the distinction between mere preparation and attempt….[1] In cases involving statutes other than § 846, the federal courts have confronted this issue on a number of occasions.

… *United States v. De Bolt* (S.D. Ohio 1918) involved an apparent attempt to sabotage the manufacture of war materials in violation of federal law. With regard to the elements of an attempt, the court in this case quoted Bishop's New Crim. Law (1892) vol. 1, §§ 728, 729: "An attempt is an intent to do a particular criminal thing, with an act toward it falling short of the thing intended. Hence, the two elements of an evil intent and a simultaneous resulting act constitute, and yet only in combination, an indictable offense, the same as in any other crime."

Gregg v. United States (8th Cir. 1940) involved in part a conviction for an attempt to import intoxicating liquor into Kansas. The court [noted] with apparent approval the definition of attempt urged by [the defendant]: "[A]n attempt is an endeavor to do an act carried beyond mere preparation, but falling short of execution, and that it must be a step in the direct movement towards the commission of the crime after preparations have been made. The act must 'carry the project forward within dangerous proximity to the criminal end to be attained.'" The court held, however, that Gregg's conduct went beyond 'mere preparation': "The transportation of goods into a state is essentially a continuing act not confined in its scope to the single instant of passage across a territorial boundary. In our view the appellant advanced beyond the stage of mere preparation when he loaded the liquor into his car

and began his journey toward Kansas. From that moment he was engaged in an attempt to transport liquor into Kansas within the clear intent of the statute."

…[In] *United States v. Coplon* (2nd Cir. 1950), where the defendant was arrested before passing to a citizen of a foreign nation classified government documents contained in [her] purse, Judge Learned Hand surveyed the law and addressed the issue of what would constitute an attempt:

"Because the arrest in this way interrupted the consummation of the crime one point upon the appeal is that her conduct still remained in the zone of 'preparation,' and that the evidence did not prove an 'attempt.' This argument it will be most convenient to answer at the outset. A neat doctrine by which to test when a person, intending to commit a crime which he fails to carry out, has 'attempted' to commit it, would be that he has done all that it is within his power to do, but has been prevented by intervention from outside; in short, that he has passed beyond any locus poenitentiae. Apparently that was the original notion, and may still be law in England; but it is certainly not now generally the law in the United States, for there are many decisions which hold that the accused has passed beyond 'preparation,' although he has been interrupted before he has taken the last of his intended steps. The decisions are too numerous to cite, and would not help much anyway, for there is, and obviously can be, no definite line; … There can be no doubt in the case at bar that 'preparation' had become 'attempt.' The jury were free to find that the packet was to be delivered that night, as soon as they both thought it safe to do so. To divide 'attempt' from 'preparation' by the very instant of consummation would be to revert to the old doctrine."

… Although the foregoing cases give somewhat varying verbal formulations, careful examination reveals fundamental agreement about what conduct will constitute a criminal attempt. First, the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting. *United States v. Quincy*, 31 U.S. 445 (1832) ("The offenses consists principally in the intention with which the preparations were made…")….

Second, the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime. A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent. … The use of the word 'conduct' indicates that omission or possession, as well as positive acts, may in certain cases provide a basis for liability. The phrase 'substantial step,' rather than 'overt act,' is suggested by *Gregg v. United States*, supra ('a step in the direct movement toward the commission of the crime'); *United States v. Coplon*, supra ('before he has taken the last of his intended steps') and [other cases] and indicates that the conduct must be more than remote preparation. The requirement that the conduct be strongly corroborative of the firmness of the defendant's criminal intent also relates to the requirement that the conduct be more than 'mere preparation,' and is suggested by the Supreme Court's emphasis upon ascertaining the intent of the defendant, *United States v. Quincy*, supra, and by the approach taken in *United States v. Coplon*, supra ('. . . some preparation may amount to an attempt. It is a question of degree').[2]

III.

The district court charged the jury in relevant part as follows:

[T]he essential elements required in order to prove or to establish the offense charged in the indictment, which is, again, that the defendant knowingly and intentionally attempted to distribute a controlled substance, must first be a specific intent to commit the crime, and next that the accused wilfully made the attempt, and that a direct but ineffectual overt act was done toward its commission, and that such overt act was knowingly and intentionally done in furtherance of the attempt.

'* * * In determining whether or not such an act was done, it is necessary to distinguish between mere preparation on the one hand and the actual commencement of the doing of the criminal deed on the other. Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging a means for its commission, is not sufficient to constitute an attempt, but the acts of a person who intends to commit a crime will constitute an attempt where they, themselves, clearly indicate a certain unambiguous intent to wilfully commit that specific crime and in themselves are an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstances not intended in the original design.

(Tr. Jury Trial Proc., pp. 138-139.) These instructions, to which the defendant did not object, are compatible with our view of what constitutes an attempt under § 846.

After the jury brought in a verdict of guilty, the trial court propounded a series of four questions to the jury:

‘(1) Do you find beyond a reasonable doubt that on the 29th day of March, 1973, Roy Mandujano, the defendant herein, knowingly, wilfully and intentionally placed several telephone calls in order to obtain a source of heroin in accordance with his negotiations with Officer Cavalier which were to result in the distribution of approximately one ounce of heroin from the defendant Roy Mandujano to Officer Cavalier?’

‘(2) Do you find beyond a reasonable doubt that the telephone calls inquired about in question no. (1) constituted overt acts in furtherance of the offense alleged in the indictment?’

‘(3) Do you find beyond a reasonable doubt that on the 29th day of March, 1973, Roy Mandujano, the defendant herein, knowingly, wilfully and intentionally requested and received prior payment in the amount of $650.00 for approximately one ounce of heroin that was to be distributed by the defendant Roy Mandujano to Officer Cavalier?’

‘(4) Do you find beyond a reasonable doubt that the request and receipt of a prior payment inquired about in question no. (3) constituted an overt act in furtherance of the offense alleged in the indictment?’

Neither the government nor the defendant objected to this novel procedure. After deliberating, the jury answered ‘No’ to question (1) and ‘Yes’ to questions (3) and (4). The jury’s answers indicate that its thinking was consistent with the charge of the trial court.

The evidence was sufficient to support a verdict of guilty… [T]he jury could have found that Mandujano was acting knowingly and intentionally and that he engaged in conduct—the request for and the receipt of the $650.00—which in fact constituted a substantial step toward distribution of heroin. From interrogatory (4), it is clear that the jury considered Mandujano’s request and receipt of the prior payment a substantial step toward the commission of the offense. Certainly, in the circumstances of this case, the jury could have found the transfer of money strongly corroborative of the firmness of Mandujano’s intent to complete the crime. Of course, proof that Mandujano’s ‘good contact’ actually existed, and had heroin for sale, would have further strengthened the government’s case; however, such proof was not essential.

Check Your Understanding (8-1)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Notes and questions on *Mandujano*

1. What was Roy Mandujano’s sentence for the crime of attempted distribution of heroin? Look at the first sentence of the court’s opinion, and then at the penalty provisions of 21 U.S.C. § 846, the federal attempt statute. Though an attempted offense may seem “lesser” than a completed offense, many attempt statutes provide that an attempt can be punished with the same range of penalties available for the underlying offense. (See also note 1 after *People v. Acosta* later in this chapter.)
2. Look again at 21 U.S.C. § 846, the federal attempt statute. It’s short! Notice that it uses the terms attempt and conspiracy, but does not define either term. This state was first enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The first two federal opinions to interpret section 846, both quoted in *Mandujano*, both noted that there was no precise definition of the term attempt in the statute, but each of these opinions also declined to provide a precise definition. Why might a court think that it is not necessary or desirable to define attempt, given the many different possible definitions listed in footnote 5?
3. As the *Mandujano* court explains, at common law courts often emphasized that there was a difference between “mere preparation” to commit a crime, on one hand, and a legally punishable attempt, on the other hand. But judges struggled to explain what the difference was, and it’s not clear that there ever was a single common law definition of attempt. Instead, common law courts developed several different tests, the most important of which are listed in footnote 5 of the court’s opinion. Note that each definition refers to “the crime” or “the completed crime.” An attempt conviction is always based upon some other offense that is defined as criminal. That is, a defendant is not convicted of “attempt” in the abstract, but attempted murder, attempted theft, attempted distribution of heroin, and so on. Note also that the common law tests in footnote 5, and the discussions of attempt in earlier federal cases, define a general doctrine of attempt that is applicable to any offense. One recurring question is whether attempt can be meaningfully defined in this “transsubstantive” way—in other words, is the definition of attempt the same whether the target crime is murder or littering? Should it be the same? Or is the struggle to define attempt caused by the fact that courts want to define it differently depending on the underlying offense?
4. Are there key differences between the various tests listed in footnote 5 of the Fifth Circuit opinion, or do these tests all amount to pretty much the same thing, as the court suggests? Would Roy Mandujano be guilty of attempted distribution of heroin under

each common law definition of attempt?

5. Ultimately, the Fifth Circuit adopts an understanding of attempt that follows the language of the Model Penal Code: the defendant must act "with the kind of culpability otherwise required for the commission of the crime," and must also engage in conduct that constitutes a "substantial step" toward commission of the crime. Look closely at MPC § 5.01, quoted in footnote 6 of the court's opinion and reprinted below. Notice that the "substantial step" is actually just one of three ways to commit an attempt. What are the other two?
6. The Fifth Circuit did not quote the full text of MPC § 5.01, which offers several specific examples of the kind of conduct that can constitute a "substantial step." The full text of MPC § 5.01 is reprinted below; it may be useful as we encounter other nuances of attempt law later in this chapter.

Model Penal Code § 5.01

(1) **Definition of Attempt.** A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) **Conduct That May Be Held Substantial Step Under Subsection (1)(c).** Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(3) **Conduct Designed to Aid Another in Commission of a Crime.** A person who engages in conduct designed to aid another to commit a crime that would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

(4) **Renunciation of Criminal Purpose.** When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is

motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

7. MPC § 5.01(1)(a) describes what are sometimes called "completed attempts," or situations in which the defendant has the mental state required by the underlying crime and engages in all the conduct elements, but cannot be punished for the underlying crime itself because some attendant circumstance element cannot be established. For example, consider the facts of *Heng Awkak Ranan*, discussed in the *Mandujano* opinion.
8. MPC § 5.01(1)(b) is similar to another common law explanation of attempt, the "last act" test. Under this test, a defendant was guilty of attempt if he had completed the "last act" or "last proximate act" necessary to accomplish the targeted crime. Most courts held that evidence of the last proximate act was sufficient but not necessary to prove attempt.
9. What mental state must be "proven" (or admitted) in order to establish liability for attempt? The jury instructions used in *Mandujano*, quoted in the Fifth Circuit's opinion, state that "a specific intent to commit the crime" is an element of attempt. This claim is somewhat at odds with the court's reliance on the Model Penal Code, which avoided the common law terms "specific intent" and "general intent." Those terms are notoriously ambiguous, as discussed in prior chapters. The claim that attempt requires specific intent is usually a claim that the defendant must have the purpose of accomplishing the underlying offense. Does the Model Penal Code require this particular mental state, or does it allow attempt liability even when the defendant does not think, "I want to commit x crime"? Look again at MPC § 5.01(1), above.
10. These notes focus heavily on the Model Penal Code's definition of attempt because Section 5.01 is one of the more influential portions of the MPC. A majority of U.S. jurisdictions now use the concept of a "substantial step" to define attempt, rather than one of the older common law tests. Whether this change in the words used to define attempt makes a difference, or what difference it makes, is a difficult question. Again, the *Mandujano* court treated all common law definitions of attempt as more or less equivalent, and treated "substantial step" as roughly equivalent to the common law. In *People v. Acosta*, presented later in this chapter, a New York court characterizes its common law dangerous proximity test as "apparently more stringent" than the substantial step test. But the dissent in *Acosta* observes that at the defendant's trial, the jury was mistakenly instructed on the substantial step test rather than the dangerous proximity test—and no one objected!
11. If redefining attempt along MPC lines does make a difference, how can we ascertain that difference? As noted in the next case in this chapter, the drafters of the MPC made clear that they intended the "substantial step" test to broaden the definition of attempt, making it possible to punish a greater range of preparatory actions. It is not clear whether lay jurors do or would actually interpret the language as the MPC drafters intended. One experimental study found that laypersons interpreted "substantial step" language more narrowly, not more broadly, than common law language such as "dangerous proximity." Avani Mehta Sood, *Attempted Justice: Misunderstandings and Bias in Psychological Constructions of Criminal Attempt*, 71 Stan. L. Rev. 593 (2019). Sood's study relied on experiments in which participants were asked to pretend to be jurors, not actual data from real prosecutions and convictions. In a world of guilty pleas, most convictions for attempted crimes are not based on jury deliberations at all. If legal professionals, including prosecutors and judges, believe that "substantial step" definitions of attempt reach more broadly than the common law tests, that belief could affect these professionals' willingness to bring attempt charges or uphold attempt convictions.
12. Professor Sood's article also investigates ways in which decisionmakers' cognitive biases might operate through attempt doctrine. Her experimental studies asked participants to evaluate the criminal responsibility of a Muslim defendant and a Christian defendant, each charged with an attempted offense. Participants were likely to judge the hypothetical Muslim defendant more harshly even when the fact scenario was written to suggest this defendant's innocence. Professor Sood suggests that "lay constructions of criminal intent may inadvertently operate as a vehicle for discriminatory decisionmaking." 71 Stan. L. Rev. at 654. Because we cannot "know" another person's thoughts in the same sense that we can know (of) their actions, we inevitably rely on conjecture and guesswork when we attribute intentions to someone. In that process of attribution, cognitive biases appear to play a role. For this reason, several commentators have suggested that as criminal liability becomes more heavily based on judgments about intent, the more likely it is that racial bias will shape impositions of criminal liability. See, e.g., Luis Chiesa, *The Model Penal Code, Mass Incarceration, and the Racialization of American Criminal Law*, 25 Geo. Mason L. Rev. 605, 609 (2018) (critiquing the Model Penal Code's definition of attempt for its emphasis on intention, and suggesting that the MPC has "made it easier for racial bigotry to slip through the seams of criminal law doctrine").

Check Your Understanding (8-2)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

South Dakota Codified Laws § 22-4-1. Attempt

Unless specific provision is made by law, any person who attempts to commit a crime and, in the attempt, does any act toward the commission of the crime, but fails or is prevented or intercepted in the perpetration of that crime, is punishable for such attempt at maximum sentence of one-half of the penalty prescribed for the underlying crime…

South Dakota Codified Laws § 22-16-4. Homicide as murder in the first degree

Homicide is murder in the first degree:

(1) If perpetrated without authority of law and with a premeditated design to effect the death of the person killed or of any other human being, including an unborn child; or

(2) If committed by a person engaged in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing, or discharging of a destructive device or explosive.

STATE of South Dakota, Plaintiff and Appellee

v.

Rocco William DISANTO, Defendant and Appellant

Supreme Court of South Dakota
688 N.W.2d 201

Decided Oct. 6, 2004

KONENKAMP, Justice.

… Defendant, Rocco William "Billy" Disanto, and Linda Olson lived together for two years and were engaged for a short time. But their turbulent relationship ended in January 2002. Olson soon began a new friendship with Denny Egemo, and in the next month, they moved in together. Obsessed with his loss, defendant began making threatening telephone calls to Olson and Egemo. He told them and others that he was going to kill them. He also sued Olson claiming that she was responsible for the disappearance of over $15,000 in a joint restaurant venture.

On February 17, 2002, while gambling and drinking at [a hotel], defendant told a woman that he intended "to shoot his ex-girlfriend, to kill her, to shoot her new lover in the balls so that he would have to live with the guilt, and then he was going to kill himself." As if to confirm his intention, defendant grabbed the woman's hand and placed it on a pistol in his jacket. The woman contacted a hotel security officer who in turn called the police. Defendant was arrested and a loaded .25 caliber pistol was taken from him.

In a plea bargain, defendant pleaded guilty to possession of a concealed pistol without a permit and admitted to a probation violation… While in the penitentiary [for these offenses], defendant met Stephen Rynders. He told Rynders of his intention to murder Olson and her boyfriend. Rynders gave this information to law enforcement and an investigation began. In June 2002, defendant was released from prison. Upon defendant's release, Rynders, acting under law enforcement direction, picked defendant up and offered him a ride… At the suggestion of the investigators, Rynders told defendant that he should hire a contract killer who Rynders knew in Denver.

On the afternoon of June 11, 2002, Rynders and Dale McCabe, a law enforcement officer posing as a killer for hire from Denver, met twice with defendant. Much of their conversation was secretly recorded. Defendant showed McCabe several photos of Olson and gave him one, pointed out her vehicle, led him to the location of her home, and even pointed Olson out to him as she was leaving her home. In between his meetings with McCabe that afternoon, by chance, defendant ran into Olson on the street. Olson exclaimed, "I suppose you're going to kill me." "Like a dog," defendant replied.

Shortly afterwards in their second meeting, defendant told McCabe, "I want her and him dead." "Two shots in the head." With only one shot, he said, "something can go wrong." If Olson's teenage daughter happened to be present, then defendant wanted her killed too: "If you gotta, you gotta, you know what I mean." He wanted no witnesses. He suggested that the murders should appear to have happened during a robbery. Because defendant had no money to pay for the murders, he suggested that jewelry and other

valuables in the home might be used as partial compensation. He told McCabe that the boyfriend, Egemo, was known to have a lot of cash. Defendant also agreed to pay for the killings with some methamphetamine he would later obtain.

At 3:00 p.m., defendant and McCabe appeared to close their agreement with the following exchange:

McCabe: So hey, just to make sure, no second thoughts or….
Defendant: No, none.
McCabe: You sure, man?
Defendant: None.
McCabe: Okay.
Defendant: None.
McCabe: The deal's done, man.
Defendant: It's a go.
McCabe: OK. Later. I'll call you tonight.
Defendant: Huh?
McCabe: I'll call you tonight.
Defendant: Thank you.

McCabe would later testify that as he understood their transaction, "the deal was sealed at that point" and the killings could be accomplished "from that time on until whenever I decided to complete the task."

Less than three hours later, however, defendant, seeking to have a message given to McCabe, called Rynders telling him falsely that a "cop stopped by here" and that Olson had spotted McCabe's car with its Colorado plates, that Olson had "called the cops," that defendant was under intense supervision, and that now the police were alerted because of defendant's threat against Olson on the street. All of this was untrue. Defendant's alarm about police involvement was an apparent ruse to explain why he did not want to go through with the killings.

Defendant: So, I suggest we halt this. Let it cool down a little bit….
Rynders: Okay.

* * *

Defendant: So I don't know if that house (Olson's) is being watched, do you know what I'm saying?
Rynders: Okay.

* * *

Defendant: And, ah, the time is not right right now. I'm just telling you, I, I don't feel it. I feel, you know what I mean. I'm not backing out of it, you know what I'm saying.
Rynders: Um hm.
Defendant: But, ah, the timing. You know what I mean. I just got out of prison, right?

* * *

Defendant: So, ah, I'm just telling you right now, put it on hold.
Rynders: Okay.
Defendant: And that's the final word for the simple reason, ah, I don't want nothing to happen to [McCabe], you know what I mean?

* * *

Defendant: Let it cool down. Plus let's let 'em make an offer …. [referring to defendant's lawsuit against Olson]
Rynders: Well, I have no clue where [McCabe is] at right now.
Defendant: Oh, God. You got a cell number?

* * *

Defendant: Get it….
Defendant: I just don't feel good about it to be honest and I'll tell 'ya, I've got great intuition.

Rynders: Okay.

* * *

Defendant: So, I mean, just let him [McCabe] know. Alright buddy?
Rynders: Okay.
Defendant: Get to him. He's gonna call me at 11 tonight.

Despite this telephone call, the next day, McCabe, still posing as a contract killer, came to defendant at his place of employment with Olson's diamond ring to verify that the murders had been accomplished. McCabe drove up to defendant and beckoned him to his car.

McCabe: Hey, man. Come here. Come here. Come here. Jump in, man. Jump in, dude.
Defendant: You sure?
McCabe: Jump in.
Defendant: I can't, I can't leave the bakery. I ain't got the key.
McCabe: Fuck, I gotta get the fuck out of here, dude. It's done, man. Fuckin' done, dude.
Defendant: Okay. I don't wanna know nothin' about it.
McCabe: All right. Check this out, man. [Showing him Olson's diamond ring.]
Defendant: No.
McCabe: Here.
Defendant: I don't wanna see nothin'.
McCabe: I got that shit.
Defendant: Good.

*** * ***

McCabe: Hey. You still owe me some shit, man.
Defendant: Guaranteed.

Defendant was arrested and charged with three counts of attempted murder. He was also charged with one count of simple assault for the threat he made against Olson on the street….

A jury convicted defendant of all charges. He was sentenced to three concurrent thirty-year terms of imprisonment in the South Dakota State Penitentiary. In addition, he received a concurrent 365 days in jail. He was fifty-nine years old at the time. These sentences were consecutive to the unfinished two-year term defendant was to serve for his prior felony conviction. …

Defendant argues that the trial court erred in denying his motion for judgment of acquittal because the State failed to offer sufficient evidence to sustain a conviction on the three counts of attempted murder. …

In defining the crime of attempt, we begin with our statute, [which] states that "Any person who attempts to commit a crime and in the attempt does any act toward the commission of the crime, but fails or is prevented or intercepted in the perpetration thereof, is punishable" as therein provided. To prove an attempt, therefore, the prosecution must show that defendant (1) had the specific intent to commit the crime, (2) committed a direct act toward the commission of the intended crime, and (3) failed or was prevented or intercepted in the perpetration of the crime.

We need not linger on the question of intent. Plainly, the evidence established that defendant repeatedly expressed an intention to kill Olson and Egemo, as well as Olson's daughter, if necessary. As McCabe told the jury, defendant "was a man on a mission to have three individuals murdered."

Defendant does not claim error in any of the court's instructions to the jury. The jury was instructed in part that

Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt; but acts of a person who intends to commit a crime will constitute an attempt when they themselves clearly indicate a certain, unambiguous intent to commit that specific crime, and in themselves are an immediate step in the present commission of the criminal design, the progress of which would be completed unless interrupted by some circumstances not intended in the original design. The attempt is the direct movement toward commission of the crime after the preparations are made.

Once a person has committed acts which constitute an attempt to commit a crime, that person cannot avoid responsibility by not proceeding further with the intent to commit the crime, either by reason of voluntarily abandoning the purpose or because of a fact which prevented or interfered with completing the crime.

However, if a person intends to commit a crime but before the commission [of] any act toward the ultimate commission of the crime, that person freely and voluntarily abandons the original intent and makes no effort to accomplish it, the crime of attempt has not been committed.

Defendant contends that he abandoned any attempt to murder when he telephoned Rynders to "halt" the killings. The State argued to the jury that defendant committed an act toward the commission of first degree murder by giving the "hit-man" a final order to kill, thus making the crime of attempt complete. If he went beyond planning to the actual commission of an act, the State asserted, then a later abandonment would not extricate him from responsibility for the crime of attempted murder. On the other hand, if he only wanted to postpone the crime, then, the State contended, his attempt was merely delayed, not abandoned.

On the question of abandonment, it is usually for the jury to decide whether an accused has already committed an act toward the commission of the murders. Once the requisite act has been committed, whether a defendant later wanted to abandon or delay the plan is irrelevant. As Justice Mosk of the California Supreme Court wrote,

It is obviously impossible to be certain that a person will not lose his resolve to commit the crime until he completes the last act necessary for its accomplishment. But the law of attempts would be largely without function if it could not be invoked until the trigger was pulled, the blow struck, or the money seized. If it is not clear from a suspect's acts what he intends to do, an observer cannot reasonably conclude that a crime will be committed; but when the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is under way, and a last-minute change of heart by the perpetrator should not be permitted to exonerate him.

People v. Dillon (Cal. 1983).

The more perplexing question here is whether there was evidence that, in fulfilling his murderous intent, defendant committed an "act" toward the commission of first degree murder. Defendant contends that he never went beyond mere preparation. In *State v. Martinez*, this Court declared that the boundary between preparation and attempt lies at the point where an act "unequivocally demonstrate[s] that a crime is about to be committed." Thus, the term "act" "presupposes some direct act or movement in execution of the design, as distinguished from mere preparation, which leaves the intended assailant only in the condition to commence the first direct act toward consummation of his design." The unequivocal act toward the commission of the offense must demonstrate that a crime is about to be committed unless frustrated by intervening circumstances. However, this act need not be the last possible act before actual accomplishment of the crime to constitute an attempt.

We have no decisions on point in South Dakota; therefore, we will examine similar cases in other jurisdictions. In murder for hire cases, the courts are divided on how to characterize the offense: is it a solicitation to murder or an act toward the commission of murder? Most courts "take the view that the mere act of solicitation does not constitute an attempt to commit the crime solicited…" …

A majority of courts reason that a solicitation to murder is not attempted murder because the completion of the crime requires an act by the one solicited. … In *State v. Otto*, 629 P.2d 646 (1981), the defendant hired an undercover police officer to kill another police officer investigating the disappearance of the defendant's wife. A divided Idaho Supreme Court reversed the attempted first-degree murder conviction, ruling that the act of soliciting the agent to commit the actual crime, coupled with the payment of $250 and a promise of a larger sum after the crime had been completed, amounted to solicitation to murder rather than attempted murder. The court in *Otto* held that "[t]he solicit[ation] of another, assuming neither solicitor nor solicitee proximately acts toward the crime's commission, cannot be held for an attempt. He does not by his incitement of another to criminal activity commit a dangerously proximate act of perpetration. The extension of attempt liability back to the solicitor destroys the distinction between preparation and perpetration." In sum, "[n]either [the defendant in *Otto*] nor the agent ever took any steps of perpetration in dangerous proximity to the commission of the offense planned."

Requisite to understanding the general rule "is the recognition that solicitation is in the nature of the incitement or encouragement of another to commit a crime in the future [and so] it is essentially preparatory to the commission of the targeted offense." The Idaho Supreme Court made the rather pointed observation that "…jurisdictions faced with a general attempt statute and no means

of severely punishing a solicitation to commit a felony might resort to the device of transforming the solicitor's urgings into [an attempt,] but doing so violates the very essence of the requirement that a sufficient actus reus be proven before criminal liability will attach."[3]

Cases like *Davis* [and] *Otto* … are helpful to our analysis because, at the time they were decided, the statutes or case law in those jurisdictions defined attempt in a way identical to our attempt statute. Under this formulation, there must be specific intent to commit the crime and also a direct act done towards its commission….

To understand the opposite point of view, we will examine cases following the minority rule. But before we begin, we must first consider the definition of attempt under the Model Penal Code, and distinguish cases decided under its formula. In response to court decisions that hiring another to commit murder did not constitute attempted murder, many jurisdictions created, sometimes at the urging of the courts, the offense of solicitation of murder. As an alternative, another widespread response was to adopt the definition of attempt under the Model Penal Code. This is because the Model Penal Code includes in criminal attempt much that was held to be preparation under former decisions. This is clear from the comments accompanying the definition of criminal attempt in Tentative Draft No. 10 (1960) of the American Law Institute's Model Penal Code, Article 5 § 5.01. The intent was to extend the criminality of attempts by drawing the line further away from the final act, so as to make the crime essentially one of criminal purpose implemented by a substantial step highly corroborative of such purpose. … The Model Penal Code treats the solicitation of "an innocent agent to engage in conduct constituting an element of the crime," if strongly corroborative of the actor's criminal purpose, as sufficient satisfaction of the substantial step requirement to support a conviction for criminal attempt.

… *State v. Molasky* (Mo. 1989) … is instructive. There, a conviction for attempted murder was reversed, but only because the conduct consisted solely of conversation, unaccompanied by affirmative acts. … [T]he court reasoned, "a substantial step is evidenced by actions, indicative of purpose, not mere conversation standing alone." Acts evincing a defendant's seriousness of purpose to commit murder, the *Molasky* Court suggested, might be money exchanging hands, concrete arrangements for payment, delivering a photograph of the intended victim, providing the address of the intended victim, furnishing a weapon, visiting the crime scene, waiting for the victim, or showing the hit man the victim's expected route of travel. Therefore, under the relaxed standards of the Model Penal Code, evidence of an act in furtherance of the crime could include what defendant did here, provide a photograph of the intended victim and point out her home to the feigned killer. *Molasky* crystallizes our sense that without the expansive Model Penal Code definition of attempt, acts such as the ones defendant performed here are not sufficient under our definition to constitute attempt.

Knowing that the Model Penal Code relaxes the distinction between preparation and perpetration, we exclude from our analysis those murder for hire cases using some form of the Code's definition of attempt. Obviously, we cannot engraft a piece of the Model Penal Code onto our statutory definition of attempt, for to do so would amount to a judicial rewriting of our statute. Nonetheless, there are several courts taking the minority position that solicitation of murder can constitute attempted murder, without reference to the Model Penal Code definition….

The minority view … is epitomized in the dissenting opinion in *Otto*, where it was noted that efforts to distinguish between "acts of preparation and acts of perpetration" are "highly artificial, since all acts leading up to the ultimate consummation of a crime are by their very nature preparatory." For these courts, preparation and perpetration are seen merely as degrees on a continuum, and thus the distinction between preparation and perpetration becomes blurred.

In interpreting our law, all "criminal and penal provisions and all penal statutes are to be construed according to the fair import of their terms, with a view to effect their objects and promote justice." SDCL 22-1-1. Under our longstanding jurisprudence, preparation and perpetration are distinct concepts. Neither defendant nor the feigned "hit man" committed an act "which would end in accomplishment, but for … circumstances occurring … independent of[] the will of the defendant."

We cannot convert solicitation into attempt because to do so is obviously contrary to what the Legislature had in mind when it set up the distinct categories of solicitation and attempt. Indeed, the Legislature has criminalized other types of solicitations. *See* SDCL 22-43-2 (soliciting commercial bribe); SDCL 22-23-8 (pimping as felony); … SDCL 22-22-24.5 (solicitation of minor for sex); SDCL 16-18-7 (solicitation by disbarred or suspended attorney).

Beyond any doubt, defendant's behavior here was immoral and malevolent. But the question is whether his evil intent went beyond preparation into acts of perpetration. Acts of mere preparation in setting the groundwork for a crime do not amount to an attempt. Under South Dakota's definition of attempt, solicitation alone cannot constitute an attempt to commit a crime. Attempt and

solicitation are distinct offenses. To call solicitation an attempt is to do away with the necessary element of an overt act. Worse, to succumb to the understandable but misguided temptation to merge solicitation and attempt only muddles the two concepts and perverts the normal and beneficial development of the criminal law through incremental legislative corrections and improvements. It is for the Legislature to remedy this problem, and not for us through judicial expansion to uphold a conviction where no crime under South Dakota law was committed.

Reversed.

SABERS, Justice (concurring).

I agree because the evidence indicates that this blundering, broke, inept 59 year-old felon, just out of prison, was inadequate to pursue or execute this crime without the motivating encouragement of his "friend from prison" and law enforcement officers. On his own, it would have been no more than a thought.

GILBERTSON, Chief Justice (dissenting).

… [Defendant's acts were] far more than mere verbal solicitation of a hit man to accomplish the murders….

… Defendant argues that the evidence clearly demonstrates that Defendant's actions in June 2002 did not go beyond mere preparation. Defendant cites the police's failure to arrest Defendant after the June 11, 2002 meeting as proof of this proposition. Defendant also notes that his phone call to Rynders "clearly shows the Defendant put a halt to the attempted commission of the crime … but chose to do so by remaining friendly and cooperative with the hitman."

Two distinct theories can be drawn from Defendant's telephone conversation. The first, posited by Defendant, is that Defendant wished to extricate himself from an agreed upon murder, but leave the "hit man" with the *perception* that the deal remained in place. However, there is a second equally plausible theory which was presented by the State. That is, Defendant merely wanted to delay the previously planned murder, but leave the "hit man" with the *knowledge* that the deal remained in place.

Both theories were thoroughly argued to the jury. However, the jury chose to believe the State's theory. Therefore, the jury could have properly concluded Defendant's actions were "done toward the commission of the crime … the progress of which would be completed unless interrupted by some circumstances not intended in the original design" and not simply mere preparation.

… The Court today enters a lengthy analysis whether the acts constituted preparation or acts in the attempt to commit murder. … Minute examination between majority and minority views and "preparation" and "perpetration" conflict with the command of SDCL 22-1-1:

The rule of the common law that penal statutes are to be strictly construed has no application to this title. All its criminal and penal provisions and all penal statutes are to be construed according to the fair import of their terms, with a view to effect their objects and promote justice.

Here there was evidence that all that was left was to pull the trigger. As the Court acknowledges "the law of attempts would be largely without function if it could not be invoked until the trigger was pulled." … Thus, I respectfully dissent.

ZINTER, Justice (dissenting).

I join the Court's legal analysis concerning the distinction between solicitations and attempts to commit murder [and I join the Court's analysis of abandonment]. Therefore, I agree that Disanto's solicitation of McCabe, in and of itself, was legally insufficient to constitute an attempt to commit murder… However, I respectfully disagree with the Court's analysis of the facts, which leads it to find as a matter of law that Disanto "committed [no] act toward the commission of the offense[]." …[E]ven setting aside Disanto's solicitation, he still engaged in sufficient other "acts" toward the commission of the murder such that reasonable jurors could have found that he proceeded "so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances." The intended victims were clearly in more danger then than they were when Disanto first expressed his desire to kill them.

Specifically, Disanto physically provided McCabe with a photograph of the victim, he pointed out her vehicle, and he took McCabe to the victim's home and pointed her out as she was leaving. None of these acts were acts of solicitation. Rather, they were physical "act[s going] toward the commission" of the murder.

Although it is acknowledged that the cases discussed by the Court have found that one or more of the foregoing acts can be part of a solicitation, Disanto's case has one significant distinguishing feature. After his solicitation was completed, after the details were arranged, and after Disanto completed the physical acts described above, he then went even further and executed a command to implement the killing. In fact, this Court itself describes this act as the "final command" to execute the murder. Disanto issued the order: "It's a go." This act is not present in the solicitation cases that invalidate attempted murder convictions because they proceeded no further than preparation.

Therefore, when Disanto's final command to execute the plan is combined with his history and other acts, this is the type of case that proceeded further than the mere solicitations and plans found insufficient in the case law. This combination of physical acts would have resulted in accomplishment of the crime absent the intervention of the law enforcement officer. Clearly, the victim was in substantially greater danger after the final command than when Disanto first expressed his desire to kill her. Consequently, there was sufficient evidence to support an attempt conviction.[4]

It bears repeating that none of the various "tests" used by courts in this area of the law can possibly distinguish all preparations from attempts. Therefore, a defendant's entire course of conduct should be evaluated in light of his intent and his prior history in order to determine whether there was substantial evidence from which a reasonable trier of fact could have sustained a finding of an attempt. In making that determination, it is universally recognized that the acts of solicitation and attempt are a continuum between planning and perpetration of the offense…

…[I]t is generally the jury's function to determine whether those acts have proceeded beyond mere planning. As this Court itself has noted, where design is shown, "courts should not destroy the practical and common sense administration of the law with subtleties as to what constitutes [the] preparation" to commit a crime as distinguished from acts done towards the commission of a crime. …We leave this question to the jury because "[t]he line between preparation and attempt is drawn at that point where the accused's acts *no longer strike the jury* as being equivocal but unequivocally demonstrate that a crime is about to be committed."

I would follow that admonition and affirm the judgment of this jury. Disanto's design, solicitation, physical acts toward commission of the crime and his final command to execute the murder, when considered together, unequivocally demonstrated that a crime was about to be committed. This was sufficient evidence from which the jury could have reasonably found that an attempt had been committed.

Notes and questions on *State v. Disanto*

1. This case introduces two new concepts important to the study of inchoate offenses: *solicitation*, discussed in this note and the next few notes, and *abandonment*, discussed below. "Solicitation" is, roughly, the crime of trying to get someone else to commit a crime. When solicitation began to be treated as a crime by common law courts in the nineteenth century, it was typically defined as the act of asking, inducing, advising, ordering, or otherwise encouraging someone else to commit a crime. No separate mental state requirement was typically identified, and some modern solicitation statutes also omit an explicit reference to mental states. However, courts typically interpret solicitation to require intent that the other person (the solicitee) commit the target crime. At the time *Disanto* was decided, South Dakota did not have a general solicitation statute. (That would soon change, as explained below.) Instead, separate statutes imposed criminal liability for certain types of offenses; it was a crime to solicit a bribe, for example, and a crime to solicit prostitution. But at the time that Mr. Disanto asked McCabe to kill Linda Olson, no statute made it criminal to solicit murder. Thus, the question before the state supreme court in this case was whether Disanto could be properly charged and convicted of attempted murder. Courts have divided on the question whether a solicitation—again, a request to someone else that they commit a crime—is itself sufficient to support attempt liability. What are the arguments for and against treating a solicitation as a form of attempt? There are a few different possible approaches that might be adopted by a jurisdiction: 1) all solicitations are attempts, making a separate crime of solicitation unnecessary; 2) some but not all solicitations are attempts; 3) solicitations are never attempts, but at least some solicitations should be separately criminalized; 4) solicitations are never attempts, and they should not be subject to criminal liability at all. Which position does the majority take? What about Justice Gilbertson? Justice Zinter?
2. One year after this case was decided, South Dakota adopted the following general solicitation statute:

Any person who, with the intent to promote or facilitate the commission of a crime, commands, hires, requests, or solicits another person to engage in specific conduct which would constitute the commission of such offense or an attempt to commit such offense, is guilty of criminal solicitation.

2005 South Dakota Laws Ch. 120, § 438, codified at SDCL § 22-4A-1. In 2021, the South Dakota Supreme Court, in an opinion by Justice Gilbertson (who dissented in *Disanto*), upheld a conviction under this statute for "solicitation to aid and abet a murder." *State v. Thoman*, 955 N.W.2d 759 (2021). The defendant, William Thoman, had asked a friend "if he knew anyone that could do away with somebody," and also asked the same friend to help him get a gun. Thoman expressed a desire to kill Dr. Mustafa Sahin, a doctor who had treated Thoman's wife until her death from cancer. The friend, Kenneth Jones, later reported the conversation to law enforcement, who had Jones make a recorded phone call to Thoman.

[I]n the recorded conversation, Jones expressed concern for Thoman. He told Thoman that he was unable to come up with a gun. Jones encouraged Thoman to get help, but Thoman told Jones that talking to him was enough. Jones asked if Thoman was still hellbent on "smoking" the doctor; to which Thoman responded, "One way or another he'll get taken care of, is the way I look at it; and if I can help that process along, by God I will." Thoman later said, "As far as literally shooting the guy that's what I would rather do, but he comes up to maybe my rib cage in height and I could just twist his head off. You know it would be just about as easy." Thoman later told Jones a story about going into the chemotherapy department to discuss a bill. While there, he saw Dr. Sahin and said, "There's that son of a bitch I'd like to get." Thoman explained that he has been thinking about killing Dr. Sahin since the December or January before Kathy died. He commented that if you are going to have a plan you ought to have a good plan. Jones asked if he could have Thoman's guns, to which Thoman responded that his guns are under lock and key, and he did not want to use his guns to kill Dr. Sahin because they have sentimental value. He further commented that shooting Dr. Sahin would be like "shooting a dog." Thoman went on to say that he looked at the doors in the hospital's chemotherapy department and noted that they are just wide enough to drive his truck through, but he did not act because he did not want to hurt other people besides the doctor. Thoman later stated that, if Jones had given him a gun, he would have needed the plan to come closer to fruition before acting, but he liked the option of personally killing Dr. Sahin. Then he said that right now it is just an option, and he would call Jones before he did anything.

Thoman, 955 N.W.2d at 764. Thoman was convicted of solicitation to murder under the new South Dakota statute. Should he have been convicted of attempted murder instead?

3. *The Disanto* majority states, "[p]lainly, the evidence established that defendant repeatedly expressed an intention to kill Olson and Egemo, as well as Olson's daughter, if necessary. As McCabe told the jury, defendant 'was a man on a mission to have three individuals murdered.'" Contrast the majority's characterization of the defendant's mental state to the concurring opinion, which finds that "the evidence indicates that this blundering, broke, inept 59-year-old felon … was inadequate to pursue or execute this crime without the motivating encouragement of his 'friend from prison' and law enforcement officers. On his own, it would have been no more than a thought." Are these two characterizations of McCabe's intentions (and actions) consistent? If not, which seems more accurate to you?
4. *Disanto* can help you refine your understanding of common law attempt terminology, including concepts discussed in *Mandujano* and the subsequent notes. The *Disanto* court distinguishes between "an unequivocal act [that] demonstrate[s] a crime is about to be committed unless frustrated by intervening circumstances" and "the last possible act before actual accomplishment of the crime." Which of these two types of act is required to establish attempt liability in South Dakota?
5. Notice that South Dakota has repealed by statute the common law principle of strict construction of criminal statutes. Both the majority opinion and Chief Justice Gilbertson's dissent quote Section 22-1-1, but the majority opinion leaves out the first sentence of the statute. Check Justice Gilbertson's dissent for the longer quotation. Does the extra sentence make a difference to the way you read the rest of the statute? In legal writing, lawyers often think carefully about what to quote and which sources to use. Professional norms generally require lawyers to avoid deliberate misrepresentation of a source. It is important to remember that judicial opinions are also advocacy documents in a certain sense: the judge who authors an opinion wants his or her readers to view the result as the only or best outcome, even if there were multiple possible interpretations of the underlying texts.
6. Disanto argued that he "abandoned" any attempt to murder Olson. The majority suggests that "abandonment" is irrelevant if Disanto had already engaged in the "actus reus" of attempted murder—if he had taken sufficient action, along with his criminal intent, to become guilty of the crime of attempted murder. In some jurisdictions, however, a claim of "abandonment" can function as an affirmative defense to an attempted offense: even if the defendant has completed the necessary elements to be guilty of an attempted crime, his or her subsequent abandonment of the planned crime is relevant to criminal liability. For more on abandonment (sometimes called renunciation) as an affirmative defense, see *People v. Acosta* later in this chapter.

Check Your Understanding (8-3)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Michigan C.L.A. 750.92. Attempt to commit crime

Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:

1. If the offense attempted to be committed is such as is punishable with death, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years;

2. If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for 5 years or more, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or in the county jail not more than 1 year;

3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than 5 years, or imprisonment in the county jail or by fine, the offender convicted of such attempt shall be guilty of a misdemeanor, punishable by imprisonment in the state prison or reformatory not more than 2 years or in any county jail not more than 1 year or by a fine not to exceed 1,000 dollars; but in no case shall the imprisonment exceed ½ of the greatest punishment which might have been inflicted if the offense so attempted had been committed.

Michigan C.L.A. 750.157b. Solicitation to commit murder or other felony; affirmative defense

(1) For purposes of this section, “solicit” means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation.

(2) A person who solicits another person to commit murder, or who solicits another person to do or omit to do an act which if completed would constitute murder, is guilty of a felony punishable by imprisonment for life or any term of years.

(3) Except as provided in subsection (2), a person who solicits another person to commit a felony, or who solicits another person to do or omit to do an act which if completed would constitute a felony, is punishable as follows:

(a) If the offense solicited is a felony punishable by imprisonment for life, or for 5 years or more, the person is guilty of a felony punishable by imprisonment for not more than 5 years or by a fine not to exceed $5,000.00, or both.

(b) If the offense solicited is a felony punishable by imprisonment for a term less than 5 years or by a fine, the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or by a fine not to exceed $1,000.00, or both, except that a term of imprisonment shall not exceed ½ of the maximum imprisonment which can be imposed if the offense solicited is committed.

(4) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose, the actor notified the person solicited of his or her renunciation and either gave timely warning and cooperation to appropriate law enforcement authorities or otherwise made a substantial effort to prevent the performance of the criminal conduct commanded or solicited, provided that conduct does not occur. The defendant shall establish by a preponderance of the evidence the affirmative defense under this subsection.

Michigan C.L.A. 722.675. Dissemination of sexually explicit material to minors

(1) A person is guilty of distributing obscene matter to a minor if that person does either of the following:

(a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.

* * *

(2) A person knowingly disseminates sexually explicit matter to a minor when the person knows both the nature of the matter and the status of the minor to whom the matter is disseminated.

(3) A person knows the nature of matter if the person either is aware of the character and content of the matter or recklessly disregards circumstances suggesting the character and content of the matter.

(4) A person knows the status of a minor if the person either is aware that the person to whom the dissemination is made is under 18 years of age or recklessly disregards a substantial risk that the person to whom the dissemination is made is under 18 years of

age.

PEOPLE of the State of Michigan, Plaintiff–Appellant

v.

Christopher THOUSAND, Defendant–Appellee

Supreme Court of Michigan
631 N.W.2d 694

Decided July 27, 2001

YOUNG, J.

We granted leave in this case to consider whether the doctrine of "impossibility" provides a defense to a charge of attempt to commit an offense prohibited by law under M.C.L. § 750.92, or to a charge of solicitation to commit a felony under M.C.L. § 750.157b….

[Because this case has not yet been tried, our statement of facts is derived from preliminary hearings and documentation in the lower court record.] Deputy William Liczbinski was assigned by the Wayne County Sheriff's Department to conduct an undercover investigation for the department's Internet Crimes Bureau. Liczbinski was instructed to pose as a minor and log onto "chat rooms" on the Internet for the purpose of identifying persons using the Internet as a means for engaging in criminal activity.

On December 8, 1998, while using the screen name "Bekka," Liczbinski was approached by defendant, who was using the screen name "Mr. Auto–Mag," in an Internet chat room. Defendant described himself as a twenty-three-year-old male from Warren, and Bekka described herself as a fourteen-year-old female from Detroit. Bekka indicated that her name was Becky Fellins, and defendant revealed that his name was Chris Thousand. During this initial conversation, defendant sent Bekka, via the Internet, a photograph of his face.

From December 9 through 16, 1998, Liczbinski, still using the screen name "Bekka," engaged in chat room conversation with defendant. During these exchanges, the conversation became sexually explicit. Defendant made repeated lewd invitations to Bekka to engage in various sexual acts, despite various indications of her young age.

During one of his online conversations with Bekka, after asking her whether anyone was "around there," watching her, defendant indicated that he was sending her a picture of himself. Within seconds, Liczbinski received over the Internet a photograph of male genitalia. Defendant asked Bekka whether she liked and wanted it and whether she was getting "hot" yet, and described in a graphic manner the type of sexual acts he wished to perform with her. Defendant invited Bekka to come see him at his house for the purpose of engaging in sexual activity. Bekka replied that she wanted to do so, and defendant cautioned her that they had to be careful, because he could "go to jail." Defendant asked whether Bekka looked "over sixteen," so that if his roommates were home he could lie.

The two then planned to meet at an area McDonald's restaurant at 5:00 p.m. on the following Thursday. Defendant indicated that they could go to his house, and that he would tell his brother that Bekka was seventeen. Defendant instructed Bekka to wear a "nice sexy skirt," something that he could "get [his] head into." Defendant indicated that he would be dressed in black pants and shirt and a brown suede coat, and that he would be driving a green Duster. Bekka asked defendant to bring her a present, and indicated that she liked white teddy bears.

On Thursday, December 17, 1998, Liczbinski and other deputy sheriffs were present at the … restaurant when they saw defendant inside a vehicle matching the description given to Bekka by defendant. Defendant … entered the restaurant. Liczbinski recognized defendant's face from the photograph that had been sent to Bekka. Defendant looked around for approximately thirty seconds before leaving the restaurant. Defendant was then taken into custody [and his vehicle and home were searched].

Following a preliminary examination, defendant was bound over for trial on charges of solicitation to commit third-degree criminal sexual conduct, attempted distribution of obscene material to a minor, and child sexually abusive activity…

Defendant brought a motion to quash the information, arguing that, because the existence of a child victim was an element of each of the charged offenses, the evidence was legally insufficient to support the charges. The circuit court agreed and dismissed the

case, holding that it was legally impossible for defendant to have committed the charged offenses. The Court of Appeals affirmed the dismissal of the charges of solicitation and attempted distribution of obscene material to a minor….

The doctrine of "impossibility" as it has been discussed in the context of inchoate crimes represents the conceptual dilemma that arises when, because of the defendant's mistake of fact or law, his actions could not possibly have resulted in the commission of the substantive crime underlying an attempt charge. Classic illustrations of the concept of impossibility include: (1) the defendant is prosecuted for attempted larceny after he tries to "pick" the victim's empty pocket; (2) the defendant is prosecuted for attempted rape after he tries to have nonconsensual intercourse, but is unsuccessful because he is impotent; (3) the defendant is prosecuted for attempting to receive stolen property where the property he received was not, in fact, stolen; and (4) the defendant is prosecuted for attempting to hunt deer out of season after he shoots at a stuffed decoy deer. In each of these examples, despite evidence of the defendant's criminal intent, he cannot be prosecuted for the *completed* offense of larceny, rape, receiving stolen property, or hunting deer out of season, because proof of at least one element of each offense cannot be derived from his objective actions. The question, then, becomes whether the defendant can be prosecuted for the *attempted* offense, and the answer is dependent upon whether he may raise the defense of "impossibility."

Courts and legal scholars have drawn a distinction between two categories of impossibility: "factual impossibility" and "legal impossibility." It has been said that, at common law, legal impossibility is a defense to a charge of attempt, but factual impossibility is not. See American Law Institute, Model Penal Code and Commentaries (1985), comment to § 5.01; Dressler, Understanding Criminal Law… However, courts and scholars alike have struggled unsuccessfully over the years to articulate an accurate rule for distinguishing between the categories of "impossibility."

"Factual impossibility," which has apparently never been recognized in any American jurisdiction as a defense to a charge of attempt, "exists when [the defendant's] intended end constitutes a crime but she fails to consummate it because of a factual circumstance unknown to her or beyond her control." An example of a "factual impossibility" scenario is where the defendant is prosecuted for attempted murder after pointing an unloaded gun at someone and pulling the trigger, where the defendant believed the gun was loaded.

… "*Pure legal impossibility* exists if the criminal law does not prohibit *D*'s conduct or the result that she has sought to achieve." In other words, the concept of pure legal impossibility applies when an actor engages in conduct that he believes is criminal, but is not actually prohibited by law: "There can be no conviction of criminal attempt based upon D's erroneous notion that he was committing a crime." As an example, consider the case of a man who believes that the legal age of consent is sixteen years old, and who [correctly] believes that a girl with whom he had consensual sexual intercourse is fifteen years old. If the law actually fixed the age of consent at fifteen, this man would not be guilty of attempted statutory rape, despite his mistaken belief that the law prohibited his conduct.

[Separately,]

Courts have recognized a defense of legal impossibility or have stated that it would exist if D receives unstolen property believing it was stolen;… offers a bribe to a "juror" who is not a juror; tries to hunt deer out of season by shooting a stuffed animal; shoots a corpse believing that it is alive; or shoots at a tree stump believing that it is a human.

Notice that each of the mistakes in these cases affected the legal status of some aspect of the defendant's conduct. The status of property as "stolen" is necessary to commit the crime of "receiving stolen property with knowledge it is stolen"—i.e., a person legally is incapable of committing this offense if the property is not stolen. The status of a person as a "juror" is legally necessary to commit the offense of bribing a juror. The status of a victim as a "human being" (rather than as a corpse, tree stump, or statue) legally is necessary to commit the crime of murder or to "take and carry away the personal property *of another.*" Finally, putting a bullet into a stuffed deer can never constitute the crime of hunting out of season.

Dressler, supra.

… It is notable that "the great majority of jurisdictions have now recognized that legal and factual impossibility are 'logically indistinguishable' … and have abolished impossibility as a defense." … In other jurisdictions, courts have considered the "impossibility" defense under attempt statutes that did not include language explicitly abolishing the defense. Several of these courts have simply declined to participate in the sterile academic exercise of categorizing a particular set of facts as representing "factual" or "legal" impossibility, and have instead examined solely the words of the applicable attempt statute.

The Court of Appeals panel in this case … concluded that it was legally impossible for defendant to have committed the charged offense of attempted distribution of obscene material to a minor. The panel held that, because "Bekka" was, in fact, an adult, an essential requirement of the underlying substantive offense was not met (dissemination to a minor), and therefore it was legally impossible for defendant to have committed the crime.

We begin by noting that the concept of "impossibility," in either its "factual" or "legal" variant, has never been recognized by this Court as a valid defense to a charge of attempt. …

Finding no recognition of impossibility in our common law, we turn now to the terms of the statute. MCL 750.92 provides, in relevant part:

Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows…

… We are unable to discern from the words of the attempt statute any legislative intent that the concept of "impossibility" provide any impediment to charging a defendant with, or convicting him of, an attempted crime, notwithstanding any factual mistake—regarding either the attendant circumstances or the legal status of some factor relevant thereto—that he may harbor. The attempt statute carves out no exception for those who, possessing the requisite criminal intent to commit an offense prohibited by law and taking action toward the commission of that offense, have acted under an extrinsic misconception.

Defendant in this case is not charged with the substantive crime of distributing obscene material to a minor. It is unquestioned that defendant could not be convicted of that crime, because defendant allegedly distributed obscene material not to "a minor," but to an adult man. Instead, defendant is charged with the distinct offense of attempt, which requires only that the prosecution prove intention to commit an offense prohibited by law, coupled with conduct toward the commission of that offense. The notion that it would be "impossible" for the defendant to have committed the *completed* offense is simply irrelevant to the analysis. Rather, in deciding guilt on a charge of attempt, the trier of fact must examine the unique circumstances of the particular case and determine whether the prosecution has proven that the defendant possessed the requisite specific intent and that he engaged in some act "towards the commission" of the intended offense.

Because the nonexistence of a minor victim does not give rise to a viable defense to the attempt charge in this case, the circuit court erred in dismissing this charge on the basis of "legal impossibility."

Defendant was additionally charged, on the basis of his Internet conversations with "Bekka," with solicitation to commit third-degree criminal sexual conduct. [The applicable underlying statute provides that "[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and … (a) [t]hat other person is at least 13 years of age and under 16 years of age."] Defendant maintains that it was "legally impossible" for him to have committed this crime, because the underlying felony requires the existence of a child under the age of sixteen. The Court of Appeals panel agreed…

The Court of Appeals erred to the extent that it relied on the doctrine of "impossibility" as a ground for affirming the … dismissal of the solicitation charge. As we have explained, Michigan has never adopted the doctrine of impossibility as a defense in its traditional *attempt* context, much less in the context of *solicitation* crimes. Moreover, we are unable to locate any authority, and defendant has provided none, for the proposition that "impossibility" is a recognized defense to a charge of solicitation in other jurisdictions.

Nevertheless, the solicitation charge was properly dismissed for the reason that there is no evidence that defendant in our case solicited anyone "to commit a felony" or "to do or omit to do an act which if completed would constitute a felony"… Pursuant to the plain statutory language, the prosecution was required to present evidence that defendant requested that *another person* perform a criminal act. The evidence here shows only that defendant requested that "Bekka" engage in sexual acts with him. While the requested acts might well have constituted a crime on defendant's part, "Bekka" (or Liczbinski) would not have committed third-degree criminal sexual conduct had she (or he) done as defendant suggested. As the Court of Appeals properly concluded:

What is lacking here is defendant's request to another person to commit a crime. "Bekka," the fourteen-year-old online persona of Deputy Liczbinski, was not asked to commit a crime. That is, while it would be a crime for defendant to engage in sexual intercourse with a fourteen-year-old girl, a fourteen-year-old girl is not committing a criminal offense (or at least not CSC–III) by engaging in sexual intercourse with an adult. Thus, whether we look at this case as defendant asking fourteen-year-old "Bekka" to

engage in sexual intercourse with him or as defendant asking Deputy Liczbinski to engage in sexual intercourse with him, he did not ask another person to commit CSC–III…. For the above reasons we conclude that the trial court properly dismissed the charge of solicitation to commit criminal sexual conduct.

Accordingly, while the concept of "impossibility" has no role in the analysis of this issue, we agree with the panel's conclusion that an element of the statutory offense is missing and that the solicitation charge was therefore properly dismissed….

MARILYN J. KELLY, J., (concurring in part and dissenting in part).

The majority errs in concluding that "legal impossibility" has never been adopted in Michigan…

People v. Tinskey (1975) held that the defendants could not be guilty of conspiracy to commit abortion because the woman who was to be aborted was not pregnant. The Court reasoned that the Legislature, in enacting the statute, purposely required that conspiracy to abort involve a pregnant woman. It thereby rejected prosecutions where the woman was not pregnant. It concluded that the defendants in *Tinskey* could not be prosecuted for conspiracy to commit abortion because one of the elements of the crime, a pregnant woman, could not be established.

Significantly, the *Tinskey* Court stated that "[t]he Legislature has not, as to most other offenses, so similarly indicated that impossibility is not a defense." By this language, *Tinskey* expressly recognized the existence of the "legal impossibility" defense in the common law of this state. Even though the reference to "legal impossibility" regarding the crime of attempt may be dictum, the later statement regarding the "impossibility" defense was part of the reasoning and conclusion in *Tinskey.* This Court recognized the defense, even if it did not do so expressly concerning charges for attempt or solicitation.

… Even if "legal impossibility" were not part of Michigan's common law, I would disagree with the majority's interpretation of the attempt statute. It does not follow from the fact that the statute does not expressly incorporate the concept of impossibility that the defense is inapplicable.

Examination of the language of the attempt statute leads to a reasonable inference that the Legislature did not intend to punish conduct that a mistake of legal fact renders unprohibited. The attempt statute makes illegal an "… attempt to *commit an offense prohibited by law* …." It does not make illegal an action not prohibited by law. Hence, one may conclude, the impossibility of completing the underlying crime can provide a defense to attempt.

This reasoning is supported by the fact that the attempt statute codified the common-law rule regarding the elements of attempt. At common law, "legal impossibility" is a defense to attempt….

This state's attempt statute, unlike the Model Penal Code and various state statutes that follow it, does not contain language allowing for consideration of a defendant's beliefs regarding "attendant circumstances." Rather, it takes an "objective" view of criminality, focusing on whether the defendant actually came close to completing the prohibited act. The impossibility of completing the offense is relevant to this objective approach because impossibility obviates the state's "concern that the actor may cause or come close to causing the harm or evil that the offense seeks to prevent."

The majority's conclusion, that it is irrelevant whether it would be impossible to have committed the completed offense, contradicts the language used in the attempt statute. If an element of the offense cannot be established, an accused cannot be found guilty of the prohibited act. The underlying offense in this case, disseminating or exhibiting sexual material to a minor, requires a minor recipient. Because the dissemination was not to a minor, it is legally impossible for defendant to have committed the prohibited act.

…As judges, we often decide cases involving disturbing facts. However repugnant we personally find the criminal conduct charged, we must decide the issues on the basis of the law. I certainly do not wish to have child predators loose in society. However, I believe that neither the law nor society is served by allowing the end of removing them from society to excuse unjust means to accomplish it. In this case, defendant raised a legal impossibility argument that is supported by Michigan case law. The majority, in determining that legal impossibility is not a viable defense in this state, ignores that law….

Notes and questions on *People v. Thousand*

1. The prosecution initially charged Thousand with a completed offense of 722.675, distribution of explicit material to a minor. That statute is reprinted just before the case. The prosecution later moved to withdraw that charge and replace it with an attempted distribution charge. Why did the prosecution make this change?

2. This court rejects "impossibility" as a limitation on attempt liability. But what does it mean to say that an attempt is impossible? Sometimes, the term is used to describe a defendant who tries to engage in conduct that is not actually criminal; that is "pure legal impossibility" in the words of this court. In that case, it is impossible to commit the underlying crime because there is no underlying crime. Aside from this situation, the label "impossibility" is contested. If a person decides to hunt deer out of season and shoots an animal that turns out to be a decoy rather than a real deer, has this person engaged in an "impossible" attempt? For information on Indiana's Robo-Deer enforcement program, see https://indianapublicmedia.org/news/dnr-sting-op-stifel-road-hunting.php.
3. Review the Model Penal Code's definition of attempt (reprinted in the notes after *Mandujano*). The MPC makes the issue of impossibility mostly irrelevant by defining attempt to include acts that would constitute a crime, or a substantial step toward a crime, "if the attendant circumstances were as [the defendant] believes them to be." So a person who tries to bribe a "juror," though mistaken about whether his bribe is going to someone who really is a juror, is as guilty as a person who tries to bribe an actual juror.
4. In the dissenting opinion in *Thousand*, the question whether "impossibility" should limit attempt liability requires us to consider the underlying rationale for punishing attempt at all. Judge Kelly writes, "impossibility obviates the state's concern that the actor may cause or come close to causing the harm or evil that the offense seeks to prevent." Does it seem correct to you that attempt doctrine is based on a worry about risks of harm? Should a defendant's liability for an attempted offense depend on the defendant's likelihood of success? What other rationales might explain the choice to criminalize attempts?
5. Note that Michigan has both a general attempt statute and a general solicitation statute, both reprinted before this case. Christopher Thousand was charged with solicitation to commit third-degree sexual conduct, but attempted distribution of obscene material to a minor. The solicitation charge and the attempt charge were paired with two different underlying offenses. But could Thousand have been charged, or convicted, with solicitation and attempt with regard to the same underlying crime? That is, could he have been charged with solicitation to commit third-degree sexual conduct and attempted third-degree sexual conduct? Many courts hold that solicitation "merges" with attempt so that a defendant can be convicted of either solicitation or attempt for a given act, but not both of these inchoate crimes.
6. Why did the Michigan Supreme Court conclude that Thousand's solicitation charge (but not the attempt charge) was properly dismissed? The court rejected the language of impossibility, but is this a case of what the court earlier called "pure legal impossibility"?

Check Your Understanding (8-4)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Renunciation or Abandonment

N.Y. Penal Law § 110.00. Attempt to commit a crime

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

N.Y. Penal Law § 40.10(3)

In any prosecution pursuant to section 110.00 for an attempt to commit a crime, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

Penal Law § 220.21 [as amended in 2004]

A person is guilty of criminal possession of a controlled substance in the first degree when he or she knowingly and unlawfully possesses:

1. one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of eight ounces or more; or

2. methadone and said methadone weighs five thousand seven hundred sixty milligrams or more.

The PEOPLE of the State of New York, Appellant

v.

Andre ACOSTA, Respondent

Court of Appeals of New York
80 N.Y.2d 665

Feb. 16, 1993

KAYE, Judge.

A person who, with intent to possess cocaine, orders from a supplier, admits a courier into his or her home, examines the drugs and ultimately rejects them because of perceived defects in quality, has attempted to possess cocaine within the meaning of the Penal Law. As the evidence was legally sufficient to establish this sequence of events, we reinstate defendant's conviction of attempted criminal possession of a controlled substance in the first degree.

I.

By jury verdict, defendant was convicted of conspiracy and attempted possession of cocaine. The latter charge—the only one at issue on this appeal—centers on the events of March 21, 1988.

Evidence at trial revealed that, commencing in November 1986, officers of the Manhattan North Narcotics Division began investigating the activities of defendant, his brother Miguel and others. Their investigation techniques included the use of an undercover officer to infiltrate the organization, stakeouts and court-authorized wiretaps. In July 1987 the undercover met with Miguel at a Manhattan apartment and purchased cocaine. At that time, Miguel introduced defendant to the officer, telling her that they "work together."

A wiretap on defendant's telephone at his Bronx apartment revealed that for several days prior to March 21, 1988, he was negotiating with Luis Rojas to purchase kilogram quantities of cocaine. [These conversations were routinely conducted in code words such as "tickets" or "tires" which the prosecution expert testified represented kilos of cocaine.] On March 21, at 11:37 a.m., Rojas called defendant and asked, "are you ready?" Defendant replied "come by here" and Rojas responded, "I'm going over." At 11:42, defendant called "Frank," an associate, and told him that he "spoke to the man" who would be "coming over here…. Right now."

About a half hour later, around 12:15 p.m., officers staking out defendant's six-floor apartment building saw a man pull up in a car, remove a black and white plastic bag from the trunk, and enter the building. The bag's handles were stretched, indicating that the contents were heavy. At 12:30, the man emerged from the building, carrying the same plastic bag which still appeared to be heavy. He placed the bag back in the trunk and drove off.

Minutes later, at 12:37 p.m., defendant called Frank, stating that he "saw the man" but "those tickets … were no good; they weren't good for the game man." Frank wondered whether "they got more expensive, the seats" and defendant explained that they were the "same price and all" but they were "not the same seats … some seats real bad, very bad, very bad." Defendant elaborated: "two pass tickets together on the outside stuck together, like a thing, like a ticket falsified. Then I told him to take it away, no, I don't want any problems and anything you see." Frank asked if defendant was told when the tickets would arrive, and defendant responded "No because who came was someone, somebody else, the guy, the messenger." Defendant acknowledged that he "want[s] to participate in the game but if you can't see it, you're going to come out upset."

At 12:50 p.m., Rojas called defendant and said something inaudible about "my friend." Defendant responded, "Oh yes, but he left because (inaudible) it doesn't fit me…. You told me it was the same thing, same ticket." Rojas rejoined, "No. We'll see each other at six."

Finally, at 1:26 p.m., defendant telephoned Hector Vargas, who wanted to know "what happened?" Defendant said, "Nothing. I saw something there, what you wanted, but I returned it because it was a shit there." Hector wanted to know, "like how?" but defendant simply responded, "No, no, a weird shit there." Vargas suggested that he might be able to obtain something "white and good."

The following day, defendant again called Vargas to discuss "the thing you told me about, you know what I'm referring to". Defendant recommended that Vargas "go talk to him, talk to him personally and check it out." Defendant thought that "it would be

better if you took the tickets, at least one or whatever."

At trial, in motions before and after the verdict, defendant argued that the foregoing evidence was insufficient to establish that he attempted to possess cocaine on March 21. The trial court rejected those arguments and sentenced defendant, upon the jury's guilty verdict, to a prison term of 25 years to life, the maximum permitted by law. On appeal, a sharply divided Appellate Division reversed and vacated the attempted possession conviction, the majority concluding that "[e]ven were we to accept [the] attenuated inference that the visitor actually reached defendant's apartment and offered his contraband to him, the remaining evidence shows defendant's flat rejection of that offer, and thus total abandonment of the criminal enterprise with respect to this particular quantity of cocaine." One of the dissenting Justices granted the People leave to appeal, and we now reverse.

II.

A person knowingly and unlawfully possessing a substance weighing at least four ounces and containing a narcotic drug is guilty of criminal possession of a controlled substance in the first degree (Penal Law § 220.21[1]). Under the Penal Law, "[a] person is guilty of an attempt to commit a crime when, with intent to commit a crime, he [or she] engages in conduct which tends to effect the commission of such crime." (Penal Law § 110.00.) While the statutory formulation of attempt would seem to cover a broad range of conduct—anything "tend[ing] to effect" a crime—case law requires a closer nexus between defendant's acts and the completed crime.

In *People v. Rizzo* (NY 1927), we observed that in demarcating punishable attempts from mere preparation to commit a crime, a "line has been drawn between those acts which are remote and those which are proximate and near to the consummation." In *Rizzo*, this Court drew that line at acts "very near to the accomplishment of the intended crime." Though apparently more stringent than the Model Penal Code "substantial step" test—a test adopted by some Federal courts—in this State we have adhered to *Rizzo's* "very near" or "dangerously near" requirement, despite the later enactment of Penal Law § 110.00. [But the statute interpreted in *Rizzo*, former Penal Law § 2, is similar to Penal Law §110.00.]

A person who orders illegal narcotics from a supplier, admits a courier into his or her home and examines the quality of the goods has unquestionably passed beyond mere preparation and come "very near" to possessing those drugs. Indeed, the only remaining step between the attempt and the completed crime is the person's acceptance of the proffered merchandise, an act entirely within his or her control.

Our decision in *People v. Warren* (NY 1985) is thus readily distinguishable…. In that case, an informant and an undercover officer posing as a cocaine seller met defendants in a hotel room and reached an agreement for the sale of about half a pound. The actual exchange, however, was to occur hours later, in another part of town, after repackaging and testing. Moreover, when defendants were arrested at that meeting, the sellers had insufficient cocaine on hand and defendants had insufficient funds. We concluded that since "several contingencies stood between the agreement in the hotel room and the contemplated purchase," defendants did not come "very near" to accomplishment of the intended crime. The same cannot be said here.

Significantly, neither the Appellate Division nor the dissent in this Court disputes the proposition that a person who arranges for the delivery of drugs and actually examines them has come sufficiently close to the completed crime to qualify as an attempt. Rather, the Appellate Division relies on two other grounds for reversal: (i) the evidence was insufficient to establish that defendant in fact met with a drug courier and examined his wares; and (ii) in any event, defendant's ultimate rejection of the drugs constituted an abandonment of the criminal enterprise, vitiating the attempt. (The dissent in this Court is limited to the first ground.) Neither ground is persuasive.

Sufficiency of the Evidence

A jury, of course, concluded from the evidence presented that defendant attempted to possess cocaine on March 21, 1988. In examining the record for legal sufficiency, "the evidence must be viewed in a light most favorable to the People … to determine whether there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" …

[W]e conclude that the evidence was legally sufficient to support the jury's finding that defendant met with a drug courier in his home on March 21. About a half-hour after defendant's supplier, Rojas, told defendant that he would be coming over, the police saw a man enter the apartment building with a weighted-down plastic bag and emerge 15 minutes later with the same heavy bag. Contemporaneously with the unidentified man's departure, defendant reported to an associate that he met with a messenger but that

he rejected the offer because the "seats" were "very bad" and the "tickets" looked "falsified." When Rojas immediately called defendant asking about his "friend," defendant explained that "he left" and complained that Rojas misrepresented that the "same ticket" would be brought. And shortly thereafter, defendant called Vargas and told him that he "saw something there, what you wanted, but I returned it because it was a shit there."

On the evidence presented, a rational jury could have found beyond a reasonable doubt that defendant, with the intent to possess more than four ounces of a controlled substance, met with Rojas' courier and examined cocaine, but rejected it because he was dissatisfied with the quality.

The dissent's contrary conclusion is reachable only by arbitrarily fragmenting the evidence. …[T]he dissent claims that the "sole basis" for defendant's guilt was a wiretapped conversation in which he told an individual that he had just rejected tickets.

The law, however, did not oblige the jury to take such an artificial view of the evidence. Rather, the jury function was to evaluate the trial evidence as a whole, to consider how the individualized bits of evidence fit together, including inferences from the evidence that rational individuals were entitled to draw. As background, the jury knew from defendant's many earlier conversations about "tickets" and his meeting with the undercover that he was involved with drugs. Further, the jury knew that in the days immediately preceding March 21 defendant was negotiating with Rojas to buy kilos of cocaine and that on March 21 Rojas said that he was coming over. The unidentified man's visit to the apartment building with the parcel—coinciding to the minute with defendant's conversations—was fully consistent with defendant's several later admissions that he had met with a courier but rejected his merchandise. While the dissent would ignore the totality of this evidence, the jury most assuredly was not required to do so.

Rejection as Abandonment

… Penal Law § 40.10(3) provides an affirmative defense to an attempt charge "under circumstances manifesting a voluntary and complete renunciation of [the] criminal purpose". To qualify for this defense, "the abandonment must be permanent, not temporary or contingent, not simply a decision to postpone the criminal conduct until another time" …

An abandonment theory is inapposite here. First, abandonment is an affirmative defense, meaning that defendant has the burden of establishing it by a preponderance of the evidence. At trial, however, defendant never sought to present a renunciation defense. Second, and even more fundamentally, the evidence revealed that even after rejecting the March 21 offer, defendant continued making efforts to obtain cocaine. Thus, while it may be true that there was an abandonment "with respect to [that] particular quantity of cocaine," this is immaterial for purposes of the statutory renunciation defense. Rather, there must be an abandonment of over-all criminal enterprise, which on this record plainly was not the case.

III.

… Accordingly, the order of the Appellate Division should be reversed, the conviction for attempted criminal possession of a controlled substance in the first degree reinstated, and the case remitted to that court for consideration of the facts….

SMITH, Judge (dissenting).

To uphold defendant's conviction of an attempt, it must be shown beyond a reasonable doubt that his acts came "dangerously close" to committing the substantive crime. That someone got out of a car carrying a bag and entered the apartment building adds nothing to the proof of the attempted crime. There was no proof of who this man was, what was in the bag, where the man went inside the building or who owned the car. Any connection of this proof with defendant would necessarily be based on pure speculation. The critical question, then, is whether defendant's wiretapped phone calls, standing alone, or even in conjunction with the evidence of a man and his bag, could constitute sufficient evidence for a finding of guilt. Without more, these phone conversations, and other evidence submitted, were insufficient to show that defendant came "dangerously close" to possessing drugs. I, therefore, dissent.

…A police officer assigned to stakeout defendant's apartment building testified at trial that shortly after noon on March 21, 1988, he observed … a male Hispanic exit [a white] car, remove a black and white plastic bag with long, completely stretched handles from the trunk, and enter the courtyard leading to the building. No one followed the person into the building to ascertain where he went. The officer testified further that the same man left the building 15 minutes later with the same bag with similarly stretched handles…. The officer testified that he never stopped the driver of the white vehicle or ascertained what was in the bag. This

incident, along with overheard conversations of defendant that he had rejected "tickets" (allegedly cocaine), presented the sole basis for convicting defendant of attempted possession of a controlled substance in the first degree.

Defendant was convicted, after a jury trial, of attempted criminal possession of a controlled substance in the first degree and conspiracy to possess a controlled substance in the second degree. [Footnote by the dissent: It should be noted that although no objection to it was made by either party, the court erroneously charged the Federal standard on attempt in that a "substantial step" is required for the completion rather than the New York standard of a requirement that conduct come "very near" or "dangerously near" to completion.]

…[T]he evidence adduced at trial does not establish that defendant came very near to the accomplishment of the crime of possession of a controlled substance in the first degree. According to the wiretap information, defendant had been anticipating a delivery of "tickets" from his suppliers for resale to a customer. The police observed an Hispanic male enter and leave the courtyard of the apartment building in which defendant lived carrying a heavy-laden shopping bag. The People assert that the unidentified male brought a supply of cocaine to defendant's apartment and defendant rejected the supply. However, the stakeout police officer did not stop and question the Hispanic male or ascertain what was in the shopping bag, nor did he observe the male approach or enter defendant's apartment. …[T]he testimony that an unidentified man entered and exited defendant's apartment building amounts to no material evidence at all.

The sole basis for defendant's guilt was the wiretap conversations in which defendant told another individual that he had just rejected a delivery of "tickets" as unacceptable because it was "no good" and "stuck together." The evidence adduced simply does not establish beyond a reasonable doubt the attempted possession of cocaine by the defendant.

Check Your Understanding (8-5)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Notes and questions on *People v. Acosta*

1. Weights and measures: in New York, first degree possession of a controlled substance requires possession of a compound or substance that contains narcotics and has "an aggregate weight of eight ounces or more." (At the time of *Acosta*, the minimum weight was only four ounces, as noted in the first sentence of Part II of the majority opinion.) Recall from Chapter Seven that the precise quantity of drugs possessed can be a significant determinant of the scope of criminal liability. When actual narcotics are seized by the police, the drugs (or a mixed substance containing the drugs) can be measured by law enforcement. In this case, no drugs were ever seized or otherwise handled by law enforcement. What evidence does the state use to prove the quantity of the drugs involved here?
2. In a footnote that is omitted here, the *Acosta* majority observed that New York law used to punish an attempted crime less severely than the completed underlying offense: someone convicted of attempted murder would be subject to a less severe sentence than someone convicted of murder itself. Subsequently, New York changed the penalty provisions to make an attempted offense punishable by the same range of penalties that apply to the completed offense. Thus, Andre Acosta could be given the same sentence that he might have received if he had actually possessed a controlled substance. This approach to grading attempt—that is, making it subject to the same penalties as those available for the underlying offense—is recommended in the Model Penal Code and adopted by many U.S. jurisdictions. There is considerable variation on this question, though; other states authorize lower maximum sentences for attempts than for the underlying offenses.
3. Given the penalty details just described, Andre Acosta, who refused to buy this cocaine, is subject to exactly the same criminal punishment to which he would have been subject had he purchased these drugs. Does that make sense? What rationale for attempt law best explains why Acosta should be punished, if indeed he should?
4. Why did the court reject Acosta's claim of abandonment? The easier, and less interesting, answer is that Acosta did not make the claim in time. Because abandonment (or renunciation) is an affirmative defense in New York, it was up to the defendant to raise this argument at trial and present evidence to support it. Acosta did not do that. But the court identifies a second and "more fundamental" reason that the abandonment defense is not available to Acosta. What is that more fundamental argument?
5. New York is not unusual in offering only a minimal statutory definition of attempt: "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." But as the court notes, case law provides additional guidance. The court cites *People v. Rizzo* (1927), a classic case that is often used

to demonstrate the common law "dangerous proximity" test of attempt. Here is the *Rizzo* court's description of the facts of that case:

Charles Rizzo, the defendant, appellant, with three others, Anthony J. Dorio, Thomas Milo and John Thomasello, on January 14th planned to rob one Charles Rao of a payroll valued at about $1,200 which he was to carry from the bank for the United Lathing Company. These defendants, two of whom had firearms, started out in an automobile, looking for Rao or the man who had the payroll on that day. Rizzo claimed to be able to identify the man and was to point him out to the others who were to do the actual holding up. The four rode about in their car looking for Rao. They went to the bank from which he was supposed to get the money and to various buildings being constructed by the United Lathing Company. At last they came to One Hundred and Eightieth street and Morris Park avenue. By this time they were watched and followed by two police officers. As Rizzo jumped out of the car and ran into the building all four were arrested. The defendant was taken out from the building in which he was hiding. Neither Rao nor a man named Previti, who was also supposed to carry a payroll, were at the place at the time of the arrest. The defendants had not found or seen the man they intended to rob; no person with a payroll was at any of the places where they had stopped and no one had been pointed out or identified by Rizzo. The four men intended to rob the payroll man, whoever he was; they were looking for him, but they had not seen or discovered him up to the time they were arrested.

People v. Rizzo, 246 N.E. 334, 336 (1927). The *Rizzo* court found that the defendants were not guilty of attempted robbery, since robbery requires a specific victim and these defendants never located their intended victim.

In a word, these defendants had planned to commit a crime and were looking around the city for an opportunity to commit it, but the opportunity fortunately never came. Men would not be guilty of an attempt at burglary if they had planned to break into a building and were arrested while they were hunting about the streets for the building not knowing where it was. Neither would a man be guilty of an attempt to commit murder if he armed himself and started out to find the person whom he had planned to kill but could not find him. So here these defendants were not guilty of an attempt to commit robbery in the first degree when they had not found or reached the presence of the person they intended to rob.

Id. at 338. The court thus reversed Rizzo's conviction—but not those of his co-defendants, because they had neglected to appeal!

A very strange situation has arisen in this case. …[The four defendants] were all tried together upon the same evidence, and jointly convicted, and all sentenced to State's prison for varying terms. Rizzo was the only one of the four to appeal to the Appellate Division and to this court. …[W]e have now held that he was not guilty of the crime charged. If he were not guilty, neither were the other three. As the others, however, did not appeal, there is no remedy for them through the court; their judgments stand, and they must serve their sentences. This of course is a situation which must in all fairness be met in some way. Two of these men were guilty of the crime of carrying weapons, pistols, contrary to law, for which they could be convicted. Two of them, John Thomasello and Thomas Milo, had also been previously convicted, which may have had something to do with their neglect to appeal. However, the law would fail in its function and its purpose if it permitted these three men whoever or whatever they are to serve a sentence for a crime which the courts subsequently found and declared had not been committed. We, therefore, suggest to the district attorney of Bronx county that he bring the cases of these three men to the attention of the Governor to be dealt with as to him seems proper in the light of this opinion.

Id. at 339-340. As we have discussed many times, the vast majority of criminal convictions do not lead to an appeal.

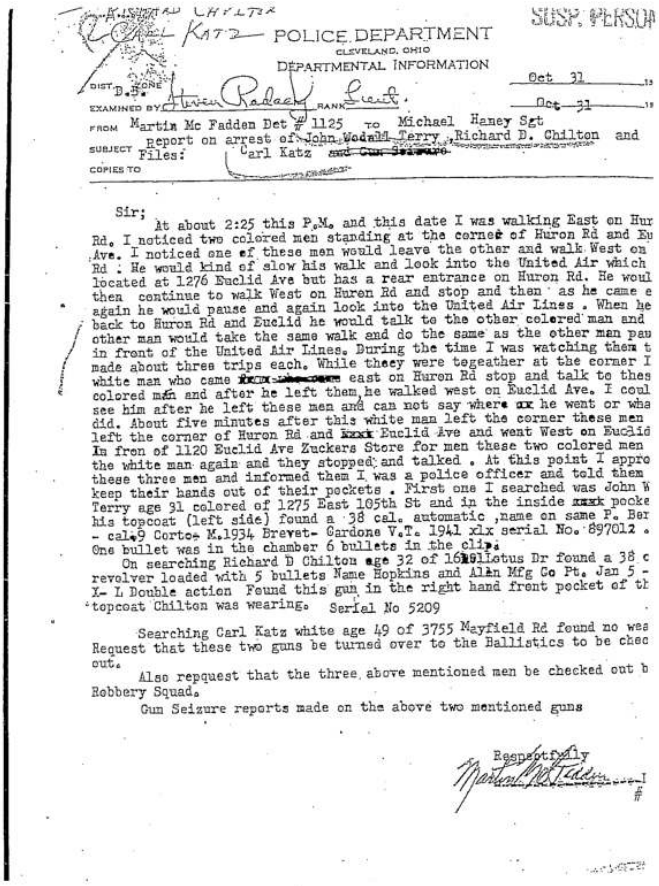
6. One last note about *People v. Rizzo*: the New York court opened its opinion with praise for the police who arrested Rizzo and his codefendants: "The police of the city of New York did excellent work in this case by preventing the commission of a serious crime. It is a great satisfaction to realize that we have such wide-awake guardians of our peace. Whether or not the steps which the defendant had taken up to the time of his arrest amounted to the commission of a crime, as defined by our law, is, however, another matter." *Id*. at 335. In the court's view, Rizzo was properly arrested but not properly convicted. This distinction invites us to think again about the interaction of criminalization, enforcement, and adjudication decisions; the next section examines that interaction.

Enforcement Powers, Enforcement Choices

One possible rationale for the law of attempt is suggested by the *Rizzo* court's praise for the New York police as "wide-awake guardians": attempt doctrine exists to enable enforcement officials to intervene at an earlier stage. This function of attempt law is

not often emphasized in contemporary discussions, in part because the powers of enforcement officials have been expanded in other ways that make attempt doctrine less important as a source of power for police. In this final section of the chapter, we consider inchoate offenses in the broader context of preventive intervention. One particularly important expansion of enforcement authority has been the Supreme Court's endorsement of the idea that a police officer can stop, question, and frisk an individual as soon as the officer has "reasonable suspicion" that "criminal activity is afoot." What does it mean for "criminal activity" to be "afoot"? Does it mean that a person is preparing to commit a crime, or already committing one? Does it allow intervention at "mere preparation," before that preparation has crossed the line into an "attempt"? And what does it mean for a police officer to have "reasonable suspicion" that these things have occurred?

To consider these questions, please read the arrest report below. It is the report generated after the arrest that eventually led to *Terry v. Ohio*, the famous Supreme Court decision that establishes "stop-and-frisk" authority as constitutional. Thinking about *Terry* can help you review inchoate offenses, and it can also help you review the relationships among criminalization, enforcement, and adjudication decisions. Some questions for reflection follow the arrest report.



KATZ — POLICE DEPARTMENT
CLEVELAND, OHIO
DEPARTMENTAL INFORMATION

SUSP. PERSON

DIST. D-5 ZONE
EXAMINED BY Huren Radaay RANK Lieut. Oct 31 19
FROM Martin Mc Fadden Det # 1125 TO Michael Haney Sgt
SUBJECT Report on arrest of John Wodall Terry, Richard D. Chilton and Carl Katz and Gun Seizure
COPIES TO Files:

Sir;

At about 2:25 this P.M. and this date I was walking East on Hur Rd. I noticed two colored men standing at the corner of Huron Rd and Eu Ave. I noticed one of these men would leave the other and walk West on Rd : He would kind of slow his walk and look into the United Air which located at 1276 Euclid Ave but has a rear entrance on Huron Rd. He woul then continue to walk West on Huren Rd and stop and then as he came e again he would pause and again look into the United Air Lines . When he back to Huron Rd and Euclid he would talk to the other colored man and other man would take the same walk and do the same as the other man pau in front of the United Air Lines. During the time I was watching them t made about three trips each. While theey were tegeather at the corner I white man who came east on Huron Rd stop and talk to thes colored man and after he left them, he walked west on Euclid Ave. I coul see him after he left these men and can not say where he went or wha did. About five minutes after this white man left the corner these men left the corner of Huron Rd and Euclid Ave and went West on Euclid In fron of 1120 Euclid Ave Zuckers Store for men these two colored men the white man again and they stopped and talked . At this point I appro these three men and informed them I was a police officer and told them keep their hands out of their pockets . First one I searched was John W Terry age 31 colored of 1275 East 105th St and in the inside pocke his topcoat (left side) found a 38 cal. automatic ,name on same P. Ber - cal.9 Corto- M.1934 Brevet- Cardone V.T. 1941 xlx serial No. 897012 . One bullet was in the chamber 6 bullets in the clip.

On searching Richard D Chilton age 32 of 16[illegible]Lotus Dr found a 38 c revolver loaded with 5 bullets Name Hopkins and Allen Mfg Co Pt. Jan 5 - X- L Double action Found this gun in the right hand front pocket of th topcoat Chilton was wearing. Serial No 5209

Searching Carl Katz white age 49 of 3755 Mayfield Rd found no wea Request that these two guns be turned over to the Ballistics to be chec out.

Also repquest that the three above mentioned men be checked out b Robbery Squad.

Gun Seizure reports made on the above two mentioned guns

Respectfully
Martin McFadden #

1. Notice that Officer McFadden's arrest report requests that the defendants "be checked out by the Robbery Squad." In later testimony before John Terry's trial, McFadden explained that he thought Terry and his co-defendants might have been "casing a job, a stick-up." Assume that at the time of John Terry's arrest, the elements of robbery in Ohio were:
   1) The taking of anything of value
   2) From the person of another
   3) By force or violence or by putting in fear
   4) With intent to steal such property.

See *State v. Carlisle*, 181 N.E.2d 517 (Ohio 1961).

And assume that at the time of Terry's arrest, a criminal attempt was defined under Ohio law "as consisting of three essentials":

1) An intent to perpetrate a criminal act,
2) The performance of some overt act toward its commission,
3) The failure to consummate its commission.

See *State v. Branch*, 26 Ohio Law Abs. 261, 262 (Ohio 1937).

Given these Ohio definitions, and based on the evidence recited in the arrest report, do you think the prosecution would be able to prove beyond a reasonable doubt that Terry committed the crime of attempted robbery? What evidence establishes Terry's intent? What is the overt act?

2. The arrest report states that Terry and his companions were looking repeatedly into the window of a United Airlines ticket office. Later, at trial, Officer McFadden testified that he wasn't sure which window the men were looking into. Still later, after this case became famous, some commentators started to claim that Terry was looking into the window of a jewelry store, although there is no reference to a jewelry store in the arrest report. This idea might have arisen from the fact that one of the stores in the area, mentioned in testimony at a pretrial hearing, was called The Diamond Store. Apparently, it was not actually a jewelry store but a men's clothing store owned by a family with the last name of Diamond. **Does the kind of business make a difference to the attempt analysis?Does it make any difference to know that even in 1963, when McFadden arrested Terry, airline tickets were rarely purchased in cash?**
3. Now, imagine that John Terry is arrested in New York instead of Ohio. Compare Terry's actions to those of the defendants in *People v. Rizzo*, discussed in the notes after *People v. Acosta*. **If the New York doctrinal test for attempt used in *Rizzo*were applied to Terry, would Terry be found guilty of attempted robbery? Do the facts of *Rizzo*better support an attempted robbery conviction, or the facts of *Terry*? Or is the evidentiary support for attempted robbery about the same in both cases?**
4. The previous questions are questions about conviction decisions—the finding that a particular defendant is in fact guilty and subject to punishment. Now, consider the enforcement decisions in these cases—the decision to arrest Rizzo and his acquaintances, and the decision to stop and frisk Terry (which, after the frisk revealed a gun, led to a decision to arrest Terry). Enforcement decisions do not require proof beyond a reasonable doubt or anything close to that level of confidence. Instead, an arrest requires "probable cause" to believe that a crime has been or is being committed by the person being arrested. Courts have struggled to define probable cause, but some typical explanations of the concept describe it as "a reasonable ground for belief of guilt" or "facts sufficient to warrant a reasonable person in the belief that the suspect has committed a crime." The Supreme Court has emphasized that probable cause is a much lower standard – easier to satisfy – than proof beyond a reasonable doubt. "The term probable cause … means less than evidence which would justify condemnation. … It imports a seizure made under circumstances which warrant suspicion." *Locke v. United States* (1813).
5. Given that probable cause is a kind of suspicion rather than a standard of proof, and that probable cause is a much lower standard to fulfill than "beyond a reasonable doubt," it makes sense that the *Rizzo* court could see the police decision to arrest as praiseworthy, but nonetheless conclude that Rizzo was not properly convicted. In other words, the enforcement decision was justified, in the court's view, but the conviction decision (or adjudication decision) was not supported by adequate evidence.
6. Consider again Officer McFadden's observations and his enforcement decisions. If McFadden's observations were sufficient to give him "a reasonable ground for belief" that Terry and Chilton were guilty of an offense, he would have "probable cause" to arrest them for that offense. Again, this "reasonable ground for belief" need not be confidence as strong as that required by the "beyond a reasonable doubt" standard. All the same, when Terry was prosecuted for weapons possession, the trial court held that "it 'would be stretching the facts beyond reasonable comprehension' to find that Officer McFadden had had probable cause to arrest the men before he patted them down for weapons." *Terry v. Ohio*, 392 U.S. 1, 7-8 (1968) (quoting the trial court). Terry could not have been arrested for attempted robbery, on the Court's analysis, and indeed he was never charged with that offense. Instead, as noted above, Terry was charged with weapons possession on the basis of the gun that Officer McFadden discovered during the frisk, and he was convicted of that offense. Terry appealed, arguing that the frisk had violated his constitutional right to be free from unreasonable searches and seizures, and thus the gun should have been excluded from evidence.

In the landmark Supreme Court case that eventually endorsed Officer McFadden's enforcement decision, the Supreme Court accepted the trial court's finding that McFadden did not have probable cause to arrest Terry for attempted robbery or some similar offense. But the Court held that McFadden acted lawfully when he approached Terry and his companions, ordered them to take

hands out of their pockets, and searched their clothing for weapons—even though the men had left the scene of the suspected would-be robbery by the time McFadden stopped them:

He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a 'stick-up.' We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point.

Id. at 28. *Terry v. Ohio* thus became the Supreme Court's official green-light for the police practice known as stop-and-frisk. A *Terry* stop is not itself an official arrest; it is a brief detention during which the officer can ask the suspect a few questions. If the officer suspects that the person stopped is "armed and dangerous," the officer may "frisk" the person, patting down their clothing to look for weapons. Again, the Supreme Court did not require the officer to have probable cause to believe the suspect had committed any crime, or even probable cause to believe the suspect was armed, before stopping and frisking someone. Instead, the Court said, the officer could take these actions on the basis of a lower level of suspicion that has come to be called "reasonable suspicion." As stated by the *Terry* Court,

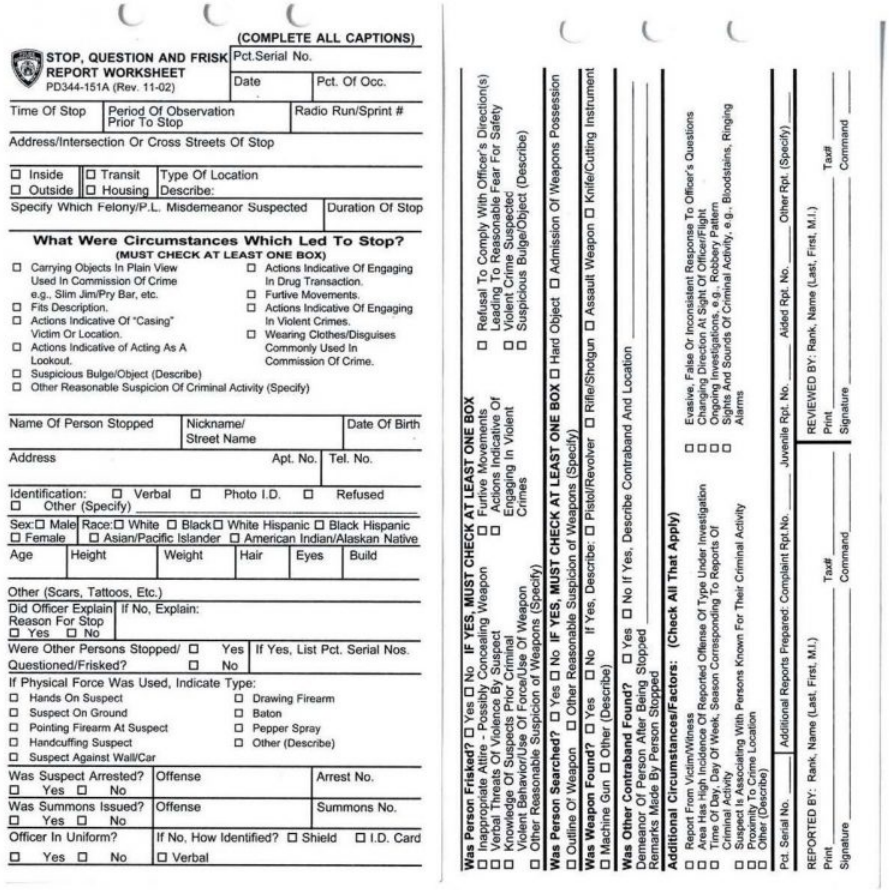
where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the [Constitution], and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Id. at 30-31. The practice of stop-and-frisk is very important to the enforcement of drug and gun offenses; a frisk often allows the police to locate drugs or guns that would otherwise remain hidden from view. If an officer feels an object likely to be a gun—or drugs—he is permitted to remove it and, if he confirms that it appears to be contraband, he can seize it and arrest the individual who possessed it.

Thus, *Terry v. Ohio* illustrates well the interaction of criminalization, enforcement, and adjudication decisions. At one time, jurisdictions may have seen the criminalization of attempt as a necessary way to enable earlier enforcement intervention. As the powers of enforcement officials have expanded through constitutional doctrine, attempt law becomes less important in this way (though it is still important for other reasons). And the broad enforcement powers granted by *Terry v. Ohio* make conviction decisions much easier in some areas of law: stop-and-frisk enables police to locate contraband items that would otherwise remain hidden. As you saw in Chapter Seven, once police have found contraband on a person, it is relatively difficult for that person to avoid a possession conviction. Again, we can put these observations in terms of criminalization, enforcement, and adjudication decisions. The criminalization of drug and gun possession would not necessarily, by itself, lead to many actual convictions unless police had ways to determine who had drugs or guns in their possession. But the expansion of enforcement powers to include a broad authority to stop and frisk on the basis of an "hypothesis" that "criminal activity is afoot" enables police to detect the guns and drugs that then make adjudication decisions easy in possession cases.

7. Who are the police likely to find to be suspicious, and on what grounds? Minority communities have long complained that police use their broad discretion to stop and frisk in racially biased ways. Indeed, that very concern was noted by the Supreme Court in *Terry*, though the Court sustained stop-and-frisk authority regardless. In 2013, a federal court found that the New York Police Department had engaged in unconstitutional racial discrimination by stopping and frisking Black and Latino New Yorkers at disproportionate rates. See *Floyd v. City of New York*, 959 F. Supp.2d 540 (S.D.N.Y. 2013). Some of the evidence in *Floyd* came from a statistical analysis of thousands of UF-250 forms—the paperwork that NYPD officers are asked to complete when they stop a suspect. A blank UF-250 form was included in Chapter Three, and included here.

APPENDIX B
Blank UF-250 Form



(COMPLETE ALL CAPTIONS)

STOP, QUESTION AND FRISK REPORT WORKSHEET
PD344-151A (Rev. 11-02)

Pct.Serial No. | Date | Pct. Of Occ.

Time Of Stop | Period Of Observation Prior To Stop | Radio Run/Sprint #

Address/Intersection Or Cross Streets Of Stop

☐ Inside ☐ Outside | ☐ Transit ☐ Housing | Type Of Location Describe:

Specify Which Felony/P.L. Misdemeanor Suspected | Duration Of Stop

What Were Circumstances Which Led To Stop?
(MUST CHECK AT LEAST ONE BOX)

- ☐ Carrying Objects In Plain View Used In Commission Of Crime e.g., Slim Jim/Pry Bar, etc.
- ☐ Fits Description.
- ☐ Actions Indicative Of "Casing" Victim Or Location.
- ☐ Actions Indicative of Acting As A Lookout.
- ☐ Suspicious Bulge/Object (Describe)
- ☐ Other Reasonable Suspicion Of Criminal Activity (Specify)
- ☐ Actions Indicative Of Engaging In Drug Transaction.
- ☐ Furtive Movements.
- ☐ Actions Indicative Of Engaging In Violent Crimes.
- ☐ Wearing Clothes/Disguises Commonly Used In Commission Of Crime.

Name Of Person Stopped | Nickname/ Street Name | Date Of Birth

Address | Apt. No. | Tel. No.

Identification: ☐ Verbal ☐ Photo I.D. ☐ Refused ☐ Other (Specify)

Sex: ☐ Male ☐ Female | Race: ☐ White ☐ Black ☐ White Hispanic ☐ Black Hispanic ☐ Asian/Pacific Islander ☐ American Indian/Alaskan Native

Age | Height | Weight | Hair | Eyes | Build

Other (Scars, Tattoos, Etc.)

Did Officer Explain Reason For Stop ☐ Yes ☐ No | If No, Explain:

Were Other Persons Stopped/ Questioned/Frisked? ☐ Yes ☐ No | If Yes, List Pct. Serial Nos.

If Physical Force Was Used, Indicate Type:

- ☐ Hands On Suspect
- ☐ Suspect On Ground
- ☐ Pointing Firearm At Suspect
- ☐ Handcuffing Suspect
- ☐ Suspect Against Wall/Car
- ☐ Drawing Firearm
- ☐ Baton
- ☐ Pepper Spray
- ☐ Other (Describe)

Was Suspect Arrested? ☐ Yes ☐ No | Offense | Arrest No.

Was Summons Issued? ☐ Yes ☐ No | Offense | Summons No.

Officer In Uniform? ☐ Yes ☐ No | If No, How Identified? ☐ Shield ☐ I.D. Card ☐ Verbal

Was Person Frisked? ☐ Yes ☐ No **IF YES, MUST CHECK AT LEAST ONE BOX**
☐ Inappropriate Attire - Possibly Concealing Weapon ☐ Furtive Movements ☐ Refusal To Comply With Officer's Direction(s)
☐ Verbal Threats Of Violence By Suspect ☐ Actions Indicative Of Engaging In Violent Crimes ☐ Leading To Reasonable Fear For Safety
☐ Knowledge Of Suspects Prior Criminal Violent Behavior/Use Of Force/Use Of Weapon ☐ Violent Crime Suspected
☐ Other Reasonable Suspicion of Weapons (Specify) ☐ Suspicious Bulge/Object (Describe)

Was Person Searched? ☐ Yes ☐ No **IF YES, MUST CHECK AT LEAST ONE BOX** ☐ Hard Object ☐ Admission Of Weapons Possession
☐ Outline Of Weapon ☐ Other Reasonable Suspicion of Weapons (Specify)

Was Weapon Found? ☐ Yes ☐ No If Yes, Describe: ☐ Pistol/Revolver ☐ Rifle/Shotgun ☐ Assault Weapon ☐ Knife/Cutting Instrument
☐ Machine Gun ☐ Other (Describe)

Was Other Contraband Found? ☐ Yes ☐ No If Yes, Describe Contraband And Location
Demeanor Of Person After Being Stopped
Remarks Made By Person Stopped

Additional Circumstances/Factors: (Check All That Apply)
☐ Report From Victim/Witness Of Reported Offense Of Type Under Investigation
☐ Area Has High Incidence Of Time Of Day, Day Of Week, Season Corresponding To Reports Of Criminal Activity
☐ Suspect Is Associating With Persons Known For Their Criminal Activity
☐ Proximity To Crime Location
☐ Other (Describe)
☐ Evasive, False Or Inconsistent Response To Officer's Questions
☐ Changes Direction At Sight Of Officer/Flight
☐ Ongoing Investigations, e.g., Robbery Pattern
☐ Sights And Sounds Of Criminal Activity, e.g., Bloodstains, Ringing Alarms

Pct. Serial No. | Additional Reports Prepared: Complaint Rpt. No. | Juvenile Rpt. No. | Aided Rpt. No. | Other Rpt. (Specify)

REPORTED BY: Rank, Name (Last, First, M.I.) | Tax# | Command
Print
Signature

REVIEWED BY: Rank, Name (Last, First, M.I.) | Tax# | Command
Print
Signature

This form asks police to record many details of a *Terry* stop, including the race of the person stopped and the officer's stated reasons for making the stop. The statistical analysis of NYPD stops showed that officers stopped and frisked Black and Latino men disproportionately often, usually citing no basis for the officer's suspicion other than the fact that the encounter occurred in a "high crime area" and/or the person made "furtive movements." The overwhelming majority of these stops and frisks of persons of color led to no arrest and no discovery of contraband. Indeed, police were somewhat more likely to find contraband or make an arrest when they stopped white people, perhaps because police were more selective and looked for more reliable evidence of criminal activity before stopping white persons.

8. A final question: what exactly does it mean for an offense to be "inchoate"? This chapter has focused on attempt and solicitation, and the next chapter will discuss conspiracy as a criminal offense. Attempt, solicitation, and conspiracy are all doctrines that can apply transsubstantively – or across different types of crimes – to expand criminal liability so it reaches people who have taken some steps toward a specific crime but have not necessarily completed that crime. A person who has thought about committing a robbery but has not actually robbed might nonetheless be convicted (depending on the circumstances) of attempted robbery, solicitation to commit robbery, or conspiracy to commit robbery.

   Sometimes, however, the term "inchoate offense" is used more broadly, to describe any offense that punishes conduct on the theory that the conduct represents a threat of some future harmful act. For example, some courts have characterized burglary as

an inchoate offense: recall from Chapter Five that burglary is typically defined as the unlawful entry into a given place with the intent to commit a crime therein. One might view the unlawful entry as a wrong or harm in itself, and indeed, many jurisdictions do have independent offenses of trespass, "breaking and entering," or "unlawful entry" that are separate from burglary and do not require proof of intent to commit some further offense. (See *State v. Begaye* in Chapter Five.) Burglary usually carries a more severe penalty than these other offenses, on the theory that a burglary conviction punishes the distinctive threat of the entry with the intent to do further wrong inside the designated location.

Now consider possession offenses, which were discussed at length in the previous chapter. Does a person who possesses drugs but does nothing with the drugs – does not consume or inject them, or distribute them to others – commit any harm worthy of legal intervention? Many courts and commentators have characterized possession offenses as inchoate offenses, reasoning that the underlying concern with possession is a worry that the possessor will take some further dangerous or harmful action.

Under this view, inchoate offenses are part of a preventive regime in which criminal law intervenes to stop harms before they occur. By necessity and by design, inchoate offenses will impose criminal liability on people who have not caused the tangible harm that motivates the law, but who are believed to pose a threat of causing that harm. In part because there is no need to show any evidence of tangible harm, enforcement officials and adjudicators will have broad discretion as they decide whom to investigate, arrest, prosecutor, or convict of inchoate offenses.

Many commentators have linked the preventive regime described above, in which both inchoate offenses and constitutional criminal procedure give enforcers the authority to intervene when they suspect that a person poses a threat of future harm, to patterns of racial disparity in American criminal law. Racial identity may influence official decisions about who is dangerous enough to warrant intervention. As noted earlier in this chapter, Professor Luis Chiesa has argued that the Model Penal Code's expansion of inchoate offenses has contributed to the "racialization" of American criminal law. Luis Chiesa, *The Model Penal Code, Mass Incarceration, and the Racialization of American Criminal Law*, 25 Geo. Mason L. Rev. 605, 609 (2018). As an illustration of the MPC's expansion, think again of John Terry: the MPC "substantial step" approach to attempt would have empowered police to arrest John Terry for attempted robbery, even though Ohio's common law definition of attempt did not permit such an arrest. Robert L. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, 33 Stan. L. Rev. 201, 216 (1981). Possession offenses are another important component of this preventive regime, leading Professor Markus Dirk Dubber to characterize possession as "the new vagrancy."

> [P]ossession offenses do the crime war's dirty work. Possession has replaced vagrancy has the most convenient gateway into the criminal justice system. Possession shares the central advantages of vagrancy as policing tool: flexibility and convenience. Yet … it is in the end a far more formidable weapon in the war on crime: it expands the scope of policing into the home, it results in far harsher penalties and therefore has a far greater incapacitative potention, and it is far less vulnerable to legal challenges.
>
> Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. Criminal Law & Criminology 829, 856 (2001). Chapter Three discussed the use of vagrancy statutes after the Civil War to enforce the continued subordination of Black Americans and, in some instances, compel them to supply the free labor that Southern states had lost when slavery was abolished. Although criminal convictions are not used to supply labor in the same way today, they are still a device of social and political subordination.

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1. [Fn. 5 by the court:] [Commentary] to the Model Penal Code catalogues a number of formulations which have been adopted or suggested, including the following: (a) The physical proximity doctrine- the overt act required for an attempt must be proximate to the completed crime, or directly tending toward the completion of the crime, or must amount to the commencement of the consummation. (b) The dangerous proximity doctrine- a test given impetus by Mr. Justice Holmes whereby the greater the gravity and probability of the offense, and the nearer the act to the crime, the stronger is the case for calling the act an attempt. (c) The indispensable element test- a variation of the proximity tests which emphasizes any indispensable aspect of the criminal endeavor over which the actor has not yet acquired control. (d) The probable desistance test- the conduct constitutes an attempt

if, in the ordinary and natural course of events, without interruption from an outside source, it will result in the crime intended. (e) The abnormal step approach- an attempt is a step toward crime which goes beyond the point where the normal citizen would think better of his conduct and desist. (f) The res ipsa loquitur or unequivocality test- an attempt is committed when the actor's conduct manifests an intent to commit a crime. ↵

2. [Fn. 6 by the court:] Our definition is generally consistent with and our language is in fact close to the definitions proposed by the National Commission on Reform of Federal Criminal Laws and the American Law Institute's Model Penal Code…. ↵
3. [Fn. 3 by the court:] This is precisely how the dissenters proceed here. They compare the crime of attempt with the crime of conspiracy and they convert the final solicitation itself into an "act." An attempt to commit a crime is a distinct offense. Defendant was not charged with conspiracy. And a solicitation is still a solicitation even when it comes in the form of a final command for another to proceed. In the end, neither defendant nor McCabe took any "act" toward the perpetration of a crime. ↵
4. [Fn. 11 by the dissent:] Contrary to the Court's suggestion at n3, supra, the foregoing analysis is not premised upon concepts of conspiracy jurisprudence. However, having said that, it is interesting to note that the purpose of distinguishing between preparations and attempts is the same as the purpose of requiring an overt act in a conspiracy case. "The purpose of the overt act is to afford a locus poenitentiae, when either or all the conspirators may abandon the unlawful purpose." ↵

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7.11: Group Criminality

Introduction

In many respects, criminal law is individualistic: it focuses on one defendant at a time, and it purports to assign responsibility for illegal conduct on the basis of the individual defendant's own thoughts and actions. In some contrast to that individualistic perspective, this chapter examines important doctrines that assign criminal liability on the basis of an individual's interactions with other persons. The doctrines of group criminality discussed here, accomplice liability and conspiracy, impose criminal liability on a person who participates in or encourages another person's criminal activity in some way. Like the inchoate offenses discussed in the last chapter, these doctrines of group criminality may be seen as expansions of criminal liability, since they will often allow a defendant to be convicted and punished even in the absence of proof that the defendant himself or herself has in fact committed the conduct specified in the underlying statute.

Doctrines of complicity and conspiracy share another feature with the law of inchoate offenses discussed in the previous chapter: this area of law contains many abstractions and is often quite confusing to newcomers. For that reason, it may be useful to begin with a concrete example. Suppose Huey knows that Louie is preparing to rob a bank, and Huey offers Louie a gun. Louie takes the gun, robs the bank, and is convicted of robbery, defined as taking the property of another by force. Huey could be charged with robbery also, even though Huey did not himself enter the bank, take any property, or use any force. Louie would be "the principal" in traditional terminology, and Huey would be charged as an "accomplice," sometimes also described as an aider and abettor. But notice: Huey would be charged with robbery as an accomplice; he is not charged with a separate offense called "complicity." Huey-the-accomplice can be found guilty of the same offense (here, robbery) and subject to the same range of punishments as Louie-the principal. That's one of the most important features of accomplice liability as it is usually defined: the accomplice can be convicted of the same offense, and punishable to the same degree, as the principal. Accomplice liability is derivative liability rather than direct liability, in that accomplice liability is derived from someone else's actions.

Now assume that the prosecution can show that Huey and Louie agreed ahead of time to commit the bank robbery together (even if the plan was that only Louie would actually enter the bank and take money). Most jurisdictions treat that prior agreement as itself an independent crime: a conspiracy to commit robbery. In most jurisdictions, Huey and Louie could each be charged and convicted of two separate offenses: conspiracy to commit robbery, and robbery itself. In other jurisdictions, Huey and Louie could be convicted of either robbery or conspiracy to commit robbery. But whether or not a conspiracy charge "merges" with the completed offense, conspiracy exists in criminal codes as a separate offense. Accomplice liability, in contrast, is simply a way for the prosecution to establish that a defendant is guilty of some other offense (robbery, in the example above) even when the defendant did not commit all relevant elements himself.

Although conspiracy is a separate offense, it is an inchoate offense like attempt or solicitation. Like those offenses, a conspiracy charge should specify the underlying crime that was the aim of the conspiracy. Recall that a defendant is never convicted of attempt, period; instead, a defendant is convicted of attempt to commit murder, attempted distribution of narcotics, attempted robbery, and so on. Similarly, a defendant is not convicted of conspiracy, period; instead, the conviction will be for conspiracy to commit murder, conspiracy to distribute narcotics, conspiracy to commit robbery, and so forth.

The basic description offered thus far distinguishes between conspiracy as an independent (but inchoate) offense and complicity (or accomplice liability) as a theory of derivative liability. Unfortunately, it gets even more complicated: some jurisdictions have developed an additional theory of derivative liability based on participation in a conspiracy. Consider Huey and Louie one more time. Suppose they have formed a conspiracy to rob a bank, with the plan that Louie will enter the bank alone, take property by force, and leave as quickly as possible. And suppose that while inside the bank, Louie commits some other offense, such as the destruction of property. Under a doctrine of derivative liability known as *Pinkerton* liability, after *Pinkerton v. United States* (1946), some jurisdictions will allow Huey to be convicted of the crime of destruction of property, even if that crime was not part of the specific plan that Huey and Louie made together. This area of law is complex, but the cases and notes in this chapter will illustrate the key concepts.

Like the inchoate offenses discussed in the last chapter, doctrines of complicity and conspiracy originated in common law courts, but both are usually codified in statutes today. As we will see, however, these statutes often fail to offer precise definitions of the concepts of complicity or conspiracy, so courts often turn to common law principles, or the Model Penal Code, for more guidance.

The Model Penal Code expanded common law principles of complicity and conspiracy in some respects, with the explicit aim of making convictions easier to obtain. Those expansions may help explain the increased scale of convictions and imprisonment in the United States. Although it is difficult to gather data, it appears that convictions on theories of accomplice liability and convictions for conspiracy have both increased substantially over the past 50 to 60 years. Conspiracy charges are particularly important in the context of drug crimes, as discussed at the end of this chapter.

Complicity

18 U.S.C. § 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 924(c)(1)(a)

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Justus C. ROSEMOND, Petitioner

v.

UNITED STATES

Supreme Court of the United States
572 U.S. 65

Decided March 5, 2014

Justice KAGAN delivered the opinion of the Court.

This case arises from a drug deal gone bad. Vashti Perez arranged to sell a pound of marijuana to Ricardo Gonzales and Coby Painter. She drove to a local park to make the exchange, accompanied by two confederates, Ronald Joseph and petitioner Justus Rosemond. One of those men apparently took the front passenger seat and the other sat in the back, but witnesses dispute who was where. At the designated meeting place, Gonzales climbed into the car's backseat while Painter waited outside. The backseat passenger allowed Gonzales to inspect the marijuana. But rather than handing over money, Gonzales punched that man in the face and fled with the drugs. As Gonzales and Painter ran away, one of the male passengers—but again, which one is contested—exited the car and fired several shots from a semiautomatic handgun. The shooter then re-entered the vehicle, and all three would-be drug dealers gave chase after the buyers-turned-robbers. But before the three could catch their quarry, a police officer, responding to a dispatcher's alert, pulled their car over. This federal prosecution of Rosemond followed. [The Government agreed not to bring charges against the other four participants in the narcotics deal in exchange for their giving truthful testimony against Rosemond.]

The Government charged Rosemond with, *inter alia*, violating § 924(c) by using a gun in connection with a drug trafficking crime, or aiding and abetting that offense under [18 U.S.C. § 2]. Section 924(c) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime[,] … uses or carries a firearm," shall receive a five-year mandatory-minimum sentence, with seven- and ten-year minimums applicable, respectively, if the firearm is also brandished or discharged. 18 U.S.C. § 924(c)(1)(A). Section 2, for its part, is the federal aiding and abetting statute: It provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

Consistent with the indictment, the Government prosecuted the § 924(c) charge on two alternative theories. The Government's primary contention was that Rosemond himself used the firearm during the aborted drug transaction. But recognizing that the identity of the shooter was disputed, the Government also offered a back-up argument: Even if it was Joseph who fired the gun as the drug deal fell apart, Rosemond aided and abetted the § 924(c) violation.

The District Judge accordingly instructed the jury on aiding and abetting law. He first explained, in a way challenged by neither party, the rudiments of § 2. Under that statute, the judge stated, "[a] person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself." And in order to aid or abet, the defendant must "willfully and knowingly associate[ ] himself in some way with the crime, and … seek[ ] by some act to help make the crime succeed." The judge then turned to applying those general principles to § 924 (c)—and there, he deviated from an instruction Rosemond had proposed. According to Rosemond, a defendant could be found guilty of aiding or abetting a § 924(c) violation only if he "intentionally took some action to facilitate or encourage the use of the firearm," as opposed to the predicate drug offense. But the District Judge disagreed, instead telling the jury that it could convict if "(1) the defendant knew his cohort used a firearm in the drug trafficking crime, and (2) the defendant knowingly and actively participated in the drug trafficking crime." In closing argument, the prosecutor contended that Rosemond easily satisfied that standard, so that even if he had not "fired the gun, he's still guilty of the crime." After all, the prosecutor stated, Rosemond "certainly knew [of] and actively participated in" the drug transaction. "And with regards to the other element," the prosecutor urged, "the fact is a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it."

The jury convicted Rosemond of violating § 924(c) (as well as all other offenses charged). The verdict form was general: It did not reveal whether the jury found that Rosemond himself had used the gun or instead had aided and abetted a confederate's use during the marijuana deal. As required by § 924(c), the trial court imposed a consecutive sentence of 120 months of imprisonment for the statute's violation.

The Tenth Circuit affirmed… We granted certiorari….

II

The federal aiding and abetting statute, 18 U.S.C. § 2, states that a person who furthers—more specifically, who "aids, abets, counsels, commands, induces or procures"—the commission of a federal offense "is punishable as a principal." That provision derives from (though simplifies) common-law standards for accomplice liability. And in so doing, § 2 reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission. See J. Hawley & M. McGregor, Criminal Law 81 (1899).

We have previously held that under § 2 "those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." Both parties here embrace that formulation, and agree as well that it has two components. As at common law, a person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission.

The questions that the parties dispute … concern how those two requirements—affirmative act and intent—apply in a prosecution for aiding and abetting a § 924(c) offense. Those questions arise from the compound nature of that provision. Recall that § 924(c) forbids "us[ing] or carr[ying] a firearm" when engaged in a "crime of violence or drug trafficking crime." The prosecutor must show the use or carriage of a gun; so too he must prove the commission of a predicate (violent or drug trafficking) offense. For purposes of ascertaining aiding and abetting liability, we therefore must consider: When does a person act to further this double-barreled crime? And when does he intend to facilitate its commission? We address each issue in turn.

A

Consider first Rosemond's account of his conduct (divorced from any issues of intent). Rosemond actively participated in a drug transaction, accompanying two others to a site where money was to be exchanged for a pound of marijuana. But as he tells it, he took no action with respect to any firearm. He did not buy or borrow a gun to facilitate the narcotics deal; he did not carry a gun to the scene; he did not use a gun during the subsequent events constituting this criminal misadventure. His acts thus advanced one part (the drug part) of a two-part incident—or to speak a bit more technically, one element (the drug element) of a two-element crime. Is that enough to satisfy the conduct requirement of this aiding and abetting charge, or must Rosemond, as he claims, have taken some act to assist the commission of the other (firearm) component of § 924(c)?

The common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part—even though not every part—of a criminal venture…. And so "[w]here several acts constitute[d] together one crime, if each [was] separately performed by a different individual[,] … all [were] principals as to the whole." Indeed … a person's involvement in the crime could be not merely partial but minimal too: "The quantity [of assistance was] immaterial," so long as the accomplice did "*something*" to aid the crime. After all, the common law maintained, every little bit helps—and a contribution to some part of a crime aids the whole.

That principle continues to govern aiding and abetting law under § 2: As almost every court of appeals has held, "[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *United States v. Sigalow* (2nd Cir. 1987). In proscribing aiding and abetting, Congress used language that "comprehends all assistance rendered by words, acts, encouragement, support, or presence"—even if that aid relates to only one (or some) of a crime's phases or elements. So, for example, in upholding convictions for abetting a tax evasion scheme, this Court found "irrelevant" the defendants' "non-participation" in filing a false return; we thought they had amply facilitated the illegal scheme by helping a confederate conceal his assets. *United States v. Johnson* (1943). "[A]ll who shared in [the overall crime's] execution," we explained, "have equal responsibility before the law, whatever may have been [their] different roles." And similarly, we approved a conviction for abetting mail fraud even though the defendant had played no part in mailing the fraudulent documents; it was enough to satisfy the law's conduct requirement that he had in other ways aided the deception. The division of labor between two (or more) confederates thus has no significance: A strategy of "you take that element, I'll take this one" would free neither party from liability.

Under that established approach, Rosemond's participation in the drug deal here satisfies the affirmative-act requirement for aiding and abetting a § 924(c) violation. As we have previously described, the commission of a drug trafficking (or violent) crime is—no less than the use of a firearm—an "essential conduct element of the § 924(c) offense." In enacting the statute, "Congress proscribed both the use of the firearm *and* the commission of acts that constitute" a drug trafficking crime. Rosemond therefore could assist in § 924(c)'s violation by facilitating either the drug transaction or the firearm use (or of course both). In helping to bring about one part of the offense (whether trafficking drugs or using a gun), he necessarily helped to complete the whole. And that ends the analysis as to his conduct….

…[But,] as we will describe, an aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime. And under that rule, a defendant may be convicted of abetting a § 924(c) violation only if his intent reaches beyond a simple drug sale, to an armed one. Aiding and abetting law's intent component—to which we now turn—thus preserves the distinction between assisting the predicate drug trafficking crime and assisting the broader § 924(c) offense.

B

… As previously explained, a person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission. An intent to advance some different or lesser offense is not, or at least not usually, sufficient: Instead, the intent must go to the specific and entire crime charged—so here, to the full scope (predicate crime plus gun use) of § 924(c). [1] And the canonical formulation of that needed state of mind—later appropriated by this Court and oft-quoted in both parties' briefs—is Judge Learned Hand's: To aid and abet a crime, a defendant must not just "in some sort associate himself with the venture," but also "participate in it as in something that he wishes to bring about" and "seek by his action to make it succeed." *Nye & Nissen v. United States* (1949) (quoting *United States v. Peoni* (2nd Cir. 1938).

We have previously found that intent requirement satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense. … [S]everal Courts of Appeals have similarly held—addressing a fact pattern much like this one—that the unarmed driver of a getaway car had the requisite intent to aid and abet armed bank robbery if he "knew" that his confederates would use weapons in carrying out the crime. So for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission. [2]

The same principle holds here: An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun. In such a case, the accomplice has decided to join in the criminal venture, and share in its benefits, with full awareness of its scope—that the plan calls not just for a drug sale, but for an armed one. In so doing, he has chosen … to align himself with the illegal scheme in its entirety—including its use of a firearm…. He thus becomes responsible, in the typical way of aiders and abettors, for the conduct of others. He may not have brought the gun to the

drug deal himself, but because he took part in that deal knowing a confederate would do so, he intended the commission of a § 924(c) offense—*i.e.*, an armed drug sale.

For all that to be true, though, the § 924(c) defendant's knowledge of a firearm must be advance knowledge—or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice. When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an *armed* offense. But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun. As even the Government concedes, an unarmed accomplice cannot aid and abet a § 924(c) violation unless he has "foreknowledge that his confederate will commit the offense with a firearm." Brief for United States 38. For the reasons just given, we think that means knowledge at a time the accomplice can do something with it—most notably, opt to walk away.[3]

…A final, metaphorical way of making the point: By virtue of § 924(c), using a firearm at a drug deal ups the ante. A would-be accomplice might decide to play at those perilous stakes. Or he might grasp that the better course is to fold his hand. What he should not expect is the capacity to hedge his bets, joining in a dangerous criminal scheme but evading its penalties by leaving use of the gun to someone else. Aiding and abetting law prevents that outcome, so long as the player knew the heightened stakes when he decided to stay in the game.

The Government, for its part, thinks we take too strict a view of when a defendant charged with abetting a § 924(c) violation must acquire that knowledge. As noted above, the Government recognizes that the accused accomplice must have "foreknowledge" of a gun's presence. But the Government views that standard as met whenever the accomplice, having learned of the firearm, continues any act of assisting the drug transaction. According to the Government, the jury should convict such a defendant even if he became aware of the gun only after he realistically could have opted out of the crime.

But that approach, we think, would diminish too far the requirement that a defendant in a § 924(c) prosecution must intend to further an *armed* drug deal. Assume, for example, that an accomplice agrees to participate in a drug sale on the express condition that no one brings a gun to the place of exchange. But just as the parties are making the trade, the accomplice notices that one of his confederates has a (poorly) concealed firearm in his jacket. The Government would convict the accomplice of aiding and abetting a § 924(c) offense if he assists in completing the deal without incident, rather than running away or otherwise aborting the sale. But behaving as the Government suggests might increase the risk of gun violence—to the accomplice himself, other participants, or bystanders; and conversely, finishing the sale might be the best or only way to avoid that danger. In such a circumstance, a jury is entitled to find that the defendant intended only a drug sale—that he never intended to facilitate, and so does not bear responsibility for, a drug deal carried out with a gun. A defendant manifests that greater intent, and incurs the greater liability of § 924(c), when he chooses to participate in a drug transaction knowing it will involve a firearm; but he makes no such choice when that knowledge comes too late for him to be reasonably able to act upon it.[4]

III

Under these principles, the District Court erred in instructing the jury…. As we have explained, active participation in a drug sale is sufficient for § 924(c) liability (even if the conduct does not extend to the firearm), so long as the defendant had prior knowledge of the gun's involvement. The problem with the [District Court's] instruction came in its description of that knowledge requirement. In telling the jury to consider merely whether Rosemond "knew his cohort used a firearm," the court did not direct the jury to determine *when* Rosemond obtained the requisite knowledge. so, for example, the jury could have convicted even if Rosemond first learned of the gun when it was fired and he took no further action to advance the crime…

… As earlier described, the prosecutor asserted in closing argument that the court's test was easily satisfied because "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun." The prosecutor thus invited the jury to convict Rosemond even if he first learned of the gun as it was discharged, and no matter what he did afterward. Once again, then, the message to the jury was that it need not find advance knowledge—exactly what we (and for that matter the Government) have said is required.

We send this case back to the Tenth Circuit to consider the appropriate consequence, if any, of the District Court's error…. Accordingly, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, with whom Justice THOMAS joins, concurring in part and dissenting in part.

…I reject the Court's conclusion that a conviction for aiding and abetting a violation of 18 U.S.C. § 924(c) demands proof that the alleged aider and abettor had what the Court terms "a realistic opportunity" to refrain from engaging in the conduct at issue. This rule represents an important and, as far as I am aware, unprecedented alteration of the law of aiding and abetting and of the law of intentionality generally.

…The Court imagines the following situation:

"[A]n accomplice agrees to participate in a drug sale on the express condition that no one brings a gun to the place of exchange. But just as the parties are making the trade, the accomplice notices that one of his confederates has a (poorly) concealed firearm in his jacket."

If the accomplice, despite spotting the gun, continues to assist in the completion of the drug sale, has the accomplice aided and abetted the commission of a violation of § 924(c)?

The Court's answer is "it depends." Walking away, the Court observes, "might increase the risk of gun violence—to the accomplice himself, other participants, or bystanders; and conversely, finishing the sale might be the best or only way to avoid the danger." Moreover—and this is where the seriously misguided step occurs—the Court says that if the risk of walking away exceeds (by some unspecified degree) the risk created by completing the sale and if the alleged aider and abettor chooses to continue for that reason, the alleged aider and abettor lacks the *mens rea* required for conviction.

What the Court has done is to convert what has up to now been an affirmative defense into a part of the required *mens rea*, and this step has very important conceptual and practical consequences. It fundamentally alters the prior understanding of mental states that form the foundation of substantive criminal law, and it places a strange and difficult burden on the prosecution.

That the Court has taken a radical step can be seen by comparing what the Court now holds with the traditional defense of necessity. That defense excuses a violation of law if "the harm which will result from compliance with the law is greater than that which will result from violation of it." This is almost exactly the balance-of-risks calculus adopted by the Court, but under the traditional approach necessity is an affirmative defense. Necessity and the closely related defense of duress are affirmative defenses because they almost invariably do not negate the *mens rea* necessary to incur criminal liability.

This Court has made clear that, except in narrow circumstances, necessity and duress do not negate the *mens rea* required for conviction….

The Court confuses two fundamentally distinct concepts: intent and motive. It seems to assume that, if a defendant's *motive* in aiding a criminal venture is to avoid some greater evil, he does not have the *intent* that the venture succeed. But the intent to undertake some act is of course perfectly consistent with the motive of avoiding adverse consequences which would otherwise occur. We can all testify to this from our daily experience. People wake up, go to work, balance their checkbooks, shop for groceries—and yes, commit crimes—because they believe something bad will happen if they do not do these things, not because the deepest desire of their heart is to do them. A person may only go to work in the morning to keep his or her family from destitution; that does not mean he or she does not intend to put in a full days work. In the same way, the fact that a defendant carries out a crime because he feels he must do so on pain of terrible consequences does not mean he does not intend to carry out the crime. When Jean Valjean stole a loaf of bread to feed his starving family, he certainly intended to commit theft; the fact that, had he been living in America today, he may have pleaded necessity as a defense does not change that fact. See V. Hugo, Les Misérables 54 (Fall River Press ed. 2012).

… Unsurprisingly, our cases have recognized that a lawful motive (such as necessity, duress, or self-defense) is consistent with the *mens rea* necessary to satisfy a requirement of intent…. Thus, it seems inarguable to me that the existence of the purpose or intent to carry out a crime is perfectly compatible with facts giving rise to a necessity or duress defense. Once that proposition is established, the Court's error is readily apparent. The Court requires the Government to prove that a defendant in Rosemond's situation could have walked away without risking harm greater than he would cause by continuing with the crime—circumstances that traditionally would support a necessity or duress defense. It imposes this requirement on the Government despite the fact that such dangerous circumstances simply do not bear on whether the defendant intends the § 924(c) offense to succeed, as (on the Court's reading) is required for aiding and abetting liability.

The usual rule that a defendant bears the burden of proving affirmative defenses is justified by a compelling, commonsense intuition: "[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof." *Smith v. United States* (2013). By abandoning that rule in cases involving aiding and abetting of § 924(c) offenses, the Court creates a perverse arrangement whereby the prosecution must prove something that is peculiarly within the knowledge of the defendant. Imagine that A aids B in committing a § 924(c) offense and claims that he only learned of the gun once the crime had begun. If A had the burden of proof, he might testify that B was a hothead who had previously shot others who had crossed him. But under the Court's rule, the prosecution, in order to show the intent needed to convict A as an aider and abettor, presumably has the burden of proving that B was not such a person and that A did not believe him to be. How is the prosecution to do this? By offering testimony by B's friends and associates regarding his peaceful and easygoing nature? By introducing entries from A's diary in which he reflects on the sense of safety he feels when carrying out criminal enterprises in B's company? Furthermore, even if B were a hothead and A knew him to be such, A would presumably only be entitled to escape liability if he continued with the offense *because of* his fear of B's reaction if he walked away. Under the Court's rule, it is up to the Government to prove that A's continued participation was not on account of his fear of B—but how? By introducing footage of a convenient security camera demonstrating that A's eyes were not wide with fear, nor his breathing rapid?

The Court's rule breaks with the common-law tradition and our case law. It also makes no sense. I respectfully dissent from that portion of the Court's opinion which places on the Government the burden of proving that the alleged aider and abettor of a § 924(c) offense had what the Court terms "a realistic opportunity" to refrain from engaging in the conduct at issue.

Notes and questions on *Rosemond*

1. As you have seen throughout this course, crimes are often defined in terms of a combination of mental state elements and conduct elements. Accomplice liability is not itself an independent crime, but a theory of liability. However, courts sometimes speak of "the elements" of accomplice liability as a way of delineating the things the prosecution must show in order to obtain a conviction on an accomplice liability theory. And the "element" of accomplice liability are often separated into intent and conduct, like the definitions to many crimes. What is the mental state that must be shown in order to prove that Rosemond is an accomplice to § 924(c)? What conduct, if any, must Rosemond have engaged in to be guilty of § 924(c) as an accomplice?
2. When one person is charged as an accomplice, the person who actually carries out the conduct elements of the underlying criminal offense is often described as "the principal." For one person to be an accomplice, another person must be the principal – that is, someone must actually carry out the offense. In *Rosemond*, the prosecution apparently believed that Justus Rosemond was in fact the principal for the § 924(c) offense. The government's first line of argument was that Rosemond did, in fact, fire the gun after the drug sale went awry. And the prosecution agreed not to prosecute the other participants in the planned sale in exchange for their testimony against Rosemond. Why, then, did the prosecution make an argument based on accomplice liability? Why not charge Rosemond as a principal and leave it at that?
3. Judge Learned Hand's 1938 opinion in *United States v. Peoni* is often quoted by courts seeking to explain the requirements of accomplice liability. In *Peoni*, Judge Hand emphasized that complicity required purpose to promote the principal's criminal conduct. The facts of *Peoni* are simple enough: Joseph Peoni sold counterfeit bills to a man named Regno; Regno later sold those bills to a man named Dorsey. After Dorsey was eventually arrested for possession of the counterfeit bills, the government sought to prosecute Peoni as an accomplice to Dorsey's possession of counterfeit bills. After a review of several accounts of accomplice liability, Judge Hand emphasized that the accounts "have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless 'abet'—carry an implication of purposive attitude toward it." *Peoni*, 100 F.2d at 402. Judge Hand concluded that Peoni could not be convicted as an accomplice to Dorsey, since there was no evidence that Peoni specifically wanted Dorsey to possess the bills (or even knew of Dorsey's existence).
4. Consider again the question raised in the first note above: what are the "elements" of accomplice liability? The *Peoni* opinion is often quoted as a formulation of the mental state required for accomplice liability – intent to promote or facilitate the commission of the offense. But *Peoni* can also help us think about other ingredients of complicity, including the "actus reus" of accomplice liability, or the conduct required to be an accomplice. Judge Hand's language does suggest that some action is required; the accomplice must "participate" in the crime and "seek *by his action* to make it succeed" (emphasis added). Similarly, *Rosemond* says the accomplice must take "an affirmative act in furtherance of [the] offense." The question has often

arisen whether causation is an element of complicity: must the alleged accomplice's actions have any identifiable effect on the principal's crime? (Look again at the federal complicity statute reprinted before *Rosemond*. Subsection (b) mentions causation directly; subsection (a) does not.) In *Peoni*, Judge Hand thought it obvious that Joseph Peoni's initial sale of counterfeit bills was "a step in the causal chain" that culminated in Dorsey's offense. But according to Hand, this causal contribution was not itself sufficient to make Peoni an accomplice, given the absence of proof that Peoni intended to promote Dorsey's crime. Indeed, Hand suggested that causation may simply be irrelevant: he reported that classic accounts of complicity have "nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct." In general, courts require some evidence of "aid" to the principal, but they do not usually require proof that the accomplice's aid actually had an effect on the principal's conduct. For an overview and critique of complicity doctrine's indifference to causation, see Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense*, 5 Ohio St. J. Crim. L. 427 (2008).

5. The *Rosemond* Court quotes Judge Hand's *Peoni* opinion approvingly, calling it "canonical," but does *Rosemond* actually adopt Hand's view of accomplice liability? Hand suggested that accomplice liability required "purposive attitude." But the Supreme Court says that the intent requirement is "satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." Is this difference between purpose (or intent) to promote the underlying crime and mere knowledge that it is taking place a meaningful difference that will change outcomes? Some jurisdictions do emphasize a difference between "knowing facilitation" of a crime, which may be codified as a separate, less severe offense, and actual accomplice liability, which requires purpose to promote the crime. See, e.g., *Skinner v. Kentucky*, 864 S.W.2d 290 (1993). Many other jurisdictions take the approach of the *Rosemond* Court and allow participation in a crime, plus knowledge that it is taking place, to suffice for accomplice liability.
6. Other states set the threshold for accomplice liability even lower, allowing convictions on the basis of complicity even in the absence of evidence that the defendant knew the crime in question was taking place. The "natural and probable consequences" doctrine, mentioned but neither endorsed nor condemned by the *Rosemond* Court in its footnote 7, holds that when a defendant is an accomplice to one offense, he may also be convicted as an accomplice to additional crimes if the additional crimes are "natural and probable consequences" of the crime that the defendant actually intended to promote. In one well-known case applying the doctrine, the defendant, Thomas Luparello, had recruited two men to track down his former girlfriend, Terri Cesak. Without Luparello present, the two men went to the home of Mark Martin, a friend of Terri and her husband, to ask him about Terri's whereabouts. Instead of questioning Martin, the men shot and killed him. Luparello was convicted of first-degree murder even though there was no evidence that he had intended for Martin to be killed. The court held that the killing was a "natural and probable consequence" of a planned assault on Martin, and Luparello had intended to encourage the assault. *People v. Luparello*, 231 Cal. Rptr. 832 (1986). The natural and probable consequences doctrine is controversial, and the *Rosemond* Court purports not to take a position on it.
7. The statutory provision discussed in *Rosemond*, 18 U.S.C. § 924(c), is an important and frequently used federal law. It was examined at the end of Chapter Seven, but a few reminders may be helpful here. Section 924(c) is a "gun enhancement," or a law that increases the penalties for some other offense if a gun is used in the underlying offense. The current version of § 924(c) imposes a mandatory minimum sentence of 5, 7, or 10 years depending on whether the gun is merely "used" or "carried" (5 years), "brandished" (7 years), or actually discharged (10 years). The extra years of prison imposed by § 924(c) really are extra, in that they run consecutively to whatever other sentence is imposed for the underlying drug offense. As you saw in *Angelos* in Chapter Seven, the prosecution can often increase a federal sentence dramatically by charging multiple counts of § 924(c). Critics of gun enhancement charges point out that they appear to be used disproportionately often against Black defendants and other defendants of color, helping to create and maintain racial disparities in the U.S. prison population. "[D]efining a crime is a political act, [and so] is the decision about whether, how, and against whom to charge a crime, and as a practical matter, it is likely a more significant one. And the racially disparate federal charging decisions in gun cases … have been pursued by Attorneys General and U.S. Attorneys from both ends of the political spectrum." David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 Emory L.J. 1011, 1025 (2020).
8. Most jurisdictions define complicity in general terms that apply across all different types of offenses. In other words, complicity principles are trans-substantive, like the attempt and solicitation doctrines examined in the previous chapter. But consider whether some offenses are less appropriately punished through accomplice liability than others. The fact that § 924(c) mandates different sentencing depending on whether a gun is "used," "brandished," or "discharged" suggests that Congress wanted to allocate punishment based on the specific way the defendant used the gun. Once we allow accomplice liability for § 924(c), aren't Congress's allocations disrupted? If courts do recognize accomplice liability for § 924(c), should they be more

demanding about the required mental state? Given that the § 924(c) charges in this case alleged not simply the use or brandishment but the discharge of the gun, should the *Rosemond* Court have required knowledge that a gun would be discharged, not merely knowledge that one participant would carry a gun?

9. Justice Alito's dissent relies on two distinctions that you should understand: a distinction between an affirmative defense and a failure-of-proof argument, and a distinction between intent and motive. A failure of proof argument is a defense claim that the prosecution has not established the necessary elements of the offense beyond a reasonable doubt. Affirmative defenses, which you will study in more detail in the next chapter, do not contest the elements of the offense, but rather identify some independent consideration as a reason not to convict the defendant. If a defendant participates in an armed drug transaction out of fear for his own safety, he could potentially benefit from the affirmative defenses of duress or necessity. But, Justice Alito would argue, such a person can still be an accomplice to a drug trafficking crime. Another way that Justice Alito might put the point: accomplice liability requires intent to promote the principal's criminal conduct, or at least knowledge that the conduct will occur; it does not ask us to inquire why the defendant intends the conduct to occur.

Check Your Understanding (9-1)

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The original version of this chapter contained H5P content. You may want to remove or replace this element.

N.Y. Penal Law § 125.25. Murder in the second degree

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person…
2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person…

N.Y. Penal Law § 20.00. Criminal liability for the conduct of another

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

The PEOPLE of the State of New York, Respondent

v.

Jermaine RUSSELL, Appellant

The PEOPLE of the State of New York, Respondent

v.

Khary BEKKA, Appellant

The PEOPLE of the State of New York, Respondent

v.

Shamel BURROUGHS, Appellant

Court of Appeals of New York
91 N.Y.2d 280

Feb. 11, 1998

KAYE, Chief Judge.

Shortly before noon on December 17, 1992, Shamel Burroughs engaged in a gun battle with Jermaine Russell and Khary Bekka on Centre Mall of the Red Hook Housing Project in Brooklyn. During the course of the battle, Patrick Daly, a public school principal looking for a child who had left school, was fatally wounded by a single stray nine millimeter bullet that struck him in the chest. Burroughs, Bekka and Russell—defendants on this appeal—were all charged with second degree murder.

Two separate juries, one for Burroughs and another for Russell and Bekka, were impaneled contemporaneously and heard the evidence presented at trial. Although ballistics tests were inconclusive in determining which defendant actually fired the bullet that killed Daly, the theory of the prosecution was that each of them acted with the mental culpability required for commission of the crime, and that each "intentionally aided" the defendant who fired the fatal shot (Penal Law § 20.00). Both juries convicted defendants of second degree, depraved indifference murder (Penal Law § 125.25[2]).

On appeal, each defendant challenges the sufficiency of the evidence. Because the evidence, viewed in the light most favorable to the prosecution, could have led a rational trier of fact to find, beyond a reasonable doubt, that each defendant was guilty of depraved indifference murder as charged, we affirm the order of the Appellate Division sustaining all three convictions.

A depraved indifference murder conviction requires proof that defendant, under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct creating a grave risk of death to another person, and thereby caused the death of another person. Reckless conduct requires awareness and conscious disregard of a substantial and unjustifiable risk that such result will occur or that such circumstance exists. "The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." To constitute "depraved indifference," conduct must be "so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy as to warrant the same criminal liability as that which the law imposes upon a person who intentionally causes the death of another."

Although defendants underscore that only one bullet killed Patrick Daly and it is uncertain which of them fired that bullet, the prosecution was not required to prove which defendant fired the fatal shot when the evidence was sufficient to establish that each defendant acted with the mental culpability required for the commission of depraved indifference murder, and each defendant "intentionally aided" the defendant who fired the fatal shot. Defendants urge, however, that the evidence adduced at trial did not support a finding that they—as adversaries in a deadly gun battle—shared the "community of purpose" necessary for accomplice liability. We disagree. The fact that defendants set out to injure or kill one another does not rationally preclude a finding that they intentionally aided each other to engage in the mutual combat that caused Daly's death.

People v. Abbott (N.Y. 1981), provides an apt illustration. That case involved two defendants—Abbott and Moon—who were engaged in a "drag race" on a residential street when Abbott lost control and smashed into another automobile, killing the driver and two passengers. Both defendants were convicted of criminally negligent homicide, but Moon asserted that he was not responsible for Abbott's actions and that his conviction should be set aside. Rejecting this argument, the court found that, although Moon did not strike the victim's car and was Abbott's adversary in a competitive race, he intentionally participated with Abbott in an inherently dangerous and unlawful activity and therefore shared Abbott's culpability. Moon's "conduct made the race possible" in the first place, as there would not have been a race had Moon not "accepted Abbott's challenge" …

In the present case, the jurors were instructed:

"If you find that the People have proven beyond a reasonable doubt that [defendants] *took up each other's challenge*, shared in the venture and unjustifiably, voluntarily and jointly created a zone of danger, then each is responsible for his own acts and the acts of the others * * * [and] it makes no difference whether it was a bullet from Mr. Bekka's gun, Mr. Russell's gun or Mr. Burrough's gun that penetrated Mr. Daly and caused his death" (emphasis added).

The trial evidence was sufficient to support each jury's findings in accordance with this charge. Although Burroughs was shooting at Russell and Bekka, and Russell and Bekka were shooting at Burroughs, there was adequate proof to justify the finding that the three defendants tacitly agreed to engage in the gun battle that placed the life of any innocent bystander at grave risk and ultimately killed Daly. Indeed, unlike an unanticipated ambush or spontaneous attack that might have taken defendants by surprise, the gunfight in this case only began after defendants acknowledged and accepted each others' challenge to engage in a deadly battle on a public concourse.

As defendants approached one another on Centre Mall, a grassy open area that serves as a thoroughfare for the 7,000 residents of the 28-building housing complex, it was evident that an encounter between them would be violent and would endanger others. There was trial evidence that when Burroughs first saw Bekka and Russell walking toward him, he immediately recognized the danger, instructing the two female friends accompanying him, one of them pregnant, to "run" or "go." They too plainly sensed the danger because, without hesitation, they turned and ran.

Despite the palpable threat, Burroughs, armed with a nine millimeter Glock, did not flee with his friends. Rather, he continued toward Russell and Bekka, tacitly accepting their invitation and issuing one of his own. In turn, Russell and Bekka, also armed with automatic weapons, continued walking toward Burroughs, challenging him and accepting his challenge. As they drew nearer, defendants each began firing their high-powered guns, capable of shooting bullets at an average rate of 1,100 feet per second, across the pedestrian thoroughfare. The dozen or more people in the area, as well as those with windows overlooking the Mall, were put at grave risk as defendants unleashed a hail of bullets. Witnesses testified that the battle sounded "like a war" and that anywhere from nine to 20 shots were fired.

Although Centre Mall is surrounded by buildings affording refuge, defendants chose instead to run through the area aggressively pursuing one another. Indeed, even after exchanging an initial volley of shots, they continued to wage their private war, issuing taunts and ducking back and forth behind buildings and trees, seeking tactical advantage. As a result of defendants' deadly gun battle, Patrick Daly was shot in the chest and killed almost instantly.

At trial, all three defendants sought to exonerate themselves by arguing self-defense—each claiming that their opponent shot first and they were justified in firing back. Under New York law, however, a person who reasonably believes that another is about to use deadly physical force is not free to reciprocate with "deadly physical force if he knows that he can with complete safety as to himself and others avoid the necessity of so doing by retreating"… Here, there was evidence that defendants did not avail themselves of opportunities for safe retreat, choosing instead to use deadly force against each other. As such, there was adequate support for each jury's rejection of defendants' justification defense.

The evidence adduced at trial was also sufficient for the jury to determine that all three defendants acted with the mental culpability required for depraved indifference murder, and that they intentionally aided and encouraged each other to create the lethal crossfire that caused the death of Patrick Daly.

To the extent defendants' remaining arguments are preserved, we conclude that they are without merit.

Accordingly, in each case the order of the Appellate Division should be affirmed.

Notes and questions on *People v. Russell*

1. No one argued that any of three defendants intended to kill Patrick Daly. That wouldn't matter for a second-degree murder charge under New York law, since a person can be guilty of second-degree murder by engaging in reckless conduct that causes death. But does the lack of intent to kill this victim matter to an accomplice liability argument? Why or why not?
2. In this case, accomplice liability is used to address an evidentiary difficulty related to causation: the prosecution could not prove that any specific one of the three defendants caused Patrick Daly's death. For each defendant, the prosecution argued that either the defendant actually caused Daly's death (by firing the fatal bullet) or the defendant was an accomplice to the person who caused Daly's death. Notice that the previous case also involved the use of accomplice liability to get around a deficiency in the evidence – the prosecution there believed, but could not adequately prove, that Rosemond himself had discharged the gun. To get around this difficulty, the prosecution offered two alternative theories: either Rosemond fired the weapon himself, or he was an accomplice to the person who did fire the weapon.
3. Look again at the text of New York's complicity statute, reprinted just before the *Russell* opinion. Do the New York state law requirements for complicity differ from the federal standards (themselves supposedly derived from common law) discussed in *Rosemond*? In particular, does accomplice liability in New York have the same mental state requirements as accomplice liability in the federal system?
4. In thinking about the previous question, you should have noticed that New York does not follow the requirement of "true purpose" to facilitate the crime that has been endorsed by federal courts. Instead, New York Penal Law 20.00 can be understood as following, and extending still further, an expansion of accomplice liability that began with the Model Penal Code. Here is key language from the Model Penal Code:

Model Penal Code § 2.06

(1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(2) A person is legally accountable for the conduct of another person when:

(a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or

(b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or

(c) he is an accomplice of such other person in the commission of the offense.

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

(i) solicits such other person to commit it, or

(ii) aids or agrees or attempts to aid such other person in planning or committing it, or

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) his conduct is expressly declared by law to establish his complicity.

(4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

(5) A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

5. In at least some circumstances (offenses involving a result element), the Model Penal Code dispenses with the traditional common law requirement that the accomplice must intend to promote the specific crime that the principal commits. Instead, the MPC allows accomplice liability if the accomplice intends to promote the principal's *conduct* and has "the kind of culpability, if any, with respect to [the] *result* that is sufficient for the commission of the offense" (emphasis added). To make this concrete, consider a set of facts similar to those you see in *Russell*: one person encourages another to shoot in a crowded area, and someone is hit by a bullet. The person who fired the gun did not intend to kill anyone, but he acted recklessly, and may be guilty of reckless homicide. Is the person who encouraged the reckless shooting also guilty of reckless homicide, as an accomplice? The MPC would allow accomplice liability in this situation, even though the accomplice did not intend to promote a homicide. The New York statute expands accomplice liability even more broadly than the Model Penal Code, since it dispenses with a "true purpose" requirement for all crimes and not merely those that involve a result element.
6. What about the conduct required of an accomplice under New York law? As we have seen in other contexts, conduct requirements and mental state requirements are closely intertwined in this statute. Penal Law § 20.00 imposes accomplice liability on one who "solicits, requests, commands, importunes, or intentionally aids" a principal to engage in criminal conduct. The prosecution in *Russell* argued that the defendants had "intentionally aided" one another in reckless conduct. The claim was not that any of the defendants had intended to kill the victim, Patrick Daly, but they had intended to aid one another in engaging in "mutual combat."
7. The terms "accomplice" and "complicity" come from Latin roots that mean "folded together" or "allied." Accomplice liability is often said to require "action in concert" or a "community of purpose." From that perspective, *People v. Russell* is an unusual use of accomplice liability: Shamel Burroughs was shooting at, and presumably trying to kill, Jermaine Russell and Khary Bekka, and Russell and Bekka were shooting at Burroughs. The prosecution argued, successfully, that all three men were accomplices to one another. What is the argument for treating enemies as accomplices here? Suppose the deadly bullet had struck Russell, not an uninvolved bystander, and Russell was hurt but not killed. Suppose then Burroughs were charged with attempted murder (of Russell). Should Russell also be charged with attempting to murder *himself*, on the theory that he was an

accomplice to Burroughs? Consider again the precise mental state and conduct requirements of the New York complicity statute.

8. Patrick Daly, the high school principal who was shot, was a beloved community figure, and the teenage defendants were his former students. Daly's death shocked, and then galvanized, the Red Hook neighborhood in Brooklyn. For an account of the shooting and immediate aftermath, see Robert D. McFadden, *Brooklyn Principal Shot to Death While Looking for Missing Pupil*, N.Y. Times (Dec. 18, 1992). For details on how the incident "indelibly transformed" Red Hook and helped lead to the development of the Red Hook Community Justice Center, see Alan Neuhauser, *Days After Newtown, City Also Remembers Principal Killed 20 Years Ago*, dnainfo.com (Dec. 17, 2012).
9. Russell and Bekka were apparently mortal enemies of Burroughs, and vice versa. All three defendants were young Black men. Might this fact have made it easier to see the three defendants as accomplices of one another? For one defendant's reflections on the case, and his own later work as a Quaker advocate for restorative justice, see https://www.afsc.org/blogs/acting-in...ve-khary-bekka.
10. As the court notes near the end of its opinion, the defendants tried unsuccessfully to raise claims of self-defense. We'll discuss self-defense doctrine, and retreat requirements, in more detail in Chapter Ten, and will reconsider the facts of this case at that point.

Conspiracy

18 U.S.C. § 371. Conspiracy to commit offense or to defraud the United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

49 U.S.C. § 32703. Preventing tampering

A person may not–

(1) advertise for sale, sell, use, install, or have installed, a device that makes an odometer of a motor vehicle register a mileage different from the mileage the vehicle was driven, as registered by the odometer within the designed tolerance of the manufacturer of the odometer;

(2) disconnect, reset, alter, or have disconnected, reset, or altered, an odometer of a motor vehicle intending to change the mileage registered by the odometer;

(3) with intent to defraud, operate a motor vehicle on a street, road, or highway if the person knows that the odometer of the vehicle is disconnected or not operating; or

(4) conspire to violate this section…

18 U.S.C. § 1341. Frauds and swindles [Mail fraud]

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service [or any private or commercial interstate carrier], or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

UNITED STATES of America, Plaintiff–Appellee

v.

Michael David HUBBARD, Defendant–Appellant

UNITED STATES of America, Plaintiff–Appellee

v.

James Ray LYON, Defendant–Appellant

U.S. Court of Appeals, Ninth Circuit
96 F.3d 1223

Decided Sept. 23, 1996

TROTT, Circuit Judge:

Michael Hubbard and James Lyon were convicted of conspiracy to commit mail fraud related to an elaborate scheme of odometer tampering. They appeal the district court's denial of their Motion for Judgment of Acquittal, arguing … that there was insufficient evidence to support a charge of conspiracy…. We reject Appellants' arguments and affirm the convictions.

Michael Hubbard, conducting business as Discount Rent–A–Car (Discount) and as AAA Rent A Car, was in the business of purchasing and selling used motor vehicles. He purchased vehicles that had previously been rental cars, and when he purchased them they generally had between 50,000 and 80,000 miles on them. On some of the vehicles Hubbard purchased, he rolled back the odometers. Then, Hubbard applied to the Departments of Motor Vehicles in California and Texas for duplicate titles, claiming that the original titles to the purchased rental cars had been lost. The duplicate titles came back with a blank mileage figure, and the rolled-back, low-mileage figure was inserted on the duplicate title. The cars that are the subject of this case were then sold by Hubbard and his employee James Lyon to Arizona Checker Sales, which converted the used cars into taxicabs. Hubbard and Lyon represented to Arizona Checker Sales that the low-mileage figures on the odometers were accurate. Once Arizona Checker Sales had possession of the vehicles and their titles, they had to obtain new Arizona titles. The State of Arizona mailed the new titles back to Arizona Checker Sales.

In February 1995, Hubbard and Lyon were tried for conspiracy to engage in odometer tampering and mail fraud. At the conclusion of the Government's case, Hubbard and Lyon moved for judgment of acquittal. The district court denied the motion as to the conspiracy to commit mail fraud, but granted the motion as to the charge of conspiracy to engage in odometer tampering. The court found that the evidence did not show conspiracy to spin odometers, reasoning that the odometer tampering crime was completed once the odometer was altered, and there was no evidence that Lyon had actually altered an odometer. The court, however, found that Lyon's role in keeping records and negotiating with purchasers could support the charge of conspiracy to commit mail fraud.

After eight days of trial, a jury convicted Hubbard and Lyon on the count of conspiracy to commit mail fraud…

To prove a conspiracy, the Government must show an agreement between two or more persons to accomplish an illegal objective, coupled with one or more overt acts in furtherance of the illegal purpose. "[I]nferences of the existence of such an agreement may be drawn 'if there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.'" *United States v. Melchor–Lopez* (9th Cir.1980). "The agreement need not be explicit, but may be inferred from circumstantial evidence." Once evidence of a conspiracy is established, only a slight connection between the defendant and the conspiracy is necessary to convict the defendant of knowing participation in the conspiracy. However, mere association with members of a conspiracy or knowledge of the conspiracy, "without an intention and agreement to accomplish a specific illegal objective, is not sufficient to make one a conspirator." Appellants do not attack the existence of fraudulent behavior. Instead, they argue that there is no evidence that Hubbard and Lyon had an *agreement* to act fraudulently.

We find, however, that the evidence presented at trial shows otherwise. Hubbard's role in the fraud is supported by the fact that he was running the company, negotiating the purchase and sale of vehicles, and picking up and delivering vehicles. One witness, a former employee of Discount, testified that she specifically saw him inside of one vehicle with the dashboard panel removed, adjusting the odometer with a screw driver. Also, Hubbard signed several documents related to the purchases and sales of the vehicles. For example, he applied for the duplicate titles, claiming that the originals were lost. During the execution of a search warrant at Discount, the titles purportedly lost were found on Hubbard's desk. Further evidence of Hubbard's intent and knowledge of the crime came from his prior conviction in June, 1990, when he pleaded guilty to two felony counts for odometer-fraud related crimes.

Appellants argue that even if there was evidence that Hubbard defrauded purchasers, the evidence does not show that Lyon knew that the mileage he represented to buyers was not accurate. However, there is sufficient evidence supporting Lyon's knowledge of and participation in the fraudulent scheme. Lyon spoke to purchasers of Discount's vehicles regarding the cost and mileage of the vehicles. For example, John Holshouser, a representative from Arizona Checker Sales, testified that he had spoken to Lyon 15–20 times over the phone about the cars that were for sale. Lyon also faxed to Holshouser documents listing vehicle prices and mileage. Holshouser specifically testified that Lyon had represented to him that the mileage figures were actual mileage figures. Holshouser also testified that he relied on mileage figures in deciding on the price he would pay for the car.

Lyon handled paperwork associated with both the purchase and sale of used cars. He personally maintained an inventory of the vehicles on a computer, inputting data about the mileage of the vehicles. Reports with vehicle information containing both high and low mileage figures for five vehicles were printed from the computer data kept by Lyon. A handwriting expert testified that Lyon had written at least some of the mileage figures on vehicle documents. For example, in relation to one vehicle, the expert testified that Lyon had written both: 1) a high mileage figure of 79,530 miles on a Dealer Jacket when Discount purchased the vehicle, and 2) the low mileage figure of 51,784 miles on the duplicate Texas Certificate of Title, which Discount provided to Arizona Checker Sales and which Arizona Checker Sales provided to the Arizona Department of Transportation. Also, in a fax to Holshouser, Lyon represented that the mileage on another vehicle was 30,100 miles, whereas the Dealer Jacket for the same vehicle states in Lyon's writing that the car has 70,550 miles.

Viewing the evidence in the light most favorable to the Government, the evidence shows that Hubbard purchased the vehicles with high mileage, rolled back the odometers, and then Hubbard and Lyon offered them for sale at a lower mileage. Lyon represented to Holshouser that the low mileage figures were accurate, and certified those low-mileage figures on title documents. Lyon input vehicle information into the company computer, and was in charge of maintaining the vehicle inventory. Hubbard and Lyon had to coordinate the new, rolled-back mileage figures to be consistent on vehicle price lists, on the duplicate titles, and on odometer disclosure statements. This scheme required their interaction and cooperation. Thus, a rational jury could have found a "concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose," which is sufficient to establish evidence of an agreement.

Accordingly, we conclude that a rational jury could have found that Appellants had an agreement to engage in this fraudulent scheme, and sufficient evidence supports the convictions for conspiracy….

… Defendants [also] argue that the district court's grant of the motion for judgment of acquittal for the charge of conspiracy to engage in odometer tampering and the denial of the motion for the charge of conspiracy to engage in mail fraud were inconsistent. In other words, they contend that they could not have conspired to commit mail fraud without conspiring to roll-back odometers.

This argument has no merit. The district court interpreted the conspiracy charge related to odometer tampering in a narrow sense, finding that the crime of odometer tampering ended as soon as the odometers were rolled-back. The court found that there was insufficient evidence to support a finding that Lyon had tampered with the odometers. This was distinct from the charge of mail fraud. As explained above, there was sufficient evidence to support a finding that Hubbard and Lyon engaged in a fraudulent scheme to sell cars with the rolled-back odometers to Arizona Checker Sales at inflated prices. Both Hubbard and Lyon performed integral parts of this scheme by signing the relevant documents, inputting the rolled-back odometer figures on new titles, and representing the low-mileage figures as actual mileage to Arizona Checker Sales.

Therefore, although there may not have been evidence that Lyon himself altered the odometers, the conspiracy charge for mail fraud included acts beyond the actual alteration of the odometer. This additional fraudulent behavior—i.e., misrepresenting mileage figures and selling vehicles to purchasers who would have to acquire new titles—provided the basis for the charge of conspiracy to commit mail fraud. Thus, there was nothing inconsistent in the district court's partial judgment of acquittal.

Notes and questions on *U.S. v. Hubbard*

1. This case introduces you to a new inchoate offense: conspiracy. Like the inchoate offenses discussed in the previous chapter, attempt and solicitation, a conspiracy charge should specify the underlying offense that the alleged co-conspirators agreed to commit. (A defendant is not charged with attempt or solicitation alone, remember, but with "attempted robbery" or "solicitation to murder" and so forth.) Here, Hubbard and Lyon were charged with two different conspiracies: a conspiracy to engage in odometer tampering, and separately, a conspiracy to commit mail fraud. After the trial, the district court granted a motion for

judgment of acquittal with respect to the conspiracy to commit odometer tampering fraud. What evidence was missing to support the charge of conspiracy to commit odometer tampering? It may help to ask, what are the elements of a conspiracy to commit odometer tampering? The next note can help you identify those elements.

2. The federal conspiracy statute used in this case, 18 U.S.C. § 371, is like many of the attempt statutes we saw in Chapter Eight: it uses the term "conspire," as those statutes used the term "attempt," without defining it. To define the term more precisely, the Ninth Circuit draws from caselaw, noting that a conspiracy charge requires the prosecution to show "an agreement between two or more persons to accomplish an illegal objective, coupled with one or more overt acts in furtherance of the illegal purpose." Are there separate mental state and conduct elements here, or does the concept of an agreement collapse mental state and action?
3. In its requirement of an agreement "between two or more persons," the federal statute takes what is often called the bilateral view of conspiracy: a conspiracy requires at least two participants. A bilateral definition of conspiracy can create obstacles in cases in which one of the supposed conspirators is not really agreeing to the crime—perhaps because he is an undercover agent working a sting operation, for example. Some jurisdictions adopt instead a "unilateral" view of conspiracy, in which true agreement between two guilty parties is not necessary. Here's one court's explanation of the distinction:

Under a unilateral formulation, the crime of conspiracy is committed *when a person agrees* to proceed in a prohibited manner; under a bilateral formulation, the crime of conspiracy is committed *when two or more persons agree* to proceed in such manner. Under either approach, the agreement is all-important to conspiracy. Under the unilateral approach, as distinguished from the bilateral approach, the trier-of-fact assesses the subjective individual behavior of a defendant, rendering irrelevant in determining criminal liability the conviction, acquittal, irresponsibility, or immunity of other co-conspirators. Under the traditional bilateral approach, there must be at least two 'guilty' persons, two persons who have agreed."

State v. Kihnel, 488 So.2d 1288 (La. 1986). Again, the federal statute used to prosecute Hubbard is a bilateral statute. For an example of unilateral language, see the Model Penal Code definition of conspiracy, discussed after the next case in this chapter.

4. As emphasized in the court's excerpt above, "the agreement is all-important" to a conspiracy charge whether the jurisdiction adopts a bilateral or unilateral approach. Many courts describe the agreement as the "actus reus" of conspiracy, but is an agreement an act? Persons can formalize an agreement through conduct—the signing of a contract, for example—but conspirators rarely put anything in writing or otherwise take action to make their agreement explicit. Conspiratorial agreements are often "inferred from circumstantial evidence" rather than proven by direct evidence. Just as attempt doctrine struggles to distinguish "mere preparation" from actual "perpetration" of an attempt, conspiracy doctrine often struggles to distinguish "mere association" from an actual agreement.
5. Which pieces of evidence establish an agreement in this case? What, precisely, did Hubbard and Lyon agree to do? Or put differently, what crime did they conspire to commit? Again, the district court entered a judgment of acquittal on one conspiracy charge, but not the other. What explains the different outcomes?
6. *Why punish conspiracy, Part One*. In a legal system that includes liability for criminal attempts, as discussed in the previous chapter, and liability for accomplices, as discussed in the first part of this chapter, what does conspiracy doctrine add? One commonly stated justification for conspiracy offenses is the claim that group efforts to commit crimes are especially dangerous and socially harmful, so much so that the very agreement to commit a crime is worthy of punishment even in the absence of the kind of preparatory activity that may be required by attempt doctrine. For one recent statement of this view, consider *People v. Martin*, 26 Cal. App. 5th 825 (Ct. App. Ca. 2018). Amaya Monique Martin and two other women had been apprehended after shoplifting cosmetics from a Walmart and a grocery store. Martin was convicted of conspiracy to commit petty theft, based in part on her own statement that she had been "recruited" to steal cosmetics for someone who planned to send them to Latin America. California law classifies shoplifting as a misdemeanor, but conspiracy to commit shoplifting (or conspiracy to commit petty theft) is a felony. Martin sought to have her felony conviction reduced to a misdemeanor shoplifting conviction. The court refused, emphasizing the unique dangers of a conspiracy:

The courts have long recognized the enhanced dangers of a conspiracy. Almost a hundred years ago, [this court] remarked: "[A] group of evil minds planning and giving support to the commission of crime is more likely to be a menace to society than where one individual alone sets out to violate the law." "The theory … is that collaborative criminal activities pose a greater potential threat to the public than individual acts. 'Criminal liability for conspiracy, separate from and in addition to that imposed for the substantive offense which the conspirators agree to commit, has been justified by a "group danger" rationale. The division of labor

inherent in group association is seen to encourage the selection of more elaborate and ambitious goals and to increase the likelihood that the scheme will be successful. Moreover, the moral support of the group is seen as strengthening the perseverance of each member of the conspiracy, thereby acting to discourage any reevaluation of the decision to commit the offense which a single offender might undertake. And even if a single conspirator reconsiders and contemplates stopping the wheels which have been set in motion to attain the object of the conspiracy, a return to the status quo will be much more difficult since it will entail persuasion of the other conspirators. [Citations.]' [Citations.]"

The instant case aptly demonstrates the enhanced dangers of a conspiracy. Respondent was not stealing cosmetics for her personal use. She was acting as part of an international conspiracy to steal cosmetics and transport them to Latin America, where they would be sold. There were no limits on her incentive to steal. The more cosmetics she stole, the more money she was guaranteed to receive. When she entered the Walmart and Albertson's stores, she was accompanied by two coconspirators. They could steal considerably more than a single person acting alone. The presence of three coconspirators supporting each other decreased the chance that one of them would get "cold feet" and not go through with the theft. Moreover, one of them could act as a lookout to avoid detection by security personnel, thus increasing the likelihood that their criminal scheme would succeed.

Martin, 26 Cal. App. 5th 825, 836-37. One recent article challenges the claim that conspiracies are uniquely dangerous, suggesting that in some cases, expanding the number of people involved in planned criminal activity make the planned crime less likely to actually occur. The article thus proposes that legal definitions of conspiracy should be revised to require prosecutors to show proof of actual dangerousness. See Steven R. Morrison, *Requiring Proof of Conspiratorial Dangerousness*, 88 Tul. L. Rev. 483 (2014).

7. *Why conspiracy, Part Two.* Leaving aside principled arguments about whether conspiratorial agreements are particularly dangerous, one can identify some concrete practical implications of conspiracy law that can make conspiracy charges especially attractive to prosecutors. In some jurisdictions, including the federal system, conspiracy is different from other inchoate offenses in that it does not "merge" into the completed offense. Attempt does merge, in this sense: if a defendant attempts to manufacture a controlled substance, and then is eventually successful, the defendant can't be convicted of both attempted manufacture and manufacture itself. The attempted manufacture is said to "merge" into the completed offense. But a conspiracy charge doesn't merge, under federal law. A defendant who conspires to manufacture a controlled substance, and then actually does manufacture that substance, can be convicted of both conspiracy to manufacture and manufacture itself. Thus, conspiracy charges often add to a defendant's overall criminal liability.

   Additionally, federal conspiracy law embraces a concept known as *Pinkerton* liability, named after *Pinkerton v. United States*, 328 U.S. 640 (1946), and many states have adopted similar doctrines. *Pinkerton* liability is a form of derivative liability, like accomplice liability; it is a way to hold one defendant liable for the conduct of someone else. The case that gave the doctrine its name involved Walter and Daniel Pinkerton, brothers who transported and sold liquor in a bootlegging business that violated existing state regulations. At some point, Daniel was convicted and jailed for liquor-related offenses. While Daniel was in jail, Walter continued to run the bootlegging business, and (unsurprisingly) did not report his illegal profits as taxable income. Federal authorities later prosecuted both Walter and Daniel for conspiracy to commit tax evasion and for the underlying tax evasion offenses. Some of the tax evasion counts were based on Walter's conduct during the time that Daniel was in jail. Daniel argued that he couldn't be punished for acts that Walter committed while he (Daniel) was in jail. But the Supreme Court held that conspiracy was a continuing offense, and each conspirator could be held liable for any and all substantive crimes committed by any member of the conspiracy, so long as the crime was committed "in furtherance of the conspiracy." If the brothers had a conspiratorial agreement to violate liquor laws, and if each act of tax evasion was done in furtherance of the overall conspiracy, then each brother could be held liable for the other's crimes.

   Pinkerton liability thus expands the number of people who can be held liable for any one crime committed "in furtherance" of a conspiracy, and it expands the number of crimes that can be charged against each member of a conspiracy. In a large and complex conspiracy, the prospect of *Pinkerton* liability can create a strong incentive for individual members of the conspiracy to cooperate with the government in the hopes of avoiding punishment for all substantive crimes committed by any of the co-conspirators. *Pinkerton* liability was widely criticized, and not widely used, until the 1970s, when federal prosecutors embraced it as a weapon in the war on drugs.

Check Your Understanding (9-2)

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The original version of this chapter contained H5P content. You may want to remove or replace this element.

Withdrawal or Abandonment of a Conspiracy

Indiana Code § 35-41-5-2. Conspiracy

(a) A person conspires to commit a felony when, with intent to commit the felony, the person agrees with another person to commit the felony. A conspiracy to commit a felony is a felony of the same level as the underlying felony. However, a conspiracy to commit murder is:

(1) a Level 2 felony if the conspiracy does not result in the death of a person; and

(2) a Level 1 felony if the conspiracy results in the death of another person.

(b) The state must allege and prove that either the person or the person with whom he or she agreed performed an overt act in furtherance of the agreement.

(c) It is no defense that the person with whom the accused person is alleged to have conspired:

(1) has not been prosecuted;

(2) has not been convicted;

(3) has been acquitted;

(4) has been convicted of a different crime;

(5) cannot be prosecuted for any reason; or

(6) lacked the capacity to commit the crime.

Indiana Code § 35-42-1-1. Murder

A person who … knowingly or intentionally kills another human being … commits murder, a felony.

Indiana Code § 35-42-3-3. Confinement

A person who knowingly or intentionally confines another person without the other person's consent commits criminal confinement….

Curtis Lee WEIDA, Appellant–Defendant

v.

STATE of Indiana, Appellee–Plaintiff

Court of Appeals of Indiana
778 N.E.2d 843

Nov. 21, 2002

MATHIAS, Judge.

Curtis Weida was convicted of Conspiracy to Commit Murder and Confinement… The trial court vacated the Confinement conviction on double jeopardy grounds, but sentenced Weida to fifty years executed for the Conspiracy to Commit Murder conviction. Weida appeals and raises two issues, which we restate as:

I. Whether the evidence was sufficient to support Weida's conviction for Conspiracy to Commit Murder; and,

II. Whether the trial court abused its discretion when it refused to give Weida's tendered jury instruction on withdrawal from conspiracy.

We affirm in part, reverse in part and remand for a new trial on the Conspiracy to Commit Murder count.

The facts most favorable to the verdict reveal that on more than one occasion prior to June 13, 2000, Weida told Kristen Gross ("Gross"), a young woman residing in his home, that he had fantasies that involved kidnapping a young boy and performing sexual acts on him…. On June 13, 2000, Weida asked Gross to go for a drive with him. During the drive, Weida informed Gross that they were driving around "to look for a kid." Weida and Gross observed several young boys, and Weida made comments about them…

Eventually, Weida and Gross arrived in Kokomo, Indiana. While driving through a neighborhood, Weida and Gross observed a young boy, I.P., standing on the side of the road. Upon seeing I.P., Weida asked Gross, "[w]hat do you think," to which Gross replied, "[t]oo young." Weida then drove around the block and stopped the car near I.P. Gross asked Weida, "what do you want me to do, what's going on, what are you going to do?" Weida responded, "[w]ell, you're going to get out of the car and ask for directions to the mall or something."

Gross got out of the car and asked I.P. how to get to the mall. As he began to tell her, Gross told him to tell Weida. As I.P. moved closer to the car to give Weida directions, Weida pushed up the front passenger seat and Gross shoved I.P. into the back of the car. Weida then gave Gross, who was in the backseat with I.P., a plastic "band" to tie I.P.'s wrists together, which she did. Before they had spotted I.P., Weida had shown the band to Gross and told her that she could use it to tie up a boy's hands.

As they were driving out of Kokomo, Gross attempted to convince Weida that they should let I.P. go because she did not want Weida to kill I.P. Gross then made a failed attempt to burn the plastic band off of I.P.'s wrists. Weida told her that "if [they] couldn't get him loose there was no option." Gross's understanding of that statement was that if she could not remove the band from I.P.'s wrists, Weida would kill him. Weida eventually stopped at a gas station and borrowed a pair of scissors that were used to cut the band around I.P.'s wrists. Weida then told I.P. to stick out his hands, put a gun in them, and stated "[t]hat's what's going to happen to you if you tell." Weida drove back to Kokomo, and before they dropped I.P. off, Weida stated, "[n]ow you remember what will happen, we know where you live."

On September 18, 2000, Weida was charged with Conspiracy to Commit Murder, a Class A felony, and Confinement, as a Class B felony. On September 17, 2001, a jury trial began, and the jury found Weida guilty of both charges. At the sentencing hearing, the trial court vacated the Confinement conviction on double jeopardy grounds, but sentenced Weida to fifty years executed for the Conspiracy to Commit Murder conviction. Weida now appeals….

… To convict Weida of Conspiracy to Commit Murder, the State had to prove that while having the intent to commit murder, Weida and Gross entered into an agreement to commit murder, and either Weida or Gross performed an overt act in furtherance of the agreement. However, the State was not required to prove that murder was actually committed or even attempted.[5] Weida argues that the evidence did not establish that he intended to kill I.P. or that there was an agreement between himself and Gross to do so.

The State is not required to establish the existence of a formal express agreement to prove a conspiracy. "It is sufficient if the minds of the parties meet understandingly to bring about an intelligent and deliberate agreement to commit the offense." An agreement can be inferred from circumstantial evidence, which may include the overt acts of the parties in furtherance of the criminal act. With regard to the intent element, we note that to determine whether the defendant had the requisite intent to commit the crime alleged, "[t]he trier of fact must usually resort to circumstantial evidence or reasonable inferences drawn from examination of the circumstances surrounding the crime."

At trial, Gross testified that she and Weida had several conversations concerning Weida's fantasies that involved performing sexual acts on the dead body of a young boy. On the date they drove to Kokomo, Weida had two guns in the car and a plastic band. Weida told Gross that the band could be used to tie a boy's hands together. Weida drove through several towns and made comments about the young boys they observed indicating for example that a given boy was too old. Although Gross testified that she had no intent to kill I.P., she was aware of Weida's fantasies and testified that she knew Weida wanted to act out those fantasies after they spotted I.P., and he told her to ask him for directions. Furthermore, Gross actively participated in the crime by shoving I.P. into the car after Weida had pushed up the front seat and by tying the plastic band around I.P.'s wrists. From this evidence, the jury could have reasonably concluded that Weida intended to kill I.P. and that he and Gross entered into an agreement to do so. Therefore, the evidence presented at trial was sufficient to support Weida's conviction for Conspiracy to Commit Murder.

Weida also argues that the trial court abused its discretion when it refused to give his tendered jury instruction regarding withdrawal from the conspiracy. "The giving of jury instructions lies within the trial court's sound discretion, and we review the court's refusal to give a tendered instruction for an abuse of that discretion." …

At trial, Weida tendered the following jury instruction:

To withdraw from conspiracy, defendant must cease his activity in the conspiracy and take affirmative act to defeat or disavow conspiracy's purposes either by making full confession to the authorities or by communicating his withdrawal in a manner reasonably calculated to inform co-conspirators, and his withdrawal must be both complete and in good faith.

Withdrawal from a conspiracy is an affirmative defense under federal law and Weida's instruction adequately describes the elements of that defense. However, withdrawal from a conspiracy has not been recognized as a defense under Indiana law. In his brief, Weida argues that his tendered instruction is a correct statement of the [Indiana] defense of abandonment, which was not covered by any other instruction; therefore, the trial court abused its discretion when it refused to give the instruction to the jury.

The State argues that Weida's tendered instruction was not a correct statement of the law of the abandonment defense. Indiana Code section 35–41–3–10 describes the defense of abandonment [that can be raised by a defendant charged with conspiracy, attempt, or aiding and abetting an offense] and provides:

[I]t is a defense that the person who engaged in the prohibited conduct voluntarily abandoned his effort to commit the underlying crime and voluntarily prevented its commission.

Ind. Code § 35–41–3–10 (1998). "To be considered voluntary, the decision to abandon must originate with the defendant, not as a result of extrinsic factors that increase the probability of detection." *Estep v. State* (Ind. Ct. App. 1999). Also, the defendant must have forsaken the criminal plan before completion of the underlying crime or before it became inevitable. Comparing the defenses of withdrawal and abandonment, it is clear that they consist of the same concepts because both defenses require that the defendant forsake the conspiracy.

However, the State contends that the tendered withdrawal instruction "reduces Defendant's burden in establishing the affirmative defense of abandonment." We disagree. The defense of withdrawal requires the defendant to *affirmatively* act to defeat the conspiracy, whereas the defense of abandonment requires only that the defendant *voluntarily* abandon his effort to commit the crime. Like lesser-included offenses, an analogy could be made that abandonment is a lesser-included defense of withdrawal. For example, if a group of individuals agrees to rob a bank, and one of those individuals voluntarily decides to forsake his part in the conspiracy, those facts might be sufficient to establish the defense of abandonment. However, those facts would clearly not be sufficient to establish the defense of withdrawal unless the individual took some affirmative act to defeat the conspiracy, such as contacting the police.

Although abandonment is clearly established as a defense by statute, withdrawal has never been recognized as a defense in Indiana. While the defendant bears the additional burden of demonstrating that he took an affirmative act to defeat the goals of the conspiracy to establish the withdrawal defense, withdrawal and abandonment are essentially the same defense. The instruction was not covered by other instructions and there was evidence in the record that would support giving the withdrawal instruction to the jury because Weida did not attempt to murder I.P., but rather he set him free. Under these extraordinary facts and circumstances, we hold that refusal of Weida's withdrawal instruction was an abuse of the trial court's discretion.

Conclusion

The evidence presented at trial was sufficient to support Weida's conviction for Conspiracy to Commit Murder. However, the trial court abused its discretion when it refused to give his tendered instruction regarding the defense of withdrawal. Therefore, we reverse Weida's conviction for Class A felony Conspiracy to Commit Murder, but we further order the trial court to reinstate Weida's Class B felony Confinement conviction pending the result of any retrial.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Notes and questions on *People v. Weida*

1. Did Kristen Gross agree to commit murder? Does it matter to Weida's criminal liability whether Gross agreed? Think again of bilateral and unilateral definitions of conspiracy. Which does Indiana seem to adopt?
2. What is the difference between the affirmative defense of withdrawal (described here by the court, and recognized under federal law, but not recognized as a defense under Indiana law) and the Indiana statutory defense of abandonment?
3. The jury convicted Weida of both conspiracy to commit murder and the separate crime of "confinement." The trial court then vacated the confinement conviction on double jeopardy grounds. Look at the confinement statute, reprinted before the court's

opinion. Why, in this case, would convictions for both confinement and conspiracy to commit murder violate double jeopardy? After the 2002 opinion you've just read, Weida was retried for both confinement and conspiracy to commit murder. He was allowed to present his abandonment argument at the new trial, but was convicted again of conspiracy to murder. Once he was convicted of the conspiracy to murder charge, the confinement charge was again vacated. As a state court later explained, "the evidentiary facts that supported the criminal confinement offense were most likely the same evidentiary facts that supported the conspiracy to commit murder charge…."

4. The Model Penal Code adopts a unilateral approach to conspiracy, and also offers an affirmative defense called "renunciation." Consider Model Penal Code § 5.03:

   (1) **Definition of Conspiracy.** A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

   (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or

   (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

   (2) **Scope of Conspiratorial Relationship.** If a person guilty of conspiracy, as defined by Subsection (1) of this Section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.

   (3) **Conspiracy with Multiple Criminal Objectives.** If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

   …

   (5) **Overt Act.** No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

   (6) **Renunciation of Criminal Purpose.** It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

   Is "renunciation" under the MPC similar to the federal defense of "withdrawal," the Indiana defense of "abandonment," or is it different from both?

Complicity, Conspiracy, and Drug Offenses

Rev. Code Washington 9.01.030 [since recodified]

Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent, shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him.

The STATE of Washington, Respondent

v.

Bruce W. GLADSTONE, Appellant

Supreme Court of Washington, En Banc
474 P.2d 274

Sept. 10, 1970

HALE, Justice.

A jury found defendant Bruce Gladstone guilty of aiding and abetting one Robert Kent in the unlawful sale of marijuana. Deferring imposition of sentence, the court placed defendant on probation. He appeals the order deferring sentencing contending that the evidence as a matter of law was insufficient to sustain a verdict of guilty. His point, we think, is well taken.

…Gladstone's guilt as an aider and abettor in this case rests solely on evidence of a conversation between him and one Douglas MacArthur Thompson concerning the possible purchase of marijuana from one Robert Kent. There is no other evidence to connect the accused with Kent who ultimately sold some marijuana to Thompson.

When asked by Thompson—an agent of the police—where marijuana could be bought, the defendant did no more than name Kent as an individual who might be willing to sell some and draw a sketch of his location. There was no evidence whatever that the defendant had any association, understanding, agreement or arrangement, direct or indirect, tacit or express with Kent to aid or persuade him in any way in the sale of marijuana.

The conversation between defendant and Thompson occurred at defendant's residence. Douglas MacArthur Thompson, a 25-year-old student at the University of Puget Sound in Tacoma and an employee of the Internal Revenue Service of the United States, had done some investigative work for the government. From time to time, the Tacoma Police Department engaged him to investigate the use, possession and sale of narcotics, principally marijuana, among college students….

Thompson testified that Lieutenant Seymour and Detective Gallwas of the narcotics detail asked him to attempt a purchase of marijuana from Gladstone. During the evening of April 10, 1967—between 10 and 11 o'clock—the two officers and Thompson drove in a police car to the vicinity of defendant's apartment. Thompson went to Gladstone's door alone, beyond the hearing and out of the sight of the two officers. He knocked at the door and Gladstone respond[ed]. Thompson asked Gladstone if he would sell him some marijuana. Describing this incident, Thompson testified as follows:

… Gladstone told me that he was—he did not have enough marijuana on hand to sell me any, but he did know an individual who had quite a sufficient quantity and that was very willing to sell and he named the individual as Robert Kent, or Bob Kent as he put it, and he gave me directions to the residence…. I asked him if, you know, if he could draw me a map and he did.

[Thompson] added, 'I'm not sure whether he did give me the exact address or not, he told me where the residence was.' He said that Gladstone then with pencil and paper sketched the location of Kent's place of residence…

The two officers then took Thompson to Kent's residence where marijuana was purchased. The actual purchase was made by Thompson directly from Kent while [the officers] stayed in the police car. Kent was subsequently arrested and convicted of selling Thompson approximately 8 ounces of marijuana—the very sale which defendant here was convicted of aiding and abetting.

That ended the prosecution's case. Even if it were accorded all favorable inferences, there appears at this point a gap in the evidence which we feel as a matter of law is fatal to the prosecution's cause. Neither on direct examination nor under cross-examination did Thompson testify that he knew of any prior conduct, arrangements or communications between Gladstone and Kent from which it could be even remotely inferred that the defendant had any understanding, agreement, purpose, intention or design to participate or engage in or aid or abet any sale of marijuana by Kent. Other than to obtain a simple map from Gladstone and to say that Gladstone told him Kent might have some marijuana available, Thompson did not even establish that Kent and the defendant were acquainted with each other….

Except for the conversation between Gladstone and Thompson and the map, the state showed only that the officers and their informant, Thompson, went to Kent's residence, more than 3 or 4 blocks from where Gladstone lived, [and] bought some marijuana from him…. Thus, at the close of its case in chief, the state had failed to show any connection or association whatever between Gladstone and Kent or even that they knew each other, and at that juncture a motion for dismissal would lie.

…Gladstone took the stand and testified that he had been a student at the University of Puget Sound in Tacoma for 2 years and that he did not know the police informant, Douglas MacArthur Thompson, personally but had seen him on campus. Prior to the evening of April 10, 1967, he said, Thompson had never been in his home. As to Kent, the party whom he was accused of aiding and abetting, he said he had seen him between classes having coffee at the student union building, and perhaps had been in his company about 10 times altogether. He knew where Kent lived because once en route home in his car he had given Kent a lift from the student union building to the latter's house. On this singular occasion, Gladstone did not get out of the car. He said that he did not know that Kent used marijuana or kept it for sale to other people.

Describing the incidents of April 10, 1967, when Thompson came to his door, Gladstone's version of the event differed somewhat from Thompson's. He testified that Thompson asked him to sell him some pot and Gladstone said, 'No,' and:

A. Then he asked me if I knew Rob Kent and I said yes. Q. What did you tell him? A. I said yes, I knew Rob Kent, and he asked me if I knew where Rob Kent lived and I said that I didn't know the address, nor did I know the street upon which he lived, but I told him that I could direct him there. Q. And did he ask you to direct him? A. Yes, I started to explain how to get there and he asked me if I would draw him a map. Q. And did you do so? A. Yes, I did.

… After that brief conversation, Thompson said, 'Thank you,' and left. Gladstone testified that he did not counsel, encourage, hire, command, induce or otherwise procure Robert Kent to make a sale of marijuana to Douglas Thompson—or do anything that would be their legal equivalent. Thus, the state at the close of its case had not established prima facie that Gladstone, as charged, aided and abetted Kent in the sale of marijuana, and its position did not improve with the defendant's case.

If all reasonable inferences favorable to the state are accorded the evidence, it does not, in our opinion, establish the commission of the crime charged. That vital element—a nexus between the accused and the party whom he is charged with aiding and abetting in the commission of a crime—is missing. The record contains no evidence whatever that Gladstone had any communication by word, gesture or sign, before or after he drew the map, from which it could be inferred that he counseled, encouraged, hired, commanded, induced or procured Kent to sell marijuana to Douglas Thompson as charged, or took any steps to further the commission of the crime charged. He was not charged with aiding and abetting Thompson in the purchase of marijuana, but with Kent's sale of it.

Nor can it be said here that the state proved the existence of a conspiracy. In this state, conspiracy to commit a crime is a gross misdemeanor. The crime is complete when the conspirators have reached an agreement or understanding or consummated a plan to do the unlawful acts, for the conspiracy statute does not require proof of the common-law element of an overt act in pursuance of the conspiracy. RCW 9.22.020. Conspiracy, therefore, is a crime separate, distinct from, and unincluded in the crime which the conspirators have agreed to commit. … One may become a principal through aiding and abetting another in the commission of a crime without participating in a conspiracy. But to be a principal one must consciously share in a criminal act and participate in its accomplishment.

Thus, even without prior agreement, arrangement or understanding, a bystander to a robbery could be guilty of aiding and abetting its commission if he came to the aid of a robber and knowingly assisted him in perpetrating the crime. But regardless of the modus operandi and with or without a conspiracy or agreement to commit the crime and whether present or away from the scene of it, there is no aiding and abetting unless one "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

In the instant case, the record is totally devoid of any proof whatever that the defendant and Kent had any arrangement, agreement or understanding, or in any way conspired and confederated with each other concerning the sale of marijuana by Kent. There was no proof that they had talked about it with each other, directly or through others. Whatever information the defendant is shown by the record to have given the police informant, to the effect that Kent might sell him some marijuana, amounted at most to no more than a statement of opinion and possibly no more than campus gossip, rumor or innuendo. That the police ultimately bought marijuana from Kent would not, without more, operate to convert defendant's statement to the police, that Kent would or might sell marijuana, into an aiding, abetting, counseling or encouraging of Kent to make the sale.

…Another case—and one nearly identical with the instant case—affirms the foregoing principles. In *Moreiv. United States* (6th Cir. 1942), undercover narcotic agents approached the defendant, a physician, and asked him to sell them narcotics. The doctor told the agents he had none, but gave the agents the name of another party and advised the agent to tell the latter that the doctor had sent him. The doctor added that 'he will take care of you.' The agents did arrange a purchase of illegal narcotics from the person to whom the doctor had referred them, and the doctor was thereupon charged with aiding and abetting in the sale.

After tracing the common-law distinction between a principal in the second degree and an accessory before the fact and pointing out that an aider and abettor must at least procure, counsel or command another to commit the felony actually committed, the court said:

It is not necessary that there should be any direct communication between an accessory before the fact and the principal felon; it is enough if the accessory direct an intermediate agent to procure another to commit the felony, without naming or knowing of the person to be procured. A person is not an accessory before the fact, unless there is some sort of active proceeding on his part; he

must incite, or procure, or encourage the criminal act, or assist or enable it to be done, or engage or counsel, or command the principal to do it….

* * * It is not to be assumed that Congress, in defining as a principal, one who 'procures the commission of an offense,' and using almost the identical language by which the common law defined aiders, abettors, and accessories, was providing for a new crime theretofore unknown. If the criterion for holding that one is guilty of procuring the commission of an offense, is that the offense would not have been committed except for such a person's conduct or revelation of information, it would open a vast field of offenses that have never been comprehended within the common law by aiding, abetting, inducing or procuring. * * *

* * * (T)he only thing Dr. Platt did was to give Beach the name of Morei as a man from whom he might secure heroin to does horses in order to stimulate them in racing. This is not the purposive association with the venture that, under the evidence in this case, brings Dr. Platt within the compass of the crime of selling or purchasing narcotics, either as principal, aider and abettor, or accessory before the fact. (Italics ours.)

This court has recognized the necessity of proof of a nexus between aider and abettor and other principals to sustain a conviction. In *State v. Hinkley* (1958), amplifying the term abet, we said:

Although the word 'aid' does not imply guilty knowledge or felonious intent, the word 'abet' includes knowledge of the wrongful purpose of the perpetrator, as well as counsel and encouragement in the crime.

and approved the instruction that:

To abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting or aiding in the commission of such criminal offense.

It would be a dangerous precedent indeed to hold that mere communications to the effect that another might or probably would commit a criminal offense amount to an aiding and abetting of the offense should it ultimately be committed.

There being no evidence whatever that the defendant ever communicated to Kent the idea that he would in any way aid him in the sale of any marijuana, or said anything to Kent to encourage or induce him or direct him to do so, or counseled Kent in the sale of marijuana, or did anything more than describe Kent to another person as an individual who might sell some marijuana, or would derive any benefit, consideration or reward from such a sale, there was no proof of an aiding and abetting, and the conviction should, therefore, be reversed as a matter of law. Remanded with directions to dismiss.

HAMILTON, Justice (dissenting).

In my view the majority has stepped into the jury box and with a flourishing dissection of the evidence placed its own interpretation thereupon and, together with deftly importing the conspiratorial element of community of purpose, has substituted its verdict for that of the jury.

Before discussing the evidence adduced at the trial, I consider it appropriate to briefly review the law concerning the offense of aiding and abetting.

At common law, persons associated in some way in the commission of a crime were classified as principals and accessories. These classifications in turn were broken down into the categories of principals in the first and second degree and accessories before and after the fact. The designation of principal in the first degree was applied to the actual perpetrator of the crime, while the characterization of principal in the second degree pertained to one who was present, either actually or constructively, at the scene of the crime assisting in some fashion the principal in the first degree. The rank of accessory before the fact was attached to one who, though not present at the scene of the offense, counseled, advised, or directed commission of the crime, while one who, knowing a crime had been committed, aided or assisted the felon in escaping capture and prosecution was denominated an accessory after the fact….

This state, in common with many jurisdictions, legislatively abolished the common law classifications of principals in the first and second degree and accessories before the fact by and through the enactment of RCW 9.01.030, which provides:

Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counsel,

encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent, shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him.

In the construction of this statute this court has said that each of the words of the statute, from which criminal culpability can flow, signifies the overt and affirmative doing or saying of something on the part of a person charged which directly or indirectly contributes to the commission of the primary crime.

It is not necessary to sustain a charge of aiding, abetting or counseling a crime that there be proof of a conspiratorial relationship or confederacy between the actual perpetrator of the primary crime and the one charged as an aider or abettor. Criminal conspiracy, in which concert of purpose becomes a salient element, is a separate substantive offense. RCW 9.22.010. Thus, it is stated in *Pereira v. United States* (1954);

Aiding, abetting, and counseling are not terms which presupposed the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy.

As is apparent from its language, our statute does not require the presence at the scene of the crime of one aiding, abetting, counseling or inducing the commission of a crime. Neither does it require a community of intent, for by the last sentence it provides that absence of criminal intent on the part of the person aided, abetted or induced to commit the primary offense is no defense to the aider or abettor. The statutory language and the overt action it contemplates does, however, give rise to the requirement that the aider or abettor entertain a conscious intent, I.e., knowledge and intent that his action will instigate, induce, procure or encourage perpetration of the primary crime.

The question to be resolved, then, in the instant case is whether the evidence sustains the jury's conclusion that the appellant entertain the requisite intent to render him culpable as an aider or abettor. In the resolution of this question, it is to be borne in mind that appellant's challenge to the sufficiency of the evidence requires that the evidence, and all reasonable inferences to be drawn therefrom, be interpreted in a light most favorable to the state. Furthermore, this court has held that an aider's or abettor's culpability may be established by circumstantial evidence.

Although the evidence in the case is conflicting, the jury was entitled to believe that on April 10, 1967, one Robert Kent sold marijuana to Douglas Thompson…; that prior to the evening of April 10, 1967, when Thompson talked to appellant, Thompson and the Tacoma Police Department were unaware of Kent or his association with marijuana; that appellant knew Kent, whom he met and associated with on the campus of the school they respectively attended; that both appellant and Kent lived off campus; that appellant knew where Kent lived and on at least one occasion had driven him home; that at the time in question the Tacoma Police Department had information that appellant was supposed to be holding a supply of marijuana for sale…; that appellant [told Thompson] that he did not have enough marijuana on hand to sell but that he knew an individual who did have an ample supply and who was willing to sell some and named the individual as Robert Kent; that upon request appellant orally gave Thompson directions to Kent's apartment and drew a map to aid Thompson in finding the address, utilizing as a reference point a building known to appellant to be a student rendezvous where drugs had been sold; that by using the map and oral directions Thompson and the police went to Kent's residence; That Thompson approached Kent and told him 'Gladstone had sent me' whereupon Kent invited him to a room and sold him some marijuana for $30; and that Thompson and one of the police officers later returned to the Kent residence, after again visiting appellant, and made a second purchase of marijuana at which time Kent was arrested.

Based upon the foregoing circumstances and the inferences reasonably derivable therefrom, I am satisfied that the jury was fully warranted in concluding that appellant, when he affirmatively recommended Kent as a source and purveyor of marijuana, entertained the requisite conscious design and intent that his action would instigate, induce, procure or encourage perpetration of Kent's subsequent crime of selling marijuana to Thompson. Furthermore, insofar as an element of preconcert be concerned, certainly the readiness with which the passwords, 'Gladstone had sent me,' gained a stranger's late evening entree to Kent's domain and produced two illegal sales strongly suggests, if not conclusively establishes, the missing communal nexus which the majority belabors.

Finally, the jury, with the witnesses before it, was in a far better position to evaluate the witnesses' candor, voice inflections, appearance, demeanor, attitude and credibility than this court viewing naught but the cold record.

I would sustain the jury's verdict and affirm the judgment.

Check Your Understanding (9-3)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

Notes and questions on *Gladstone*

1. Bruce Gladstone was charged with selling marijuana as an accomplice, not with purchasing it or possessing it. That is, Gladstone was charged as an accomplice to Kent, not as an accomplice to Thompson, who was working as a police informant. Do you think that distinction makes a difference to the court?
2. The dissenting opinion offers one way to think about the difference between complicity and conspiracy. Conspiracy, the dissent argues, requires the "concert of purpose" or "community of intent" that the majority seems to believe is lacking in this case, but (the dissent would argue) complicity, or accomplice liability, does not require that concert of purpose. In other words, the dissent suggests that the majority has conflated conspiracy and complicity. Is this an accurate characterization of the majority opinion, in your view? Is it "community of intent" or "concert of purpose" that is missing from the prosecution's evidence, according to the majority opinion?
3. *Gladstone* also raises an important question about the appropriate criminal liability, if any, for what might be called aiding with indifference. Traditional doctrines of complicity require the accomplice to intend to facilitate the underlying criminal offense. That is, the required mental state for complicity is usually said to be "true purpose" or a real intention that the crime take place. But what about a person who facilitates criminal activity by others but is indifferent to their success? What if a defendant is, like Bruce Gladstone, aware that someone is seeking help with criminal activity, but not particularly invested in whether that activity takes place or not? Some states have enacted "criminal facilitation" statutes that do not require the purpose or intent traditionally required for accomplice liability. Here is one example:

A person is guilty of criminal facilitation in the second degree when, believing it probable that he is rendering aid to a person who intends to commit a class A felony, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit such class A felony.

N.Y. Penal Law §115.05. New York has more or less serious versions of criminal facilitation depending on the seriousness of the crime facilitated and the age of the person that the defendant assists.

4. Unlike many appellate opinions addressing complicity or conspiracy in the context of drug trafficking, *Gladstone* involves only a few parties and relatively simple facts. For that reason, it's a good case to help clarify complicity, conspiracy, and the relation between the two. But as a 1970 decision, *Gladstone* also offers a snapshot of a drug prosecution just before the War on Drugs gained new intensity and used expanded notions of complicity and conspiracy to obtain more drug trafficking convictions. Note that the *Gladstone* majority relies again on Judge Learned Hand's language from *United States v. Peoni*: accomplice liability requires that the defendant "associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." Recall that Judge Hand applied this principle to conclude that Peoni, who sold counterfeit bills to Regno, could not be convicted as an accomplice to Dorsey after Regno sold the bills to Dorsey. Now imagine that the contraband is narcotics, not counterfeit bills. Contemporary prosecutors use expanded notions of accomplice liability and conspiracy, including but not limited to *Pinkerton* liability, to link together various participants in the drug trade, whether or not they have direct contact with each other or specific awareness of one another's offenses.

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1. [Fn. 7 by the Court:] Some authorities suggest an exception to the general rule when another crime is the "natural and probable consequence" of the crime the defendant intended to abet…. That question is not implicated here, because no one contends that a § 924(c) violation is a natural and probable consequence of simple drug trafficking. We therefore express no view on the issue. ↵
2. [Fn. 8 by the Court:] We did not deal in these cases, nor do we here, with defendants who incidentally facilitate a criminal venture rather than actively participate in it. A hypothetical case is the owner of a gun store who sells a firearm to a criminal, knowing but not caring how the gun will be used. We express no view about what sort of facts, if any, would suffice to show that such a third party has the intent necessary to be convicted of aiding and abetting. ↵
3. [Fn. 9 by the Court:] Of course, if a defendant continues to participate in a crime after a gun was displayed or used by a confederate, the jury can permissibly infer from his failure to object or withdraw that he had such knowledge. In any criminal

case, after all, the factfinder can draw inferences about a defendant's intent based on all the facts and circumstances of a crime's commission. ↵

4. [Fn. 10 by the Court:] Contrary to the dissent's view, nothing in this holding changes the way the defenses of duress and necessity operate. Neither does our decision remotely deny that the "intent to undertake some act is ... perfectly consistent with the motive of avoiding adverse consequences which would otherwise occur." Our holding is grounded in the distinctive intent standard for aiding and abetting someone else's act—in the words of Judge Hand, that a defendant must not just "in some sort associate himself with the venture" (as seems to be good enough for the dissent), but also "participate in it as in something that he wishes to bring about" and "seek by his action to make it succeed." For the reasons just given, we think that intent standard cannot be satisfied if a defendant charged with aiding and abetting a § 924(c) offense learns of a gun only after he can realistically walk away—i.e., when he has no opportunity to decide whether "he wishes to bring about" (or make succeed) an armed drug transaction, rather than a simple drug crime. And because a defendant's prior knowledge is part of the intent required to aid and abet a § 924(c) offense, the burden to prove it resides with the Government. ↵
5. [Fn. 6 by the court:] We also note that in many instances the alleged overt act in a conspiracy would also constitute a substantial step toward the commission of a crime, which is an essential element in an attempt conviction. This is the reason for the prohibition against conviction for conspiracy to commit a crime and conviction for attempt to commit the same underlying crime. ↵

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7.12: Affirmative Defenses

Introduction

Nearly universally, persons wish to avoid the burdens of a criminal conviction. Once charged with an offense, defendants often face a range of different outcomes. As you know by now, for many defendants a guilty plea may seem the best available option, especially if they face the threat of pretrial detention or more severe charges at trial. But for those defendants who decide against a guilty plea, there are a few main strategies to avoid conviction. The type of defense that is the focus of this chapter—the affirmative defense—is best understood in relation to other types of defense arguments that you have already seen.

Because the prosecution bears the burden of proof in a criminal case, one defense strategy is to argue that the prosecution has not met that burden. A failure of proof argument is a claim that the prosecution has not adequately proven all necessary elements of the charged offense. There are many variations of a failure of proof claim. You have seen sufficiency of the evidence claims, in which the defendant argues that the evidence is insufficient to establish one or more elements of the offense. Other failure of proof claims may be linked to questions of statutory interpretation. For example, a defendant may argue that, when the language of the statute is properly interpreted, it requires proof of a given mental state that the prosecution has not established. Challenges to jury instructions may also be a form of failure of proof claim. A defendant could argue that a jury instruction misstated the law and thus did not require the jury to find the precise elements required by the applicable statute. (Still another approach, one you will see frequently in a course in constitutional criminal procedure, is an effort to suppress the prosecution's key evidence by arguing that the evidence was seized in violation of the federal or state constitution. Without the necessary evidence, the prosecution would then be unable to meet its burden of proof. In this book, you saw this kind of argument in *Commonwealth v. Copenhaver* in Chapter One, but for the most part we do not address issues of constitutional criminal procedure.)

Less frequently, defendants may try to avoid a conviction (or get it reversed on appeal) by raising a constitutional challenge to the statute itself or to an enforcement decision other than the obtaining of evidence. In Chapters Two and Three, you saw examples of these types of constitutional challenges, such as the argument in *City of Chicago v. Morales* that Chicago's gang loitering statute was void for vagueness and thus a violation of the Due Process Clause, or the argument in *United States v. Armstrong* that prosecutors had selected defendants for prosecution in a racially biased manner that violated the Equal Protection Clause. And you have seen other appeals to both state and federal constitutional constraints occasionally throughout the book.

This chapter focuses on a third type of defense argument: the affirmative defense. In contrast to a failure of proof claim, an affirmative defense typically does not dispute that the prosecution can establish the elements of the charged offense. And in contrast to a constitutional claim, an affirmative defense argument does not challenge the government's constitutional authority to enact the relevant statute or use it against the defendant. Instead, an affirmative defense is an argument that the defendant should not be convicted and punished even if the evidence establishes the elements of the charged offense. Courts and scholars frequently speak of affirmative defenses in terms of justification and excuse. Some affirmative defenses, such as self-defense, are classified as justifications on the theory that a defendant was justified in committing the conduct that violates the statute, perhaps because committing the crime was necessary to avoid a still worse outcome (such as the defendant's own death at the hands of an attacker). Some affirmative defenses, such as insanity, are characterized as excuses rather than justifications: when a person with severe mental illness commits a crime, we do not say that the person was justified in acting that way, but we may choose to excuse the person from criminal liability if we think the mental illness was severe enough. You have seen a few examples of other types of affirmative defenses, such as the mistake-of-law affirmative defense that the defendant raised unsuccessfully in *People v. Marrero* (Chapter Seven), or the abandonment / renunciation defense to a charge of attempt, discussed in *People v. Acosta* (Chapter Eight). (In those two cases, neither court characterized the affirmative defense in terms of justification or excuse, but it's likely both the mistake-of-law and abandonment defenses would be seen as arguments that the defendant's conduct should be excused, rather than arguments that it was justified conduct.)

Affirmative defense arguments are not often successful, but they can be illuminating. They can help clarify the state's choices to impose criminal liability by providing a point of contrast: when does the legal system decline to impose criminal liability, even on someone whose conduct and mental state meets the statutory definition of a criminal offense? Self-defense arguments have drawn particular attention in recent years thanks to several high-profile cases in which a white (or non-Black) defendant killed an unarmed Black victim but avoided conviction by claiming self-defense. As will be discussed in this chapter, the success of a self-defense

claim usually depends on convincing a judge (and possibly a jury) that the defendant had a "reasonable" fear for his own life. Thus, self-defense claims often put the target of force on trial, in a sense; the question becomes whether the person who was shot or otherwise harmed was "reasonably" perceived as threatening. If race affects who is perceived as dangerous, then race can influence which self-defense claims are successful. Many commentators have argued that self-defense law undervalues Black lives by accommodating biased fears of Blacks. Indeed, the 2012 killing of Trayvon Martin by George Zimmerman, followed by Zimmerman's subsequent acquittal on grounds of self-defense, launched the Black Lives Matter movement. Though more empirical research is needed to fully understand racial disparities in self-defense claims, it appears that white defendants who kill Black victims are about ten times more likely to prevail with a self-defense claim than Black defendants who kill white victims, and white defendants who kill Black victims are about eight times more likely to prevail with a self-defense claim than all other combinations (white killing white, Black killing Black, etc.). See Addie C. Rolnick, *Defending White Space*, 40 Cardozo L. Rev. 1639, 1654-1655 (2019).

Race has been a contentious issue in many self-defense cases; gender has been salient in others. One strand of controversial self-defense cases involves women who kill allegedly abusive partners. Self-defense law generally requires proof that the defendant responded to an "imminent" threat using only "necessary" force. Gender can potentially influence the perception of a threat as imminent, or the perception that force is necessary. Some critics of traditional self-defense doctrine have argued that it is based on a background assumption of the "true man" that does not give abused women adequate leeway to protect themselves.

As is true with crime definitions, affirmative defenses may be defined differently in different jurisdictions. However, there are clear patterns and a lot of commonality across different states and the federal system. This chapter will identify the most common legal definitions of the affirmative defenses of self-defense, duress, necessity, and insanity. Like crime definitions, affirmative defenses can be described as lists of elements: what are the specific facts that must be established in order for the defendant to avoid conviction? But affirmative defenses differ from crime definitions in two important respects. First, common law doctrines remain more influential in the context of affirmative defenses. Although most U.S. jurisdictions require crimes to be defined by legislatures in statutory text, there is more variation with affirmative defenses. Some jurisdictions do define affirmative defenses by statute, but others rely on common law definitions. In this chapter, you will see examples of both approaches.

Second, the prosecution bears the burden of proof with respect to the elements of crimes, but the defendant often bears the burden of proving an affirmative defense. To be sure, the standard of proof is typically lower than "beyond a reasonable doubt" – for example, a defendant may have to prove the elements of duress by a preponderance of the evidence, or the elements of insanity by clear and convincing evidence. For self-defense, defendants typically have a burden of production but not the ultimate burden of proof. That is, most states provide that once the defendant has introduced sufficient evidence of self-defense, the prosecution then bears the burden of disproving the self-defense claim beyond a reasonable doubt. Just as the precise elements of an affirmative defense are defined by the specific jurisdiction, the allocation of the burden of proof, and the precise standard of proof, for such a defense will also be determined by the specific jurisdiction.

This chapter focuses on four affirmative defenses: self-defense, necessity, duress, and insanity. Each of these defenses is highly individualistic, in the sense that each focuses on the particular circumstances and mental states of an individual defendant. In this regard, the law of affirmative defenses (like the rest of criminal law) treats responsibility for crime as a matter of individual, rather than social, responsibility. Although there is considerable evidence that social and environmental factors – including poverty, family circumstances, access to health care, and similar variables – have substantial effects on the likelihood that a person will engage in conduct that leads to an arrest and prosecution, American criminal law has generally resisted taking any of those factors into account in deciding an individual's criminal liability. See, e.g., Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 Law & Inequality 9 (1985); Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 Ala. C.R. & C.L. L. Rev. 79 (2011).

Self-defense

N.Y. Penal Law § 35.15. Justification; use of physical force in defense of a person

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:

(a) The latter's conduct was provoked by the actor with intent to cause physical injury to another person; or

(b) The actor was the initial aggressor; except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

(a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating; except that the actor is under no duty to retreat if he or she is:

(i) in his or her dwelling and not the initial aggressor; or

(ii) a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant [to law]; or

(b) He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery; or

(c) He or she reasonably believes that such other person is committing or attempting to commit a burglary, and the circumstances are such that the use of deadly physical force is authorized by § 35.20.

The PEOPLE of the State of New York, Appellant

v.

Bernhard GOETZ, Respondent

Court of Appeals of New York
68 N.Y.2d 96

July 8, 1986

Chief Judge WACHTLER.

A Grand Jury has indicted defendant on attempted murder, assault, and other charges for having shot and wounded four youths on a New York City subway train after one or two of the youths approached him and asked for $5. The lower courts, concluding that the prosecutor's charge to the Grand Jury on the defense of justification was erroneous, have dismissed the attempted murder, assault and weapons possession charges. We now reverse and reinstate all counts of the indictment.

I.

The precise circumstances of the incident giving rise to the charges against defendant are disputed, and ultimately it will be for a trial jury to determine what occurred. We feel it necessary, however, to provide some factual background to properly frame the legal issues before us. Accordingly, we have summarized the facts as they appear from the evidence before the Grand Jury. We stress, however, that we do not purport to reach any conclusions or holding as to exactly what transpired or whether defendant is blameworthy….

On Saturday afternoon, December 22, 1984, Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen boarded an IRT express subway train in The Bronx and headed south toward lower Manhattan. The four youths rode together in the rear portion of the seventh car of the train. Two of the four, Ramseur and Cabey, had screwdrivers inside their coats, which they said were to be used to break into the coin boxes of video machines.

Defendant Bernhard Goetz boarded this subway train at 14th Street in Manhattan and sat down on a bench towards the rear section of the same car occupied by the four youths. Goetz was carrying an unlicensed .38 caliber pistol loaded with five rounds of ammunition in a waistband holster. The train left the 14th Street station and headed towards Chambers Street.

It appears from the evidence before the Grand Jury that Canty approached Goetz, possibly with Allen beside him, and stated "give me five dollars." Neither Canty nor any of the other youths displayed a weapon. Goetz responded by standing up, pulling out his

handgun and firing four shots in rapid succession. The first shot hit Canty in the chest; the second struck Allen in the back; the third went through Ramseur's arm and into his left side; the fourth was fired at Cabey, who apparently was then standing in the corner of the car, but missed, deflecting instead off of a wall of the conductor's cab. After Goetz briefly surveyed the scene around him, he fired another shot at Cabey, who then was sitting on the end bench of the car. The bullet entered the rear of Cabey's side and severed his spinal cord.

All but two of the other passengers fled the car when, or immediately after, the shots were fired. The conductor, who had been in the next car, heard the shots and instructed the motorman to radio for emergency assistance. The conductor then went into the car where the shooting occurred and saw Goetz sitting on a bench, the injured youths lying on the floor or slumped against a seat, and two women who had apparently taken cover, also lying on the floor. Goetz told the conductor that the four youths had tried to rob him.

While the conductor was aiding the youths, Goetz headed towards the front of the car. The train had stopped just before the Chambers Street station and Goetz went between two of the cars, jumped onto the tracks and fled. Police and ambulance crews arrived at the scene shortly thereafter. Ramseur and Canty, initially listed in critical condition, have fully recovered. Cabey remains paralyzed, and has suffered some degree of brain damage.

On December 31, 1984, Goetz surrendered to police in Concord, New Hampshire, identifying himself as the gunman being sought for the subway shootings in New York nine days earlier. Later that day, after receiving *Miranda* warnings, he made two lengthy statements, both of which were tape recorded with his permission. In the statements, which are substantially similar, Goetz admitted that he had been illegally carrying a handgun in New York City for three years. He stated that he had first purchased a gun in 1981 after he had been injured in a mugging. Goetz also revealed that twice between 1981 and 1984 he had successfully warded off assailants simply by displaying the pistol.

According to Goetz's statement, the first contact he had with the four youths came when Canty, sitting or lying on the bench across from him, asked "how are you," to which he replied "fine." Shortly thereafter, Canty, followed by one of the other youths, walked over to the defendant and stood to his left, while the other two youths remained to his right, in the corner of the subway car. Canty then said "give me five dollars." Goetz stated that he knew from the smile on Canty's face that they wanted to "play with me." Although he was certain that none of the youths had a gun, he had a fear, based on prior experiences, of being "maimed."

Goetz then established "a pattern of fire," deciding specifically to fire from left to right. His stated intention at that point was to "murder [the four youths], to hurt them, to make them suffer as much as possible." When Canty again requested money, Goetz stood up, drew his weapon, and began firing, aiming for the center of the body of each of the four. Goetz recalled that the first two he shot "tried to run through the crowd [but] they had nowhere to run". Goetz then turned to his right to "go after the other two". One of these two "tried to run through the wall of the train, but * * * he had nowhere to go." The other youth (Cabey) "tried pretending that he wasn't with [the others]" by standing still, holding on to one of the subway hand straps, and not looking at Goetz. Goetz nonetheless fired his fourth shot at him. He then ran back to the first two youths to make sure they had been "taken care of." Seeing that they had both been shot, he spun back to check on the latter two. Goetz noticed that the youth who had been standing still was now sitting on a bench and seemed unhurt. As Goetz told the police, "I said '[y]ou seem to be all right, here's another' ", and he then fired the shot which severed Cabey's spinal cord. Goetz added that "if I was a little more under self-control * * * I would have put the barrel against his forehead and fired." He also admitted that "if I had had more [bullets], I would have shot them again, and again, and again."

II.

… On March 27, 1985, [a] Grand Jury filed a 10–count indictment, containing four charges of attempted murder, four charges of assault in the first degree, one charge of reckless endangerment in the first degree, and one charge of criminal possession of a weapon in the second degree…. Goetz was arraigned on this indictment on March 28, 1985, and it was consolidated with [an] earlier three-count indictment.

On October 14, 1985, Goetz moved to dismiss the charges … alleging, among other things, that the evidence before the second Grand Jury was not legally sufficient to establish the offenses charged, and that the prosecutor's instructions to that Grand Jury on the defense of justification were erroneous and prejudicial to the defendant….

In an order dated January 21, 1986, Criminal Term granted Goetz's motion to the extent that it dismissed all counts of the second indictment, other than the reckless endangerment charge, with leave to resubmit these charges to a third Grand Jury. The court … rejected Goetz's contention that there was not legally sufficient evidence to support the charges [but held] that the prosecutor, in a supplemental charge elaborating upon the justification defense, had erroneously introduced an objective element into this defense by instructing the grand jurors to consider whether Goetz's conduct was that of a "reasonable man in [Goetz's] situation". The court … concluded that the statutory test for whether the use of deadly force is justified to protect a person should be wholly subjective, focusing entirely on the defendant's state of mind when he used such force. It concluded that dismissal was required for this error because the justification issue was at the heart of the case.

… On appeal by the People, a divided Appellate Division affirmed [the] dismissal of the charges. [The People appealed] to this court….

III.

Penal Law article 35 recognizes the defense of justification, which [permits] the use of force in defense of a person, encompassing both self-defense and defense of a third person. Penal Law § 35.15(1) sets forth the general principles governing all such uses of force: "[a] person may * * * use physical force upon another person when and to the extent he *reasonably believes* such to be necessary to defend himself or a third person from what he *reasonably believes* to be the use or imminent use of unlawful physical force by such other person" (emphasis added).

Section 35.15(2) sets forth further limitations on these general principles with respect to the use of "deadly physical force": "A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless (a) He *reasonably believes* that such other person is using or about to use deadly physical force or (b) He *reasonably believes* that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery" (emphasis added).

Thus, consistent with most justification provisions, Penal Law § 35.15 permits the use of deadly physical force only where requirements as to triggering conditions and the necessity of a particular response are met. As to the triggering conditions, the statute requires that the actor "reasonably believes" that another person either is using or about to use deadly physical force or is committing or attempting to commit one of certain enumerated felonies, including robbery. As to the need for the use of deadly physical force as a response, the statute requires that the actor "reasonably believes" that such force is necessary to avert the perceived threat.[1]

Because the evidence before the second Grand Jury included statements by Goetz that he acted to protect himself from being maimed or to avert a robbery, the prosecutor correctly chose to charge the justification defense in § 35.15 to the Grand Jury… When the prosecutor had completed his charge, one of the grand jurors asked for clarification of the term "reasonably believes." The prosecutor responded by instructing the grand jurors that they were to consider the circumstances of the incident and determine "whether the defendant's conduct was that of a reasonable man in the defendant's situation." It is this response by the prosecutor—and specifically his use of "a reasonable man"—which is the basis for the dismissal of the charges by the lower courts. As expressed repeatedly in the Appellate Division's plurality opinion, because section 35.15 uses the term "*he* reasonably believes," the appropriate test, according to that court, is whether a defendant's beliefs and reactions were "reasonable *to him.*" Under that reading of the statute, a jury which believed a defendant's testimony that he felt that his own actions were warranted and were reasonable would have to acquit him, regardless of what anyone else in defendant's situation might have concluded. Such an interpretation defies the ordinary meaning and significance of the term "reasonably" in a statute, and misconstrues the clear intent of the Legislature … to retain an objective element as part of any provision authorizing the use of deadly physical force.

Penal statutes in New York have long codified the right recognized at common law to use deadly physical force, under appropriate circumstances, in self-defense… These provisions have never required that an actor's belief as to the intention of another person to inflict serious injury be correct in order for the use of deadly force to be justified, but they have uniformly required that the belief comport with an objective notion of reasonableness….

In 1961 the Legislature established a Commission to undertake a complete revision of the Penal Law and the Criminal Code. The impetus for the decision to update the Penal Law came in part from the drafting of the Model Penal Code by the American Law Institute, as well as from the fact that the existing law was poorly organized and in many aspects antiquated…. The drafting of the general provisions of the new Penal Law, including the article on justification, was particularly influenced by the Model Penal

Code…. While using the Model Penal Code provisions on justification as general guidelines, however, the drafters of the new Penal Law did not simply adopt them verbatim.

…[U]nder Model Penal Code § 3.04(2)(b), a defendant charged with murder (or attempted murder) need only show that he *"believe[d]* that [the use of deadly force] was necessary to protect himself against death, serious bodily injury, kidnapping or [forcible] sexual intercourse" to prevail on a self-defense claim [against a charge of intentional murder or attempted murder]…. If the defendant's belief was wrong, and was recklessly, or negligently formed, however, he may be convicted of [a] homicide charge requiring only a reckless or negligent … criminal intent….

The drafters of the Model Penal Code recognized that the wholly subjective test set forth in section 3.04 differed from the existing law in most States by its omission of any requirement of reasonableness….

New York did not follow the Model Penal Code's equation of a mistake as to the need to use deadly force with a mistake negating an element of a crime, choosing instead to use a single statutory section which would provide either a complete defense or no defense at all to a defendant charged with any crime involving the use of deadly force. The drafters of the new Penal Law adopted in large part the structure and content of Model Penal Code § 3.04, but, crucially, inserted the word "reasonably" before "believes".

The plurality below agreed with defendant's argument that the change in the statutory language from "reasonable ground," used prior to 1965, to "he reasonably believes" in Penal Law § 35.15 evinced a legislative intent to conform to the subjective standard contained in Model Penal Code § 3.04. This argument, however, ignores the plain significance of the insertion of "reasonably." Had the drafters of § 35.15 wanted to adopt a subjective standard, they could have simply used the language of [MPC] § 3.04. "Believes" by itself requires an honest or genuine belief by a defendant as to the need to use deadly force. Interpreting the statute to require only that the defendant's belief was "reasonable to *him,"* as done by the plurality below, would hardly be different from requiring only a genuine belief; in either case, the defendant's own perceptions could completely exonerate him from any criminal liability.

We cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.

We can only conclude that the Legislature retained a reasonableness requirement to avoid giving a license for such actions. The plurality's interpretation, as the dissenters below recognized, excises the impact of the word "reasonably." …

…The conclusion that § 35.15 retains an objective element to justify the use of deadly force is buttressed by the statements of its drafters. The executive director and counsel to the Commission which revised the Penal Law have stated that the provisions of the statute with respect to the use of deadly physical force largely conformed with the prior law, with the only changes they noted not being relevant here… Nowhere in the legislative history is there any indication that "reasonably believes" was designed to change the law on the use of deadly force or establish a subjective standard….

Statutes or rules of law requiring a person to act "reasonably" or to have a "reasonable belief" uniformly prescribe conduct meeting an objective standard measured with reference to how "a reasonable person" could have acted…

Goetz … argues that the introduction of an objective element will preclude a jury from considering factors such as the prior experiences of a given actor and thus, require it to make a determination of "reasonableness" without regard to the actual circumstances of a particular incident. This argument, however, falsely presupposes that an objective standard means that the background and other relevant characteristics of a particular actor must be ignored. To the contrary, we have frequently noted that a determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation." Such terms encompass more than the physical movements of the potential assailant. As just discussed, these terms include any relevant knowledge the defendant had about that person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.

Accordingly, a jury should be instructed to consider this type of evidence in weighing the defendant's actions. The jury must first determine whether the defendant had the requisite beliefs under § 35.15, that is, whether he believed deadly force was necessary to avert the imminent use of deadly force or the commission of one of the felonies enumerated therein. If the People do not prove beyond a reasonable doubt that he did not have such beliefs, then the jury must also consider whether these beliefs were reasonable. The jury would have to determine, in light of all the "circumstances," as explicated above, if a reasonable person could have had these beliefs.

The prosecutor's instruction to the second Grand Jury that it had to determine whether, under the circumstances, Goetz's conduct was that of a reasonable man in his situation was thus essentially an accurate charge. It is true that the prosecutor did not elaborate on the meaning of "circumstances" or "situation" and inform the grand jurors that they could consider, for example, the prior experiences Goetz related in his statement to the police. We have held, however, that a Grand Jury need not be instructed on the law with the same degree of precision as the petit jury… This lesser standard is premised upon the different functions of the Grand Jury and the petit jury: the former determines whether sufficient evidence exists to accuse a person of a crime and thereby subject him to criminal prosecution; the latter ultimately determines the guilt or innocence of the accused, and may convict only where the People have proven his guilt beyond a reasonable doubt…

…[The prosecutor's] instructions were not as complete as the court's charge on justification [to a trial jury] should be, but they sufficiently apprised the Grand Jury of the existence and requirements of that defense to allow it to intelligently decide that there is sufficient evidence tending to disprove justification and necessitating a trial. The Grand Jury has indicted Goetz. It will now be for the petit jury to decide whether the prosecutor can prove beyond a reasonable doubt that Goetz's reactions were unreasonable and therefore excessive.

Notes and questions on *Goetz*

1. Goetz was charged with attempted murder, under the same attempt statute that you saw in *People v. Acosta* (Chapter Eight) and the same murder statute that you saw in *Patterson v. New York* (Chapter Five) and *People v. Russell* (Chapter Nine). The state relied on the portion of the New York second degree murder statute that criminalized an intentional killing: "A person is guilty of murder in the second degree when … [w]ith intent to cause the death of another person, he causes the death of such person…." Notice that Goetz did not contest that he tried to cause the death of his victims, or that he had intent to kill them. Indeed, he testified that his intent was to "murder" them. That claim of intent illustrates the distinctive nature of an affirmative defense. Goetz could concede that his conduct and mental state met the definition of attempted murder in New York, but he argued that even so he should not be punished because his actions—which did violate the terms of the murder statute—were justified.
2. After the New York Court of Appeals reinstated the charges (in the opinion you've just read), this case went to trial, and the jury acquitted Goetz of all charges except weapons possession. He spent eight months in jail. The case and trial captured national attention; Goetz was called "the subway vigilante" and embraced by many who saw his actions as a necessary response to prevalent urban crime. The court's opinion does not mention the races of the persons involved (Goetz was white, the four young men he shot were Black), but by one observer's account, racialized imagery and fears loomed large in the trial. Professor George Fletcher observed the trial and later reported that neither the prosecution or defense explicitly mentioned race, but Goetz's defense referred to the Black youths as "savages," "predators," and "vultures." According to Fletcher,

The covert appeal to racial bias came out most dramatically in [a re-enactment] of the shooting… The nominal purpose of the demonstration was to show the way in which the bullet entered the body of each victim. The defense's real purpose, however, was to recreate for the jury … the scene that Goetz encountered when four black passengers began to surround him. [Goetz's attorney] asked the Guardian Angels [a volunteer crime patrol organization] to send him … four young black men to act as the props in the demonstration. In came the four young black Guardian Angels, fit and muscular, dressed in T-shirts, to play the parts…

George P. Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* 206-207 (1988).

Should the New York Court of Appeals have addressed race in its opinion, and if so, what should it have said? Was the defense attorney's decision to stage a reenactment with young Black men problematic? If so, why? Some scholars have argued that the racial identity of parties operates (impermissibly, but unavoidably) as a kind of character evidence, because jurors are likely to draw conclusions about the parties on the basis of their racial identities. See Jasmine B. Gonzales Rose, *Toward A Critical Race Theory of Evidence*, 101 Minn. L. Rev. 2243, 2261-2268 (2017).

3. Darrell Cabey, who was shot in the spine and left paralyzed, sued Goetz in civil court and won a $43 million judgment in 1996. Goetz declared bankruptcy, however, and Cabey was unable to collect the judgment. As one newspaper reported,

The jury's decision was a stunning reversal for Goetz, 48, who was acquitted of attempted murder nine years ago in the same shooting and become a national symbol of urban rage and frustration.

But this time around—in a civil as opposed to a criminal trial, before a largely black jury in the Bronx instead of a largely white one in Manhattan, and at a time when crime here is on the downswing as opposed to the upswing—the six-person jury ruled against Goetz in about five hours.

It found that Goetz acted "recklessly" and "outrageously" in his attack on Darrell Cabey, now 30, who was left brain damaged and paralyzed from the chest down by one of Goetz's bullets.

Malcolm Gladwell, *Goetz Told to Pay $43 Million, But Plaintiff to Get Little of That*, South Florida Sun-Sentinel, April 24, 1996.

4. In the opinion you've read, the New York Court of Appeals is very focused on whether self-defense doctrine should use a subjective standard or an objective one to evaluate the defendant's beliefs. Self-defense doctrines always ask whether the specific defendant actually believed that he faced a sufficient threat to warrant the use of deadly force, but do we also need to evaluate whether the defendant's belief was "objectively" reasonable? The Court of Appeals found that the second inquiry was indeed necessary. How is "objective" reasonableness determined? Which factors do you think mattered most to the jury that acquitted Goetz?The newspaper article about the civil trial quoted in the previous note suggests that both the race of the jurors and the overall salience of crime as an issue could influence a jury's decision. The decisionmakers who determine whether a defendant's fears are "objectively" reasonable are, of course, themselves human beings with particular perspectives and particular experiences. Are average members of a jury – at least, average members of a mostly white jury – more likely to find fear to be "objectively" reasonable when the person who is feared is Black? Or does the legal language of objectivity successfully push decisionmakers to leave aside their own specific experiences and biases?
5. The basic framework of self-defense is consistent across most jurisdictions: a defendant who uses force and claims self-defense must show that a) a reasonable belief that b) there existed an imminent threat c) of great bodily harm to the defendant and d) the force used was necessary to avert the threat. Most jurisdictions require proportionality, meaning that the defendant's use of force should not be more than is necessary to avert the threat. Beyond these basic requirements, jurisdictions vary on specific details such as what to do with defendants who start a fight that then escalates, or whether defendants have an obligation to retreat, if it is safe to do so, before using force. (It may seem that an option to retreat safely defeats a claim that force is "necessary," but the concept of necessity is itself susceptible to multiple interpretations.) Under the New York self-defense statute, a defendant who is "the initial aggressor" cannot generally claim self-defense, except an aggressor who later withdraws from the conflict may regain the right to use force if the other person "persists in continuing the incident." Notice also that the New York statute includes a duty to retreat under some circumstances. Was there any plausible argument that Goetz was the initial aggressor? Was there any plausible argument that Goetz had a duty to retreat before using deadly force?
6. The classification of a defendant as an aggressor is thus important, and often contentious. Many definitions of self-defense, like the New York statute, refer to aggressors but do not define the term. Some New York courts have said that the term "initial aggressor" in the New York statute means "the first person who uses or threatens the imminent use of offensive physical force." But if the first use of force is non-deadly and is met with deadly force, then courts may treat "the first person in the encounter to use deadly physical force" as the initial aggressor. See *People v. McWilliams*, 852 N.Y.S.2d 523, 524 (N.Y. App. Div. 2008). It is fairly common for jury instructions to refer to an aggressor as "one who provokes the conflict," and also common for courts to leave the term "aggressor" undefined and allow the jury to interpret the word on its own.
7. Recall the facts of *People v. Russell*, presented in Chapter Nine: two young men, Russell and Bekka, were crossing a courtyard when they encountered a third man, Burroughs. Someone started shooting, and soon all three were shooting. A bystander was killed. Each of the three men later claimed he had fired in self-defense. Why were the self-defense claims unsuccessful in that case? Apply N.Y. Penal Code § 35.15. Note: as a doctrinal matter, it is not the identity of the victim that makes a difference here. Most states provide that if a reasonable use of force harms someone other than the person threatening the defendant, the privilege to use force still protects the defendant from criminal liability for the injury to the third person. An unreasonable use of force, however, may result in criminal liability. See, e.g., People v. Morris, 491 N.Y.S.2d 860, 863 (N.Y. App. Div. 1985).
8. The *Goetz* court notes that the New York legislature chose not to follow the Model Penal Code's precise approach to self-defense. The MPC definition of self-defense is reprinted below for reference, but it is not as influential as other portions of the

MPC that we've considered. Only a few states have adopted this particular definition of self-defense. See Richard Singer, *The Resurgence of Mens Rea: II – Honest but Unreasonable Mistake of Fact in Self-Defense*, 28 B.C. L. Rev. 459, 505 (1987). The relevant text can be found in MPC § 3.04:

(1) **Use of Force Justifiable for Protection of the Person.** Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) **Limitations on Justifying Necessity for Use of Force.**

(a) The use of force is not justifiable under this Section:

(i) to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful; or

(ii) to resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:

(A) the actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest; or

(B) the actor has been unlawfully dispossessed of the property and is making a re-entry or recaption justified by Section 3.06; or

(C) the actor believes that such force is necessary to protect himself against death or serious bodily injury.

(b) The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:

(i) the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take, except that:

(A) the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and

(B) a public officer justified in using force in the performance of his duties or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape is not obliged to desist from efforts to perform such duty, effect such arrest or prevent such escape because of resistance or threatened resistance by or on behalf of the person against whom such action is directed.

(c) Except as required by paragraphs (a) and (b) of this Subsection, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act that he has no legal duty to do or abstaining from any lawful action.

(3) **Use of Confinement as Protective Force.** The justification afforded by this Section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.

9. Model Penal Code § 3.04 could be read as a significant broadening of self-defense, since it allows a defense for any defendant who "believes" the use of force is immediately necessary, without an inquiry into whether the defendant's belief is reasonable. However, the MPC is somewhat less favorable to defendants claiming self-defense than it may first appear. In a separate provision, MPC § 3.09, the MPC adopts what it sometimes called "imperfect self-defense." On this approach, a defendant who has a genuine, but mistaken and unreasonable, belief that he needs to use force will have partial, but only partial, protection from criminal liability. If a defendant forms the belief that it is necessary to use deadly force against a purported attacker, but is reckless or negligent in forming that belief, he still may be convicted of a crime for which recklessness or negligence is a sufficient mens rea. Consider carefully the text of MPC § 3.09(2):

Model Penal Code § 3.09

(1) The justification afforded by Sections 3.04 to 3.07, inclusive, is unavailable when:

(a) the actor's belief in the unlawfulness of the force or conduct against which he employs protective force or his belief in the lawfulness of an arrest that he endeavors to effect by force is erroneous; and

(b) his error is due to ignorance or mistake as to the provisions of the Code, any other provision of the criminal law or the law governing the legality of an arrest or search.

(2) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(3) When the actor is justified under Sections 3.03 to 3.08 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those Sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

Check Your Understanding (10-1)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

The original version of this chapter contained H5P content. You may want to remove or replace this element.

As should be clear by now, self-defense law is largely focused on beliefs, so we are again in the world of mental states. But in most jurisdictions, a self-defense claim requires not only a showing that the defendant believed force was necessary, but also a showing that the defendant's belief was reasonable (even if mistaken). *Goetz* raises questions about whether and how race influences perceptions of threat, and judgments of reasonableness. Another line of self-defense doctrine grapples with killings that follow domestic violence; here the question is whether gender influences either perceptions of threat or judgments about the reasonableness of those perceptions. *State v. Gartland*, below, illustrates this area of self-defense law. New Jersey's self-defense statute is followed by the state supreme court opinion.

N.J. S.A. § 2C:3-4. Use of force in self-protection [as of 1997; since amended]

a. …[T]he use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

b. Limitations on justifying necessity for use of force.

…

(2) The use of deadly force is not justifiable under this section unless the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm; nor is it justifiable if:

(a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or

(b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

(i) The actor is not obliged to retreat from his dwelling, unless he was the initial aggressor or is assailed by another person whose dwelling the actor knows it to be; and

(ii) A public officer justified in using force in the performance of his duties … or a person justified in using force in making an arrest or preventing an escape is not obliged to desist from efforts to perform such duty, effect such arrest or prevent such escape because of resistance or threatened resistance by or on behalf of the person against whom such action is directed.

…

c. (1) Notwithstanding [other statutory provisions], the use of force or deadly force upon or toward an intruder who is unlawfully in a dwelling is justifiable when the actor reasonably believes that the force is immediately necessary for the purpose of protecting himself or other persons in the dwelling against the use of unlawful force by the intruder on the present occasion.

(2) A reasonable belief exists when the actor, to protect himself or a third person, was in his own dwelling at the time of the offense or was privileged to be thereon and the encounter between the actor and intruder was sudden and unexpected, compelling the actor to act instantly and:

(a) The actor reasonably believed that the intruder would inflict personal injury upon the actor or others in the dwelling; or

(b) The actor demanded that the intruder disarm, surrender or withdraw, and the intruder refused to do so.

(3) An actor employing protective force may estimate the necessity of using force when the force is used, without retreating, surrendering possession, withdrawing or doing any other act which he has no legal duty to do or abstaining from any lawful action.

STATE of New Jersey, Plaintiff–Respondent

v.

Ellen GARTLAND, Defendant–Appellant

Supreme Court of New Jersey
694 A.2d 564

Decided June 19, 1997

PER CURIAM.

This appeal concerns the statutory duty to retreat before resorting to the use of deadly force in self-defense. …

I

The killing occurred on February 8, 1993. The jury heard evidence of long-standing physical and emotional abuse inflicted by the victim on defendant. Witnesses portrayed John Gartland as a violent and threatening husband obsessed with jealousy.

On the afternoon of the killing, the Gartlands … returned home at about 5:00 p.m., [and] a neighbor heard Mr. Gartland (John) threaten his wife. Other neighbors heard similar abuse and threats. The argument continued when John could not find the remote control for the television and accused Ellen of hiding it. Angered, he left the home. When he returned, he renewed the argument about the remote control. Ellen asked him to leave her alone and went upstairs to her bedroom. For over ten years, she and her husband had had separate bedrooms.

Previously, John had left her alone in this room. On this evening, he followed her into her bedroom. She told him to go to bed and to leave her alone. He approached her, threatening to strike her. One of them, the parties dispute which, said “I’m going to hurt you” as he approached her.

Ellen took her son’s hunting shotgun from her bedroom closet. She pointed it at her husband and told him to stop. He said, “You’re not going to do [anything] to me because you, bitch, I’m going to kill you.” He lunged at her with his fists clenched. She pulled the trigger. The shotgun blast hit her husband. He stepped into the hallway and fell.

Ellen dropped the gun, called an operator, and asked for an ambulance, saying that she had just shot her husband. She then called her son as well as John Gartland’s son. She told the responding officers that she had feared for her life. She said that she would never forget the look on his face and that he approached her looking “like a devil.”

At trial, the jury had asked twice during its deliberations for clarification of the court’s charge on self-defense. On both occasions the trial court repeated its initial instructions. The instruction never specifically apprised the jury that it could consider the seventeen years of spousal abuse suffered by Mrs. Gartland in determining whether she honestly and reasonably believed that

deadly force was necessary to protect herself against her husband. The trial court used the Model Jury Charge and told the jury that "[a] reasonable belief is one which is to be held by a person of ordinary prudence and intelligence situated as Mrs. Gartland was on February 8, 1993."

Prior to the charge, defense counsel objected to the court's intent to charge that Ellen had a duty to retreat before resorting to deadly force. Counsel renewed his objection immediately after the charge. Before the first recharge on self-defense, defense counsel again objected. He noted that because Ellen had been in her own room, one that her husband never occupied, he was not a cohabitant and under the law she had no duty to retreat from her own separate dwelling. The trial court ruled that "under the statute, there was a duty to retreat." …

The jury convicted Mrs. Gartland of reckless manslaughter. Two jurors later contacted the court describing confusion and indecision in their deliberations. After denying a motion for a new trial, the court sentenced Mrs. Gartland to a five-year term with a mandatory three-years imprisonment under the Graves Act. She was freed on bail pending appeal. The Appellate Division affirmed the conviction. ….

II

Should the appeal be dismissed because defendant died before her appeal could be heard by this Court?

… Unlike the federal constitution, the New Jersey Constitution does not confine the exercise of the judicial power to actual cases and controversies. Our courts will entertain a case that has become moot when the issue is of significant public importance and is likely to recur. We decided the right of one to die even though her death had occurred before we could decide her appeal. …

Our Legislature has made a strong commitment to the eradication of domestic violence. To the extent that this decision addresses concerns in this area, it is worth the judicial effort. … [I]mportant interests of the defendant or society at large may be at stake if an erroneous conviction is left standing. We find those important interests present here.

III

Did the trial court err in failing to instruct the jury that defendant had no duty to retreat if defendant's bedroom functioned as a separate dwelling and that her husband was an intruder into that separate room within the house that they shared?

New Jersey is among the minority of jurisdictions that impose a duty of retreat on a woman attacked by her cohabitant spouse. The New Jersey Code of Criminal Justice contains carefully articulated standards for determining when the use of force against another is justified. The drafters of our Code originally approached the concept of justification in terms of the subjective attitudes of the criminal actor. However, in the course of legislative modifications the self-defense provisions of the Code were altered to reestablish objective standards of self-defense…. Concerning deadly force, the Code provides: "The use of deadly force is not justifiable under this section unless the actor reasonably believes that such force is necessary to protect [the actor] against death or serious bodily harm …." *N.J.S.A.* 2C:3–4b(2). Even if deadly force is permissible, the actor still has the duty to retreat from the scene if the actor can do so safely. *N.J.S.A.* 2C:3–4b(2)(b). One exception to this duty to retreat is if the actor is in his or her own home at the time of the attack (the so-called "castle doctrine"), unless the attacker is a cohabitant. *N.J.S.A.* 2C:3–4b(2)(b)(i) states that "[t]he actor is not obliged to retreat from [the] dwelling, unless [the actor] was the initial aggressor or is assailed in [the actor's own] dwelling by another person whose dwelling the actor knows it to be…." *N.J.S.A.* 2C:3–4c provides special rules for the use of deadly force on an intruder into one's dwelling. For example, under this provision, deadly force may be used against an intruder to counter any level of unlawful force threatened by the intruder.

The Public Defender argues that it is ironic that Ellen Gartland could have used the shotgun against a burglar who intended to do her no serious harm but was precluded from using the same force against the true threat in her life, her husband. Instead, the law requires her to flee from her bedroom, which she had described as the only sanctuary in her chaos-filled home.

The retreat doctrine is one of several related legal doctrines affecting battered women as criminal defendants. The male pronouns used in the Code reflect a history of self-defense that is derived from a male model.[2]

Under the common law regime, even if faced with immediate danger of death or great bodily harm, an individual could use only equal force to repel the danger. The doctrine of equal force, developed on a prototype of two males of equal size and strength, held that, if attacked without a deadly weapon, one could not respond with a deadly weapon. This doctrine obviously disadvantaged women, who are generally smaller and lack the same upper-body strength as men.

Traditional common law self-defense imposes no duty to retreat, except for co-occupants of the same house. Given that most men are assaulted and killed outside their homes by strangers, while most women are assaulted and killed within their homes by male intimates, this doctrine also disadvantaged women.

[Marina Angel, *Criminal Law And Women: Giving The Abused Woman Who Kills A Jury Of Her Peers Who Appreciate Trifles*, 33 Am. Crim. L.Rev. 229, 320 (1996).]

… These are grave concerns. When the drafters of our Code of Criminal Justice commenced their work in 1971, the public was not fully aware of the epidemic of domestic violence. Knowledge of the problem, however, was more widespread at the time of the adoption of the Code in 1979. Legislative activity in the field of domestic abuse was already underway. For example, New Jersey had adopted the Prevention of Domestic Violence Act [later repealed] and the Shelters for Victims of Domestic Violence Act. However, there is no evidence that the Legislature specifically considered the loophole in the castle doctrine. As presently structured, the Code of Criminal Justice requires that a cohabitant who can safely leave the home to avoid violence should do so before resorting to deadly force. We have invariably adhered to the Code's concepts of self-defense.

… There is no … basis for departing from the language of the Code…. Although we find present the statutory duty to retreat, we commend to the Legislature consideration of the application of the retreat doctrine in the case of a spouse battered in her own home. There are arguments to be made on each side of the issue.

… That leaves for resolution whether John Gartland could be considered a cohabitant of Ellen's bedroom. Put the other way, the question is whether the upstairs bedroom in which Ellen slept was a separate dwelling. It is a close question on this record but we agree with the courts below that the bedroom was not a separate dwelling….

Defendant emphasizes that the Prevention of Domestic Violence Act implicitly recognizes the concept of a private dwelling within a larger home by authorizing the issuance of in-house restraining orders in its attempt to prevent spousal attacks….

It is true that one building may have separate apartments. However, the idea of a dwelling is that one has an "exclusive right to occupy" a portion of a building…. In this case, there is simply no evidence that the door to the bedroom had normally been kept locked or that John Gartland did not generally have access to the room. Defendant merely testified that because of sexual dysfunction, the couple slept in separate rooms. We cannot say that Ellen had the exclusive right to occupy this room. Hence, we agree, on this record, that the court correctly charged the statutory duty to retreat.

IV

Did the trial court err in failing specifically to instruct the jury that the evidence that defendant was abused by the decedent could be considered in assessing her claim of self-defense?

…[This Court has recognized that] evidence of prior abuse has the potential to confuse the jury and that expert testimony is useful to clarify and refute common myths and misconceptions about battered women…. Like the elements of passion-provocation manslaughter, the elements of self-defense contain subjective and objective factors that focus, respectively, on the sincerity and reasonableness of the defendant's beliefs. Thus, defendant argues that because evidence of prior abuse is relevant to the issue of self-defense and because evidence of prior abuse is potentially confusing, it follows that the jury must be properly instructed concerning how to consider and give effect to such evidence in assessing a claim of self-defense. The trial court specifically instructed the jury to consider the evidence of prior abuse in determining the question of provocation. However, it did not specifically instruct the jury to consider evidence of prior abuse in determining the question of self-defense.

We agree that a better charge would have instructed the jury to consider the history of prior abuse in assessing the honesty and reasonableness of defendant's belief in the need to use deadly force. Our courts have always admitted evidence of a victim's violent character as relevant to a claim of self-defense so long as the defendant had knowledge of the dangerous and violent character of the victim.

The issue arises in this case as one of plain error and the question is whether the absence of the specific instruction was such that it was clearly capable of producing an unjust result. We have often emphasized that instructions to a jury are to be examined as a whole. … Taken as a whole, the instruction could not be understood to foreclose the jury's full and appropriate consideration of the prior abuse in assessing the honesty and reasonableness of defendant's belief.

The possibility that the jury might not have considered the prior abuse in assessing the self-defense claim appears highly attenuated in this case. A major focus of the opening and closing remarks of defense counsel was that the jury could and should consider the long-standing abuse of defendant by her husband in assessing her claim of self-defense. In his opening remarks defense counsel said:

Now this is not a case, ladies and gentlemen, where a woman who claimed to have been abused for years walked into the bedroom one night and shot her sleeping husband or set the bed on fire when he was sleeping because she couldn't take it anymore, that is not this case. This is self-defense. If Mrs. Gartland hadn't acted to defend herself that night Johnny Gartland would be on trial for murder right now, that is what the case is all about.

So, yes, there are always many dynamics at work in a case like this and you're going to have to try to understand some of them, but in the end what is the single most important reason that the evidence in this case will show as to why it's important that Johnny Gartland beat up Ellen Gartland and abused her for so many years? You know why? Because on February 8, 1993, she knew what type of violence he was capable of inflicting against her and that's why it's important. She had every reason in the world to be afraid of him because *she knew what he had done to her before. She knew what he was capable of doing* and she knew the imminency of the threats, and she saw the look when he came in the bedroom to hit her. [Emphasis added.]

In his summation, he repeated this theme:

You see what is important, ladies and gentlemen, about the history and the context of this case is that she knew he was capable of doing serious injury to her *because he had done it before.* She knew he was capable of beating the hell out of her…. Ladies and gentlemen, in the end the history is important because that it why Ellen knew that she had a good reason to be afraid. She knew that he was capable of hurting her very badly…. He was known to be violent and abusive when he was drunk, that he had beaten his wife on occasions over a seventeen-year marriage…. [Emphasis added.]

The court's instructions did not foreclose the jury's consideration of that prior abuse; nor were its instructions so erroneous as to confuse or mislead the jury in its consideration of self-defense. The instructions gave the members of the jury an opportunity to consider fully whether an honest and reasonable belief in the necessity to use deadly force was present. The trial court explicitly told the jurors to consider passion-provocation in the context of knowing or purposeful murder. It also told the jurors that they could not find the defendant guilty of murder or any of the lesser-included offenses if they had a reasonable doubt as to whether or not the defendant had killed her victim in the honest and reasonable belief that the use of deadly force was necessary on the occasion.

V

We now turn to consider other aspects of this case that have been neither raised nor argued by the parties, that would have been grounds for retrial in the case of a living defendant.

In a long series of cases, we have held that an essential ingredient to a fair trial is that adequate and understandable instructions be given to the jury. We have regularly insisted that courts give content to statutory language in their charges to juries….

The instructions in this case were largely devoid of reference to the specific circumstances of the case. As noted, the trial court instructed the jury that if Mrs. Gartland "knew that she could avoid the necessity of using deadly force by retreating from that house, providing … [that] she could do so with complete safety, then the defense is not available to her." We intend no criticism of the trial court because neither party requested a charge tailored to the facts. However, an abstract charge on the duty to retreat could only have been confusing in the circumstances of this case. Exactly where could she retreat? As we understand the record, there was no other way out of the bedroom other than the doorway where her assailant stood. The charge should have asked whether, armed with a weapon, she could have safely made her way out of the bedroom door without threat of serious bodily injury to herself. In the similar circumstances of *State v. Thomas* (Ohio 1997) a woman trapped in her trailer retreated to the bathroom. Unable to escape, she ran to a closet and took out a gun. She fired two warning shots and even after being shot her assailant continued to threaten her. The concurring judge asked, "[h]ad the defendant gotten around [her cohabitant] to the door of the small trailer, would her attempt to escape the altercation have increased the risk of her death? Would [the cohabitant] have become further enraged and tried to kill her?" These are the circumstances that a jury must evaluate. One of the problems in applying the retreat doctrine to the case of a battered woman is that the jurors may confuse the question of leaving the abusive partner with the duty to retreat on the occasion. Among the many myths concerning battered women is the belief "that they are masochistic and actually

enjoy their beatings, that they purposely provoke their husbands into violent behavior, and, most critically … that women who remain in battering relationships are free to leave their abusers at any time."

The charge on self-defense should also have been tailored to the circumstances of the case. In *State v. Wanrow*, 559 P.2d 548 (1977), the Washington Supreme Court recognized that its traditional self-defense standard failed to account for the perspective of abused women. Any limitation of the jury's consideration of the surrounding acts and circumstances to those occurring at or immediately before the killing would be an erroneous statement of the applicable law. The Washington court held that a battered woman was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions that were the product of our nation's unfortunate history of sex discrimination. At a minimum, the jury in Ellen Gartland's case should have been asked to consider whether, if it found such to be the case, a reasonable woman who had been the victim of years of domestic violence would have reasonably perceived on this occasion that the use of deadly force was necessary to protect herself from serious bodily injury.

In another context, the failure to relate to the facts of the case the duty to retreat and right of self-defense might not have cut so mortally into a defendant's ability to maintain a defense on the merits. However, the persistent stereotyping of the victims of domestic violence requires special concern. Both partners to the domestic tragedy are now deceased. Although we cannot fully right past wrongs, we can correct errors in the charge that were clearly capable of producing an unjust result.

The judgment of the Appellate Division is reversed and the conviction of manslaughter is set aside.

Notes and questions on *Gartland*

1. Ellen Gartland had passed away between the time that she was convicted of manslaughter and the time that the New Jersey Supreme Court heard the appeal to her conviction. The state court took the case even though defendant had died, on the grounds that the case raised issues "of significant public importance" that are "likely to recur." What were those issues of public importance?
2. After hearing the deceased defendant's appeal, the state court then rejected the defense's two main arguments. What were those arguments, and why did the court reject them? Finally, in Part V, the court turns to "other aspects of this case that have been neither raised nor argued by the parties." What are those aspects? Why does the court eventually reverse Gartland's conviction?
3. Be sure to understand the castle doctrine, and the "loophole" in it referred to by the *Gartland* court. The castle doctrine is essentially an exception to a duty to retreat. Many states that impose a duty to retreat provide an exception to that duty for a defendant who is threatened in his or her own home. (The name of the doctrine comes from the phrase, "A man's home is his castle," and reflects a view that no one should have to retreat from an attacker in one's own "castle.") But under the New Jersey law applicable at the time of *Gartland*, the castle doctrine was itself subject to an exception: if the attacker also lives in the same home, then the duty to retreat apparently arises again. Even so, the duty to retreat (rather than use force in self-defense) applies only when one can retreat "with complete safety." Do the reported facts suggest an option of safe retreat here? (In 1999, not long after *Gartland*, the state legislature amended the statute to remove the requirement of retreat from a cohabitant.)
4. As Gartland's public defender pointed out, the New Jersey statute gave Ellen Gartland broader leeway to use force against an intruder who did not threaten deadly force than against her husband who had directly threatened to kill her. Consider carefully the terms of N.J.S.A. § 2C:3-4c. This section provides that the use of deadly force against an intruder is justifiable "when the actor reasonably believes that the force is immediately necessary for the purpose of protecting himself or others … against the use of unlawful force by the intruder on the present occasion." That much is consistent with general self-defense doctrine. But then the statute goes on to state the necessary reasonable belief exists if the defendant had any fear of personal injury, or the defendant "demanded that the intruder disarm, surrender, or withdraw, and the intruder refused to do so."
5. The National Rifle Association has had a significant influence on American self-defense law. According to one study, since 2005 more than 40 states have enacted or proposed new legislation that broadens the right to use deadly force. These new laws, "conceived and advocated by the National Rifle Association, … purport to change existing self-defense law in one or both of the following ways: First, they permit a home resident to kill an intruder by presuming rather than requiring proof of reasonable fear of death or serious bodily harm; second, they reject a general duty to retreat from attack, even when retreat is possible, not only in the home, but also in public space." Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 Harv. J. L. & Gender 237, 238 (2008). The latter type of law is often labeled a "Stand Your Ground" law. Both types of provisions are sometimes championed as efforts to help women protect themselves from violence. Critics argue that in practice, the effect of

these legal changes has been "the normalization and promotion of (often white) male violence in an increasing number of scenarios," rather than any greater protection for women who are subjected to physical abuse. See, e.g., Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women*, 69 Univ. Miami L. Rev. 1099 (2014).

6. As suggested by the quotation from Professor Franks in the previous note, criticisms of Stand Your Ground laws have focused at least as much on race as on gender. By giving defendants greater leeway to respond to perceived threats with force (even when retreat is an option), Stand Your Ground laws may exacerbate the effects of racial bias in threat perceptions. So argues one scholar: even in a state without a Stand Your Ground law, a white defendant is more than twice as likely to succeed with a self-defense claim if the victim of the force was Black rather than white. In states that do have Stand Your Ground Laws, a white defendant is more than three times as likely to succeed with a self-defense claim if the victim of the force was Black rather than white. See Jasmine B. Gonzales Rose, *Toward A Critical Race Theory of Evidence*, 101 Minn. L. Rev. 2243, 2267-2268 (2017).
7. Some courts and commentators frame debates about self-defense law in terms of objectivity (usually, reasonable person standards) and subjectivity (standards that are more attentive to the particular experiences of the individual defendant). You saw this debate in *People v. Goetz*, and here again in *Gartland*. Notice that the objectivity vs. subjectivity framing assumes that objectivity is an option – that is, it assumes that legal decisionmakers can develop and apply legal standards without taking their own subjective perspectives into account. Against that assumption, one study of self-defense cases suggested that the "objective" elements of self-defense doctrine are actually vehicles for decisionmakers to shape outcomes based on the details that the individual decisionmaker sees as important.

   The problem with the law of self-defense is neither new nor limited to the battered woman; it is as old and as persistent as the law's search for an objective meaning for necessity. Based on a survey of twenty years of self-defense cases, I sought to "test" claims of objectivity by focusing on what purports to be one of the most objective of self-defense rules: the requirement that the threat must have been "imminent" for the defendant's response to have been permissible. …

   My survey shows that the important question is not whether the law has become too soft or subjectified but what we mean by its objectivity. The case law shows that imminence has many meanings; indeed, imminence often operates as a proxy for any number of other self-defense factors—for example, strength of threat, retreat, proportionality, and aggression. Perhaps more importantly, my survey shows that the conventional image of imminence may be incorrect. It is widely believed by scholars that the "problem" of imminence is one of too much time between the threat and the killing. If my survey is right, however, most judicial opinions raising imminence do not involve long periods of time between the threat and the killing. They are cases of weak threats and extended fights, cases in which the defendant is struggling with the victim, is faced with a gun, believes that the victim is advancing, or hears a stranger in the woods outside his home. This should confound traditional doctrinal understandings of the term "imminence" (which presume imminence as relevant only in nonconfrontational "waiting" cases). Indeed, it presents strong evidence supporting my hypothesis—that imminence carries undeclared meanings.

   This has important implications for both the law of self-defense as well as our image of the problem of battered women. The law of self-defense, if I am right, is far from as settled or coherent as it is assumed to be; its meaning and theory remain, in my view, largely unresolved. What seems so objective—the status quo—turns out to be a good deal more complex and contingent than has been assumed.

   V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. Chi. L. Rev. 1235, 1236-1237 (2001).

Check Your Understanding (10-2)

The original version of this chapter contained H5P content. You may want to remove or replace this element.

From Justification to Excuse: Necessity and Duress

[The relevant statutory provision is included in footnote 1 in the opinion below.]

UNITED STATES, Petitioner

v.

Clifford BAILEY et al.

Supreme Court of the United States
444 U.S. 394

Decided Jan. 21, 1980

Mr. Justice REHNQUIST delivered the opinion of the Court.

In the early morning hours of August 26, 1976, respondents Clifford Bailey, James T. Cogdell, Ronald C. Cooley, and Ralph Walker, federal prisoners at the District of Columbia jail, crawled through a window from which a bar had been removed, slid down a knotted bedsheet, and escaped from custody. Federal authorities recaptured them after they had remained at large for a period of time ranging from one month to three and one-half months. Upon their apprehension, they were charged with violating 18 U.S.C. § 751(a), which governs escape from federal custody.[3] At their trials, each of the respondents adduced or offered to adduce evidence as to various conditions and events at the District of Columbia jail, but each was convicted by the jury. The Court of Appeals for the District of Columbia Circuit reversed the convictions by a divided vote…. We granted certiorari, and now reverse the judgments of the Court of Appeals.

In reaching our conclusion, we must decide the state of mind necessary for violation of § 751(a) and the elements that constitute defenses such as duress and necessity. In explaining the reasons for our decision, we find ourselves in a position akin to that of the mother crab who is trying to teach her progeny to walk in a straight line, and finally in desperation exclaims: "Don't do as I do, do as I say." The Act of Congress we construe consists of one sentence set forth in the margin, n. 1, *supra* ; our own pragmatic estimate … is that "in general, trials for violations of § 751(a) should be simple affairs." Yet we have written, reluctantly but we believe necessarily, a somewhat lengthy opinion supporting our conclusion, because in enacting the Federal Criminal Code Congress legislated in the light of a long history of case law that is frequently relevant in fleshing out the bare bones of a crime that Congress may have proscribed in a single sentence. See *Morissette v. United States* (1952).

I

All respondents requested jury trials and were initially scheduled to be tried jointly. At the last minute, however, respondent Cogdell secured a severance. Because the District Court refused to submit to the jury any instructions on respondents' defense of duress or necessity and did not charge the jury that escape was a continuing offense, we must examine in some detail the evidence brought out at trial.

The prosecution's case in chief against Bailey, Cooley, and Walker was brief. The Government introduced evidence that each of the respondents was in federal custody on August 26, 1976, that they had disappeared, apparently through a cell window, at approximately 5:35 a. m. on that date, and that they had been apprehended individually between September 27 and December 13, 1976.

Respondents' defense of duress or necessity centered on the conditions in the jail during the months of June, July, and August 1976, and on various threats and beatings directed at them during that period. In describing the conditions at the jail, they introduced evidence of frequent fires in "Northeast One," the maximum-security cellblock occupied by respondents prior to their escape. Construed in the light most favorable to them, this evidence demonstrated that the inmates of Northeast One, and on occasion the guards in that unit, set fire to trash, bedding, and other objects thrown from the cells. According to the inmates, the guards simply allowed the fires to burn until they went out. Although the fires apparently were confined to small areas and posed no substantial threat of spreading through the complex, poor ventilation caused smoke to collect and linger in the cellblock.

Respondents Cooley and Bailey also introduced testimony that the guards at the jail had subjected them to beatings and to threats of death. Walker attempted to prove that he was an epileptic and had received inadequate medical attention for his seizures.

Consistently during the trial, the District Court stressed that, to sustain their defenses, respondents would have to introduce some evidence that they attempted to surrender or engaged in equivalent conduct once they had freed themselves from the conditions they described. But the court waited for such evidence in vain. Respondent Cooley, who had eluded the authorities for one month, testified that his "people" had tried to contact the authorities, but "never got in touch with anybody." He also suggested that someone had told his sister that the Federal Bureau of Investigation would kill him when he was apprehended.

Respondent Bailey, who was apprehended on November 19, 1976, told a similar story. He stated that he "had the jail officials called several times," but did not turn himself in because "I would still be under the threats of death." Like Cooley, Bailey testified that "the FBI was telling my people that they was going to shoot me."

Only respondent Walker suggested that he had attempted to negotiate a surrender. Like Cooley and Bailey, Walker testified that the FBI had told his "people" that they would kill him when they recaptured him. Nevertheless, according to Walker, he called the FBI three times and spoke with an agent whose name he could not remember. That agent allegedly assured him that the FBI would not harm him, but was unable to promise that Walker would not be returned to the D.C. jail. [The FBI disputed that Walker contacted them at all.] Walker testified that he last called the FBI in mid-October. He was finally apprehended on December 13, 1976.

At the close of all the evidence, the District Court rejected respondents' proffered instruction on duress as a defense to prison escape.[4] The court ruled that respondents had failed as a matter of law to present evidence sufficient to support such a defense because they had not turned themselves in after they had escaped the allegedly coercive conditions. After receiving instructions to disregard the evidence of the conditions in the jail, the jury convicted Bailey, Cooley, and Walker of violating § 751(a).

Two months later, respondent Cogdell came to trial before the same District Judge who had presided over the trial of his co-respondents…. [T]he District Court ruled that Cogdell could not present evidence of conditions at the jail. Cogdell subsequently chose not to testify on his own behalf, and was convicted by the jury of violating § 751(a).

By a divided vote, the Court of Appeals reversed each respondent's conviction and remanded for new trials. The majority concluded that the District Court should have allowed the jury to consider the evidence of coercive conditions in determining whether the respondents had formulated the requisite intent to sustain a conviction under § 751(a). According to the majority, § 751(a) required the prosecution to prove that a particular defendant left federal custody voluntarily, without permission, and "with an intent to avoid confinement." The majority then defined the word "confinement" as encompassing only the "normal aspects" of punishment prescribed by our legal system. Thus, where a prisoner escapes in order to avoid "non-confinement" conditions such as beatings or homosexual attacks, he would not necessarily have the requisite intent to sustain a conviction under § 751(a)…

The dissenting judge objected to what he characterized as a revolutionary reinterpretation of criminal law by the majority. He argued that the common-law crime of escape had traditionally required only "general intent," a mental state no more sophisticated than an "intent to go beyond permitted limits."…

II

… In the present case, we must examine both the mental element, or *mens rea*, required for conviction under § 751(a) and the circumstances under which the "evil-doing hand" can avoid liability under that section because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present.

A

…As relevant to the charges against Bailey, Cooley, and Walker, § 751(a) required the prosecution to prove (1) that they had been in the custody of the Attorney General, (2) as the result of a conviction, and (3) that they had escaped from that custody. As for the charges against respondent Cogdell, § 751(a) required the same proof, with the exception that his confinement was based upon an arrest for a felony rather than a prior conviction. Although § 751(a) does not define the term "escape," courts and commentators are in general agreement that it means absenting oneself from custody without permission.

Respondents have not challenged the District Court's instructions on the first two elements of the crime defined by § 751(a). It is undisputed that, on August 26, 1976, respondents were in the custody of the Attorney General as the result of either arrest on charges of felony or conviction. As for the element of "escape," we need not decide whether a person could be convicted on evidence of recklessness or negligence with respect to the limits on his freedom. A court may someday confront a case where an escapee did not know, but should have known, that he was exceeding the bounds of his confinement or that he was leaving without permission. Here, the District Court clearly instructed the juries that the prosecution bore the burden of proving that respondents "knowingly committed an act which the law makes a crime"…. At a minimum, the juries had to find that respondents knew they were leaving the jail and that they knew they were doing so without authorization. The sufficiency of the evidence to support the juries' verdicts under this charge has never seriously been questioned, nor could it be.

The majority of the Court of Appeals, however, imposed the added burden on the prosecution to prove as a part of its case in chief that respondents acted "with an intent to avoid confinement." While, for the reasons noted above, the word "intent" is quite

ambiguous, the majority left little doubt that it was requiring the Government to prove that the respondents acted with the purpose —that is, the conscious objective—of leaving the jail without authorization. In a footnote explaining their holding, for example, the majority specified that an escapee did not act with the requisite intent if he escaped in order to avoid " 'non-confinement' conditions" as opposed to "normal aspects of 'confinement.' "

We find the majority's position quite unsupportable. Nothing in the language or legislative history of § 751(a) indicates that Congress intended to require either such a heightened standard of culpability or such a narrow definition of confinement. As we stated earlier, the cases have generally held that, except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction. Accordingly, we hold that the prosecution fulfills its burden under § 751(a) if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission….

B

Respondents also contend that they are entitled to a new trial because they presented (or, in Cogdell's case, could have presented) sufficient evidence of duress or necessity to submit such a defense to the jury….

Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity.

Modern cases have tended to blur the distinction between duress and necessity. In the court below, the majority discarded the labels "duress" and "necessity," choosing instead to examine the policies underlying the traditional defenses. In particular, the majority felt that the defenses were designed to spare a person from punishment if he acted "under threats or conditions that a person of ordinary firmness would have been unable to resist," or if he reasonably believed that criminal action "was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense." The Model Penal Code redefines the defenses along similar lines. See Model Penal Code § 2.09 (duress) and § 3.02 (choice of evils).

We need not speculate now, however, on the precise contours of whatever defenses of duress or necessity are available against charges brought under § 751(a). Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail. Clearly, in the context of prison escape, the escapee is not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of § 751(a) was his only reasonable alternative.

In the present case, the Government contends that respondents' showing was insufficient on two grounds. First, the Government asserts that the threats and conditions cited by respondents as justifying their escape were not sufficiently immediate or serious to justify their departure from lawful custody. Second, the Government contends that, once the respondents had escaped, the coercive conditions in the jail were no longer a threat and respondents were under a duty to terminate their status as fugitives by turning themselves over to the authorities.

Respondents, on the other hand, argue that the evidence of coercion and conditions in the jail was at least sufficient to go to the jury as an affirmative defense to the crime charged. As for their failure to return to custody after gaining their freedom, respondents assert that this failure should be but one factor in the overall determination whether their initial departure was justified. According to respondents, their failure to surrender "may reflect adversely on the bona fides of [their] motivation" in leaving the jail, but should not withdraw the question of their motivation from the jury's consideration.

We need not decide whether such evidence as that submitted by respondents was sufficient to raise a jury question as to their initial departures. This is because we decline to hold that respondents' failure to return is "just one factor" for the jury to weigh in deciding whether the initial escape could be affirmatively justified. On the contrary, several considerations lead us to conclude that, in order to be entitled to an instruction on duress or necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure[5] and that an indispensable element of such an offer is

testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force.

First, we think it clear beyond peradventure that escape from federal custody as defined in § 751(a) is a continuing offense and that an escapee can be held liable for failure to return to custody as well as for his initial departure. Given the continuing threat to society posed by an escaped prisoner, "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." Moreover, every federal court that has considered this issue has held, either explicitly or implicitly, that § 751(a) defines a continuing offense.

… The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses. It is for them, generally, and not for appellate courts, to say that a particular witness spoke the truth or fabricated a cock-and-bull story. An escapee who flees from a jail that is in the process of burning to the ground may well be entitled to an instruction on duress or necessity, "for he is not to be hanged because he would not stay to be burnt." *United States v. Kirby* (1869). And in the federal system it is the jury that is the judge of whether the prisoner's account of his reason for flight is true or false. But precisely because a defendant is entitled to have the credibility of his testimony, or that of witnesses called on his behalf, judged by the jury, it is essential that the testimony given or proffered meet a minimum standard as to each element of the defense so that, if a jury finds it to be true, it would support an affirmative defense—here that of duress or necessity.

We therefore hold that, where a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force. We have reviewed the evidence examined elaborately in the majority and dissenting opinions below, and find the case not even close, even under respondents' versions of the facts, as to whether they either surrendered or offered to surrender at their earliest possible opportunity. Since we have determined that this is an indispensable element of the defense of duress or necessity, respondents were not entitled to any instruction on such a theory. Vague and necessarily self-serving statements of defendants or witnesses as to future good intentions or ambiguous conduct simply do not support a finding of this element of the defense.

III

In reversing the judgments of the Court of Appeals, we believe that we are at least as faithful as the majority of that court to its expressed policy of "allowing the jury to perform its accustomed role" as the arbiter of factual disputes. The requirement of a threshold showing on the part of those who assert an affirmative defense to a crime is by no means a derogation of the importance of the jury as a judge of credibility. Nor is it based on any distrust of the jury's ability to separate fact from fiction. On the contrary, it is a testament to the importance of trial by jury and the need to husband the resources necessary for that process by limiting evidence in a trial to that directed at the elements of the crime or at affirmative defenses. If, as we here hold, an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense.

These cases present a good example of the potential for wasting valuable trial resources. In general, trials for violations of § 751(a) should be simple affairs. The key elements are capable of objective demonstration; the *mens rea*, as discussed above, will usually depend upon reasonable inferences from those objective facts. Here, however, the jury in the trial of Bailey, Cooley, and Walker heard five days of testimony. It was presented with evidence of every unpleasant aspect of prison life from the amount of garbage on the cellblock floor, to the meal schedule, to the number of times the inmates were allowed to shower. Unfortunately, all this evidence was presented in a case where the defense's reach hopelessly exceeded its grasp. Were we to hold, as respondents suggest, that the jury should be subjected to this potpourri even though a critical element of the proffered defenses was concededly absent, we undoubtedly would convert every trial under § 751(a) into a hearing on the current state of the federal penal system.

Because the juries below were properly instructed on the *mens rea* required by § 751(a), and because the respondents failed to introduce evidence sufficient to submit their defenses of duress and necessity to the juries, we reverse the judgments of the Court of Appeals.

Reversed.

Mr. Justice MARSHALL took no part in the consideration or decision of these cases.

[Concurring opinion by Justice STEVENS omitted.]

Mr. Justice BLACKMUN, with whom Mr. Justice BRENNAN joins, dissenting.

The Court's opinion, it seems to me, is an impeccable exercise in the undisputed general principles and technical legalism: The respondents were properly confined in the District of Columbia jail. They departed from that jail without authority or consent. They failed promptly to turn themselves in when, as the Court would assert by way of justification, the claimed duress or necessity "had lost its coercive force." Therefore, the Court concludes, there is no defense for a jury to weigh and consider against the respondents' prosecution for escape….

It is with the Court's assertion that the claimed duress or necessity had lost its coercive force that I particularly disagree. The conditions that led to respondents' initial departure from the D.C. jail continue unabated. If departure was justified—and on the record before us that issue, I feel, is for the jury to resolve as a matter of fact in the light of the evidence, and not for this Court to determine as a matter of law—it seems too much to demand that respondents, in order to preserve their legal defenses, return forthwith to the hell that obviously exceeds the normal deprivations of prison life and that compelled their leaving in the first instance. The Court, however, requires that an escapee's action must amount to nothing more than a mere and temporary gesture that, it is to be hoped, just might attract attention in responsive circles. But life and health, even of convicts and accuseds, deserve better than that and are entitled to more than pious pronouncements fit for an ideal world.

The Court, in its carefully structured opinion, does reach a result that might be a proper one were we living in that ideal world, and were our American jails and penitentiaries truly places for humane and rehabilitative treatment of their inmates. Then the statutory crime of escape could not be excused by duress or necessity, by beatings, and by guard-set fires in the jails, for these would not take place, and escapees would be appropriately prosecuted and punished.

But we do not live in an ideal world "even" (to use a self-centered phrase) in America, so far as jail and prison conditions are concerned. The complaints that this Court, and every other American appellate court, receives almost daily from prisoners about conditions of incarceration, about filth, about homosexual rape, and about brutality are not always the mouthings of the purely malcontent. The Court itself acknowledges that the conditions these respondents complained about do exist. It is in the light of this stark truth, it seems to me, that these cases are to be evaluated. It must follow, then, that the jail-condition evidence proffered by respondent Cogdell should have been admitted, and that the jury before whom respondents Bailey, Cooley, and Walker were tried should not have been instructed to disregard the jail-condition evidence that did come in. I therefore dissent.

I

The atrocities and inhuman conditions of prison life in America are almost unbelievable; surely they are nothing less than shocking. The dissent in the *Bailey* case in the Court of Appeals acknowledge that "the circumstances of prison life are such that at least a colorable, if not credible, claim of duress or necessity can be raised with respect to virtually every escape." And the Government concedes: "In light of prison conditions that even now prevail in the United States, it would be the rare inmate who could not convince himself that continued incarceration would be harmful to his health or safety."

A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system. Prison officials often are merely indifferent to serious health and safety needs of prisoners as well.

Even more appalling is the fact that guards frequently participate in the brutalization of inmates. The classic example is the beating or other punishment in retaliation for prisoner complaints or court actions.

The evidence submitted by respondents in these cases fits that pattern exactly. Respondent Bailey presented evidence that he was continually mistreated by correctional officers during his stay at the D.C. jail. He was threatened that his testimony in the Brad King case would bring on severe retribution. Other inmates were beaten by guards as a message to Bailey. An inmate testified that on one occasion, three guards displaying a small knife told him that they were going [kill Bailey, using a racial epithet to refer to

Bailey]. The threats culminated in a series of violent attacks on Bailey. Blackjacks, mace, and slapjacks (leather with a steel insert) were used in beating Bailey.

Respondent Cooley also elicited testimony from other inmates concerning beatings of Cooley by guards with slapjacks, blackjacks, and flashlights. There was evidence that guards threatened to kill Cooley.

… It cannot be doubted that excessive or unprovoked violence and brutality inflicted by prison guards upon inmates violates the Eighth Amendment…. There can be little question that our prisons are badly overcrowded and understaffed and that this in large part is the cause of many of the shortcomings of our penal systems. This, however, does not excuse the failure to provide a place of confinement that meets minimal standards of safety and decency. Penal systems in other parts of the world demonstrate that vast improvement surely is not beyond our reach….

II

The real question presented in this case is whether the prisoner should be punished for helping to extricate himself from a situation where society has abdicated completely its basic responsibility for providing an environment free of life-threatening conditions such as beatings, fires, lack of essential medical care, and sexual attacks. To be sure, Congress in so many words has not enacted specific statutory duress or necessity defenses that would excuse or justify commission of an otherwise unlawful act. The concept of such a defense, however, is "anciently woven into the fabric of our culture." J. Hall, General Principles of Criminal Law 416 (2d ed. 1960), quoted in Brief for United States 21. And the Government concedes that "it has always been an accepted part of our criminal justice system that punishment is inappropriate for crimes committed under duress because the defendant in such circumstances cannot fairly be blamed for his wrongful act."

Although the Court declines to address the issue, it at least implies that it would recognize the common-law defenses of duress and necessity to the federal crime of prison escape, if the appropriate prerequisites for assertion of either defense were met. Given the universal acceptance of these defenses in the common law, I have no difficulty in concluding that Congress intended the defenses of duress and necessity to be available to persons accused of committing the federal crime of escape.

I agree with most of the Court's comments about the essential elements of the defenses. I, too, conclude that intolerable prison conditions are to be taken into account through affirmative defenses of duress and necessity, rather than by way of the theory of intent espoused by the Court of Appeals… I therefore agree that it is appropriate to treat unduly harsh prison conditions as an affirmative defense.

I also agree with the Court that the absence of reasonable less drastic alternatives is a prerequisite to successful assertion of a defense of necessity or duress to a charge of prison escape. One must appreciate, however, that other realistic avenues of redress seldom are open to the prisoner. Where prison officials participate in the maltreatment of an inmate, or purposefully ignore dangerous conditions or brutalities inflicted by other prisoners or guards, the inmate can do little to protect himself. Filing a complaint may well result in retribution, and appealing to the guards is a capital offense under the prisoners' code of behavior. In most instances, the question whether alternative remedies were thoroughly "exhausted" should be a matter for the jury to decide.

I, too, conclude that the jury generally should be instructed that, in order to prevail on a necessity or duress defense, the defendant must justify his continued absence from custody, as well as his initial departure. I agree with the Court that the very nature of escape makes it a continuing crime. But I cannot agree that the only way continued absence can be justified is by evidence "of a bona fide effort to surrender or return to custody." The Court apparently entertains the view, naive in my estimation, that once the prisoner has escaped from a life- or health-threatening situation, he can turn himself in, secure in the faith that his escape somehow will result in improvement in those intolerable prison conditions. While it may be true in some rare circumstance that an escapee will obtain the aid of a court or of the prison administration once the escape is accomplished, the escapee, realistically, faces a high probability of being returned to the same prison and to exactly the same, or even greater, threats to life and safety.

The rationale of the necessity defense is a balancing of harms. If the harm caused by an escape is less than the harm caused by remaining in a threatening situation, the prisoner's initial departure is justified. The same rationale should apply to hesitancy and failure to return. A situation may well arise where the social balance weighs in favor of the prisoner even though he fails to return to custody. The escapee at least should be permitted to present to the jury the possibility that the harm that would result from a return to custody outweighs the harm to society from continued absence.

Even under the Court's own standard, the defendant in an escape prosecution should be permitted to submit evidence to the jury to demonstrate that surrender would result in his being placed again in a life- or health-threatening situation. The Court requires return to custody once the "claimed duress or necessity had lost its coercive force." Realistically, however, the escapee who reasonably believes that surrender will result in return to what concededly is an intolerable prison situation remains subject to the same "coercive force" that prompted his escape in the first instance. It is ironic to say that that force is automatically "lost" once the prison wall is passed.

The Court's own phrasing of its test demonstrates that it is deciding factual questions that should be presented to the jury. It states that a "bona fide" effort to surrender must be proved. Whether an effort is "bona fide" is a jury question. The Court also states that "[v]ague and necessarily self-serving statements of defendants or witnesses as to future good intentions or ambiguous conduct simply do not support a finding of this element of the defense.". Traditionally, it is the function of the jury to evaluate the credibility and meaning of "necessarily self-serving statements" and "ambiguous conduct."

Finally, I of course must agree with the Court that use of the jury is to be reserved for the case in which there is sufficient evidence to support a verdict. I have no difficulty, however, in concluding that respondents here did indeed submit sufficient evidence to support a verdict of not guilty, if the jury were so inclined, based on the necessity defense. Respondent Bailey testified that he was in fear for his life, that he was afraid he would still face the same threats if he turned himself in, and that "[t]he FBI was telling my people that they was going to shoot me." Respondent Cooley testified that he did not know anyone to call, and that he feared that the police would shoot him when they came to get him. Respondent Walker testified that he had been in "constant rapport" with an FBI agent, who assured him that the FBI would not harm him, but who would not promise that he would not be returned to the D.C. jail. Walker also stated that he had heard through his sister that the FBI "said that if they ran down on me they was going to kill me."

Perhaps it is highly unlikely that the jury would have believed respondents' stories… Nevertheless, such testimony, even though "self-serving," and possibly extreme and unwarranted in part, was sufficient to permit the jury to decide whether the failure to surrender immediately was justified or excused. This is routine grist for the jury mill and the jury usually is able to sort out the fabricated and the incredible.

In conclusion, my major point of disagreement with the Court is whether a defendant may get his duress or necessity defense to the jury when it is supported only by "self-serving" testimony and "ambiguous conduct." It is difficult to imagine any case, criminal or civil, in which the jury is asked to decide a factual question based on completely disinterested testimony and unambiguous actions. The very essence of a jury issue is a dispute over the credibility of testimony by interested witnesses and the meaning of ambiguous actions.

…[T]he Court here appears to place an especially strict burden of proof on defendants attempting to establish an affirmative defense to the charged crime of escape. That action is unwarranted. If respondents' allegations are true, society is grossly at fault for permitting these conditions to persist at the D.C. jail. The findings of researchers and government agencies, as well as the litigated cases, indicate that in a general sense these allegations are credible. The case for recognizing the duress or necessity defenses is even more compelling when it is society, rather than private actors, that creates the coercive conditions. In such a situation it is especially appropriate that the jury be permitted to weigh all the factors and strike the balance between the interests of prisoners and that of society. In an attempt to conserve the jury for cases it considers truly worthy of that body, the Court has ousted the jury from a role it is particularly well suited to serve.

Notes and questions on *U.S. v. Bailey*

1. *Bailey* provides a good illustration of the difference between, on one hand, a failure of proof claim based on inadequate evidence of the necessary mental state, and, on the other hand, an affirmative defense. The lower federal court, the Court of Appeals, had reversed the defendants' convictions with an argument focused on mental states. Specifically, the lower court held that the federal escape statute required the prosecution to prove that the defendant left custody "with an intent to avoid confinement," meaning, an intent to avoid ordinary prison conditions rather than an intent to avoid extreme violence or especially poor conditions. At the Supreme Court, both the majority and the dissenting opinions rejected this reading of the statute. But the majority also rejected the defendants' separate argument that the jury should have been instructed on the affirmative defenses of necessity and duress. Justice Blackmun's dissent argued that the defendants had introduced enough evidence in support of these affirmative defenses to allow the jury to consider them.

2. Notice that the question of jury instructions here is not about the specific way that necessity or duress doctrines will be described to the jury, but about whether the jury should have been told to consider these affirmative defenses at all. Judges typically serve as gatekeepers for affirmative defense arguments, meaning that the trial judge considers the evidence that the defendant wishes to present in support of the affirmative defense, and then decides whether the defendant's evidence is substantial enough for the question to be presented to the jury. The process is comparable to a court making a probable cause determination pre-trial: a court could, in theory, decide that the evidence in support of a prosecution's charge is so weak that it does not even establish "probable cause" and the case should not go forward. In practice, judges rarely throw out prosecutorial charges for lack of probable cause, but judges deny defendants' requests to present affirmative defenses to juries fairly often. In Bailey's trial, he and his co-defendants were initially allowed to present extensive evidence of the deplorable conditions in the DC jail, but the trial judge subsequently denied the defendants' request for jury instructions on necessity and duress, and instead told the jury to disregard the evidence concerning jail conditions.
3. Neither necessity nor duress was defined by statute in federal law at the time of this case, so the Supreme Court relies on common law to identify the elements of each defense. Necessity is sometimes called "the choice of evils" defense. The *Bailey* Court describes necessity as applicable to "the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils," but does not give a specific list of elements. Here is one more specific, and fairly standard, definition of necessity from a state court:

(1) there must be a situation of emergency arising without fault on the part of the actor concerned;
(2) this emergency must be so imminent and compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting;
(3) this emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and
(4) the injury impending from the emergency must be of sufficient seriousness to outmeasure the criminal wrong.

State v. Thayer, 14 A.3d 231, 233 (Vt. 2010). In *Thayer*, the Vermont Supreme Court rejected a necessity defense raised by a woman prosecuted for growing marijuana. Vermont had legalized medical marijuana before the woman's arrest, but required growers to meet certain conditions, such as growing the marijuana in an indoor facility. The woman argued that marijuana was necessary to treat her ailing son and that she needed to cultivate plants outdoors in order to produce a sufficient quantity. The court found that the defendant had not established a true necessity to grow the plants inside, and noted, "to the extent defendant justifies the violation based on her disagreement or disapproval of the law's provisions, this argument falls outside the scope of the necessity defense. The necessity defense is generally not available to excuse criminal activity by those who disagree with the policies of the government." *Thayer*, 14 A.3d at 235.

4. Duress is similar to necessity, but usually defined to require evidence that a specific person or persons threatened the defendant or a third party with death or great bodily injury, and the defendant reasonably believed that the commission of the offense was the only way to avoid that harm. The *Bailey* Court's description of the conditions that will give rise to a duress defense, "threats or conditions that a person of ordinary firmness would have been unable to resist," is typical. And as the *Bailey* Court notes, the traditional understanding of the necessity defense identifies some circumstance or condition ("physical forces beyond the actor's control") that generates the need to commit a crime, while the traditional understanding of duress identifies a human being (or multiple humans) as the source of the threat to the defendant. Necessity is classified as a justification, whereas duress is classified as an excuse.
5. Self-defense doctrine typically applies only to defendants who are charged with the use of force against another person, so self-defense is raised most often in homicide, attempted homicide, and assault cases. Necessity and duress defenses could in principle be raised against any kind of criminal charge, although many jurisdictions say that necessity and duress are not available as a defense to murder or other homicide charges. Necessity and duress claims are infrequently raised, and they are usually unsuccessful. One context in which both claims are raised by defendants with some regularity (but again, usually without success) is gun possession.
6. Be sure to understand why the trial court, and the U.S. Supreme Court, found it proper to deny the defendants' request for a necessity or duress instruction to the jury: "[W]here a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force." Does Justice Blackmun's dissent reject this requirement? What is the key disagreement between majority and dissent in this case?

7. The exponential growth of the U.S. prison population that eventually produced the term “mass incarceration” began in the 1970s and continued throughout the 1980s and 1990s, finally leveling off early in the twenty-first century. In the first decades of mass incarceration, there was a great deal of attention to, and litigation over, conditions in U.S. prisons and jails. By many accounts, prisoners’ challenges to their conditions of confinement eventually achieved a measure of success, in that prisons and jails became somewhat safer and less overcrowded. This was accomplished in part by judicial injunctions that led to the building of more prisons and the investment of more resources to manage them. For an overview and analysis of the courts’ role in this lengthy and significant change, see Malcolm Feeley & Edward Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* (1998). In 1976, when Bailey and his co-defendants escaped from the DC jail, conditions were still terrible at many institutions. Note the contrast between the way that the conditions identified by the majority opinion (“garbage on the cellblock floor … the meal schedule … the number of times the inmates were allowed to shower”) and the conditions identified by the concurring and dissenting opinions. The dissenting opinion reports that jail officials had made specific threats to kill Bailey and Cooley, another defendant, that the officials had used a racial epithet in referring to Bailey, and that both men were subjected to “a series of violent attacks” by jail employees.

Check Your Understanding (10-3)

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Insanity

Cal. Penal Code 25. Diminished capacity; insanity.

(a) The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person’s intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.

(b) In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.

(c) Notwithstanding the foregoing, evidence of diminished capacity or of a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment.

(d) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

THE PEOPLE, Plaintiff and Respondent

v.

BETTY HORN, Defendant and Appellant

Court of Appeal, Third District, California
158 Cal.App.3d 1014, 205 Cal.Rptr. 119

Aug 1, 1984

SPARKS, J.

“It is fundamental to our system of jurisprudence that a person cannot be convicted for acts performed while insane.” People v. Kelly (1973). But who is insane? In this case we explore that question by considering the type of showing which will support a finding of not guilty by reason of insanity under Penal Code section 25, subdivision (b), a new statute added to that code by the enactment of Proposition 8, the Victim’s Bill of Rights, at the June 1982 Primary Election. Under this statute, a defendant is insane

only when “he or she was incapable of knowing or understanding the nature and quality of his or her act *and* of distinguishing right from wrong at the time of the commission of the offense.” (Pen. Code, § 25, subd. (b), italics added.) The central issue is whether the use of the word “and” rather than “or” reflects an intent of the people to reject California’s version of the historic *M’Naghten* standard of insanity and adopt instead the “wild beast” test of antiquity. We conclude that it does not and consequently hold that the initiative measure reinstated the California *M’Naghten* right and wrong test as the measure of criminal insanity in this state.

…The factual circumstances are not in dispute. On the afternoon of September 17, 1982, defendant drove her automobile into the self-service island of a Texaco gas station. She put $15 worth of gasoline into her car and then attempted to pay for it with a Triple A Towing Card. When told the attendant could not accept the card, defendant stated she must have left her credit card at home…. The attendant … suggested defendant call someone to bring some cash to the station. Defendant agreed and used the telephone.

Defendant told the gas station attendant that someone was bringing money to her and the attendant suggested defendant move her car so she would not block the island. Defendant got into her car and drove out of the station. As she did so she almost struck another car. She then drove through a parking lot, across a cement border into a field, into another parking lot, and finally onto the road. An attendant from the gas station followed defendant on his motorcycle. He observed defendant travel at 80 to 85 miles per hour, and run a red light. Defendant continued at 80 to 85 miles per hour until she approached another red light. At that time she applied her brakes and slowed to about 60 miles per hour, and then entered the intersection. There defendant collided with another motorcycle and tragically killed the rider.

Defendant was charged with vehicular manslaughter. She entered pleas of not guilty and not guilty by reason of insanity. Defendant waived a jury trial and submitted the issue of guilt to the trial court…. Predictably, she was found guilty. The plea of not guilty by reason of insanity was then tried to the court.

During the sanity trial it was established beyond any doubt that defendant suffers from mental illness. …[S]he has been under treatment for mental illness for a number of years. Dr. Alfred French, a court-appointed psychiatrist, diagnosed defendant’s illness as a manic-depressive disorder. The other court-appointed psychiatrist, Dr. Audrey Mertz, concurred and added that defendant’s illness is a bipolar affective disorder. This means that she is subject to mood swings and may suffer from both the manic and depressive aspects of the disease at different times.

Defendant has been hospitalized from time to time for her illness, including a hospitalization as recent as July 1982. During her treatment for the disease defendant has been given lithium, which is one of the primary means of treating her illness. When she was discharged from the hospital in July 1982, her lithium treatment was discontinued.

Dr. French testified that in his opinion defendant would have been incapable of knowing or understanding the nature and quality of her acts and distinguishing right from wrong at the time of the accident. The discontinuance of her lithium treatment would cause her condition to deteriorate and lead to an increase in her manic state. This would result in the characteristics of impulsiveness, irrational thinking, grandiosity and irritability. This, coupled with the “provocation” she would perceive from being followed by a motorcyclist, would impair her ability to perceive her true situation accurately.

Dr. Mertz agreed that in the manic phase of her illness defendant would have difficulty determining right from wrong and in understanding the nature and quality of her acts. Her judgment, in Mertz’s opinion, was seriously impaired….

Defendant testified at the insanity phase of the trial. It appeared that in the months before the accident her life had been in turmoil. Her husband had taken the children and filed for a dissolution…. She had been using her husband’s credit card for living expenses, but had been required to return it. She had then begun selling her furniture to obtain funds. Shortly before this incident there had been a fire in defendant’s residence. [As a result of that fire, defendant was charged with arson, but was found not guilty by reason of insanity.]

…[On the day of the accident,] she wanted her husband to come to the station and pay for her gas. When she called him, however, he either could not or would not come to the station. She then got into her car and headed towards a friend’s house to obtain money. She observed the attendant from the station following on his motorcycle and was afraid of him, although she was not trying to get away from him. She remembered seeing the red light before the collision, but could not remember if she tried to stop. She did not see the motorcyclist before the collision.

Based upon this evidence, the trial court found that defendant was sane at the time of the accident. The court [found] that Proposition 8 added a more strict standard than any of the usual tests for insanity. The court expressly indicated that defendant “was

legally insane under every standard known to the law except for the mental standard." The court said defendant was insane under both prongs of the American Law Institute (ALI) test; under the knowledge of wrongfulness prong of the M'Naghten Test, and under the so-called Durham or product test. The court further indicated that it would be prepared to find that at the time of the incident defendant was incapable of distinguishing between right and wrong by reason of her mental illness. Nevertheless, the court concluded that defendant had not sustained her burden of showing that she was also incapable of knowing the nature and quality of her act, and therefore ruled that she was not insane under § 25. Defendant was sentenced to state prison for the lower base term of 16 months.

Discussion

This case squarely presents issues of the meaning and validity of § 25(b). In order to resolve these issues it will be necessary to recite a brief review of the history of the insanity defense.

"The starting point from an historical point of view is the ancient position which did not regard mental disorder, or insanity, as having any bearing upon the matter of criminal guilt." (Perkins on Criminal Law (2d ed. 1969). … When insanity became a defense to a charge of crime, it was generally held that the insanity must be total: the accused had to be wholly without the capacity to understand and remember in order to be innocent by reason of insanity.

In the nineteenth century the celebrated case of Daniel M'Naghten arose. M'Naghten had attempted to assassinate the Prime Minister of England, and instead succeeded in killing the Prime Minister's secretary. He was found not guilty by reason of his insanity. Because of the prominence of M'Naghten's intended victim, there was great public excitement and eventually the House of Lords put five hypothetical questions to the judges of the common law courts concerning the law of criminal responsibility. It was the judges' response to two of those questions which ultimately became the basis for the insanity test in all American states except New Hampshire. The response asserted: "[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *M'Naghten's Case* (1843) 10 Clark & Fin. 200.

The *M'Naghten* "right and wrong" standard was early adopted in California as the standard for an insanity defense…. The insanity test based upon the *M'Naghten* case has generally become known as the "right and wrong" test. [The court contrasted *M'Naghten* to an older "wild beast" test, which exempted a defendant from punishment on grounds of insanity only if he was "a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment."] … Although various phrases have been used to set forth the *M'Naghten* test, "[i]n substance these all have reference to whether the defendant really knew what he was doing, and this is true whether we have in mind an extreme situation such as Stephen's illustration of a man who thought his homicidal act was 'breaking a jar,' or an inquiry whether there was an understanding of the 'real nature and true character of the act as a crime, and not … the mere act itself.'

Although the *M'Naghten* right and wrong standard became the test for insanity in the majority of American jurisdictions, numerous criticisms were directed at it. Some jurisdictions have modified or abandoned the *M'Naghten* test in favor of tests providing a broader scope of insanity. The primary manner in which the test has been modified has been by the addition of a volitional element, usually referred to as an "irresistible impulse" test, and also known as "moral insanity" or "emotional insanity." Under this test the accused may escape criminal liability for his acts regardless whether he was capable of understanding the nature and quality of those acts and that they were wrong, if he was unable to choose between right and wrong, or to conform his conduct to the requirements of the law. In short, "this rule, broadly stated, tells jurors to acquit by reason of insanity if they find the defendant had a mental disease which kept him from controlling his conduct." As we shall see, California's rejection of the irresistible impulse test came early, and has persisted.

Another test developed was the Durham or "product" test [*Durham v. United States* (D.C. Cir. 1954).] That test required the trier of fact to determine whether the accused was insane, and if so, whether the wrongful act was the product of his insanity. The Durham formulation received little support from lawmakers and courts….

From an early date the California Supreme Court was urged to adopt the irresistible impulse test as a means of determining criminal responsibility, but the court refused to do so. In *People v. Hoin*, the court explained that there are three powerful restraints to a disposition to commit crime—the restraint of religion, the restraint of conscience, and the restraint of law. If a criminal

disposition or influence may itself serve as an excuse for crime, then a most powerful restraint is withdrawn, that forbidding and punishing its perpetration. Accordingly, unless the impulse under which the deed was done was one which altogether deprived the accused of the ability to know that he was doing wrong, he is responsible for his actions.

… [However,] [i]n *People v. Drew* the Supreme Court … judicially abandoned *M'Naghten*. In its stead the court decreed that trial courts should apply the test developed by the American Law Institute for its Model Penal Code, known as the ALI test. Under that test, "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." (Model Penal Code (Official Draft 1962) § 4.01.) This test alters the test for insanity in at least two major respects. First, it does away with the all-or-nothing language of *M'Naghten*, and replaces it with a less stringent standard of substantial capacity. Second, it adds a volitional prong to the test by requiring the capacity to conform to legal requirements….

The ALI test was itself rejected four years later when the people exercised the legislative power through the retained right of initiative by enacting Proposition 8 at the June 1982 Primary Election. Among other things that measure enacted Penal Code § 25. For the first time in California's history, the defense of insanity was statutorily defined. Subdivision (b) of § 25 now provides: "In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense."

Although the insanity provisions of Proposition 8 are couched in the language of *M'Naghten*, the conjunctive "and" is used rather than the disjunctive "or" between the two prongs of the test. Defendant argues that Proposition 8 was not intended to create a new test of insanity, but was only intended to abrogate the decision in *Drew* and to return to California's version of the *M'Naghten* right and wrong test for criminal insanity. For reasons we shall explain, we agree.

[The court explained that confusion had arisen because trial courts sometimes spoke of the definition of sanity, and in other cases, of the definition of insanity. One formulation required "and"; the other required "or."] [As put in *People v. Wolff*,] "The test of sanity is this: First, did the defendant have sufficient mental capacity to know *and understand* what he was doing, and second, did he know *and understand* that it was wrong *and a violation of the rights of another*?" (italics in original.) As can be seen, this test of *sanity* uses the conjunctive "and" construction. Conversely, the test of *insanity* necessarily must use the disjunctive "or" form. In order to be sane, "'the defendant must be able to know *and understand* the nature and quality of his act *and* to distinguish between right and wrong at the time of the commission of the offense."' (*Ibid.*, italics in original.) Thus if a defendant knows and understands the nature and quality of his act but does not know it is wrong, he is, by definition, insane. Hence the reciprocal tests of sanity and insanity were correctly stated in CALJIC No. 4.00 (3d ed. 1970): "If you find that the defendant was capable of knowing and understanding the nature and quality of his act and, in addition, was capable of knowing and understanding that his act was wrong, you will find that he was legally sane. However, if you find that the defendant was not capable of knowing or understanding the nature and quality of his act, you will find that he was legally insane; or, if you find that he was incapable of knowing or understanding that his act was wrong, you will find that he was legally insane." The confusion over the correct usage of the conjunctive/disjunctive form of the *M'Naghten* rule thus arises from the failure to distinguish between the alternative definitions of sanity and insanity. This not uncommon confusion is evident in the Proposition 8 formulation of the *M'Naghten* test. We accept this blurred statement for what it appears to be, a careless draft, rather than divining in it some inexplicable regression by California's citizens to medieval barbarism.

We do not lightly disregard the fact that the word "and" is used in the statute. Nevertheless, "the word 'or' is often used as a careless substitute for the word 'and'; that is, it is often used in phrases where 'and' would express the thought with greater clarity." … Where, as here, we are concerned with a measure adopted by the people through the initiative power, it is appropriate that the purpose of the measure be determined by reference to the language used, the ballot summary, the argument and analysis presented to the voters, and the contemporaneous construction by the Legislature.

… Proposition 8 was … intended to serve as a deterrent to criminal behavior. Deterrence was the precise reason our courts refused to adopt the irresistible impulse theory before *Drew*… But this purpose of deterrence would not be served by the abrogation of the *M'Naghten* test as well. This is because the restraint of law is dependent upon the ability of the individual to make a choice between right and wrong, and a person who cannot understand right and wrong cannot make such a choice. … Thus, as the Supreme Court of Washington noted: "*M'Naghten* is preferable to the American Law Institute test in that the *M'Naghten* rule better

serves the basic purpose of the criminal law-to minimize crime in society. … [W]hen *M'Naghten* is used, all who might possibly be deterred from the commission of criminal acts are included within the sanctions of the criminal law." *State v. White* (Wash. 1962).

The primary means by which Proposition 8 deters crime is through punishment. … The criminal law has long been based upon the concept of freedom of choice and adherence to the *M'Naghten* test has been based upon the refusal of the courts to accept the proposition that a person who knowingly commits a wrongful or criminal act should not be held accountable. But the *M'Naghten* test recognizes that those who are incapable of understanding the wrongfulness of their conduct have no opportunity of choice and cannot harbor an evil intent or mens rea….

It can thus be seen that the purposes of Proposition 8 would be served by the abrogation of *Drew*, but not by the abrogation of *M'Naghten*….

Proposition 8 was passed by the electorate on June 8, 1982, and became law the following day. On that day the Attorney General [explained the new law]: "Essentially, this restores the traditional *M'Naghten* rule as to insanity, which was overturned by the California Supreme Court in *People v. Drew* (1978). While 'and' is used between the two phrases, although 'or' was used in the former test, there appears to be little practical difference between the former version of *M'Naughton* and the new structure." We agree with this assessment that the new statute "restores the traditional *M'Naghten* rule."

… For all of these reasons, we decline to interpret the statute as enacting a new drooling idiot test in place of the century old *M'Naghten* standard merely because it uses the single, and often misused, conjunctive "and." That conjunctive is too thin a reed to support such a massive doctrinal transformation.

In this case in addition to the briefs from defendant and the People we have accepted amicus curiae briefs from the State Public Defender and the California Attorneys for Criminal Justice in support of defendant, and from the Criminal Justice Legal Foundation in support of the People. It is significant that all of the parties who have submitted briefs are in agreement that the insanity provisions of Proposition 8 were intended to abrogate *Drew* and return to the traditional *M'Naghten* standard. While we are reluctant to decide a matter of statewide significance based upon a concession of the parties, in this case our independent research convinces us that this position is sound. Accordingly, we hold that § 25(b) reinstates the California *M'Naghten* right and wrong test as the standard for the insanity defense in this state.

Since we conclude that Proposition 8 and § 25(b) abrogate the *Drew* decision and return California to the right and wrong standard of criminal insanity, it is unnecessary for us to consider the contentions that a stricter standard would violate the constitutional requirement of due process and the prohibition against cruel and unusual punishment. The right and wrong test passes constitutional muster. … We turn then to a consideration whether defendant is entitled to a finding of not guilty by reason of insanity.

Defendant contends the People are collaterally estopped to deny that she was insane [because she] was found to have been legally insane [in an earlier proceeding regarding an arson charge]. We reject [this] contention…. The issue in an insanity trial is whether the defendant, at the time of the commission of the offense, could appreciate right and wrong in relation to the very act with which she is charged. Whether defendant could appreciate the wrongfulness of her conduct in relationship to an arson some days before this incident is not determinative of her sanity in this case and hence poses a different issue in a different controversy. As the psychiatric testimony in this case established, defendant's … mental capacity at one point in time is not necessarily indicative of her capacity at another time. In short, the sanity issue decided in the Placer County prosecution is not identical to the issue posed in this case because proof of insanity on one day is not proof of insanity on another.

The People, while agreeing that § 25(b) reinstates the *M'Naghten* standard, urge that the two prongs of the *M'Naghten* test are really the same thing. As our earlier discussion forecasts, we must reject this contention. A person who is capable of understanding the nature and quality of her action is not necessarily capable of appreciating the wrongfulness of her conduct. The evidence in this case illustrates this truism. There was no real evidence that defendant could not understand the nature and quality of her act. From her testimony it is clear that she was aware that she was driving her car, was being followed by the gas station attendant on his motorcycle, and that she was entering an intersection on a red light. However, the psychiatric testimony and defendant's own recollection supported the claim that she was incapable of appreciating the wrongfulness of her conduct.

The trial court rejected the insanity defense, but in doing so it expressly found that defendant met the second prong of the *M'Naghten* test because she was incapable of distinguishing between right and wrong at the time of the incident. Since this finding

established insanity under the *M'Naghten* test, defendant is entitled to a judgment of not guilty by reason of insanity.

The judgment is reversed and the cause is remanded to the trial court with directions to enter a judgment of not guilty by reason of insanity and to take such further proceedings as are required by law.

EVANS, Acting P. J., dissenting.

…The text of § 25(b) demonstrates that the initiative enacted by the People imposes a far more stringent standard which requires proof that the accused suffered from both aspects of the *M'Naghten* test.

Viewed from any intellectual position, the harshness of the result extracted by the clear, unambiguous language of the provisions of § 25(b) is apparent. However, that harshness does not rise to prohibitive constitutional dimension or compel a statutory change by judicial decision; the fact that the statute compels a harsh result does not render it ambiguous and subject to interpretation. Merely because the language used results in the imposition of a strict standard for the defense of criminal insanity, we may not be permitted to indulge a judicial preference and conjure a judicial amendment to the statute by construing "and" to mean "or."

The terms "and" and "or," clearly conjunctive and disjunctive, may have at times in the past been erroneously used interchangeably by careless courts; however, that circumstance does not permit us to be so presumptive as to conclude the people, by their initiative process, didn't mean what they clearly stated, that the conjunctive rather than the disjunctive be required and both prongs of the *M'Naghten* test be established in order to prove insanity as a criminal defense.

… Proposition 8 received widespread publicity. … Each voter was … provided written arguments [for and against] Proposition 8… In those documents the analysis by the legislative analyst described the test of insanity in the conjunctive and stated, "These provisions could increase the difficulty of proving that a person is not guilty by reason of insanity." In the argument submitted to the voters in favor of Proposition 8 was the statement, "[Y]ou will limit the ability of violent criminals to hide behind the insanity defense, … Of those *convicted* of felonies, one-third go to state prison and the remaining two-thirds are back in the community in a relatively short period of time. There Is Absolutely No Question That the Passage of This Proposition Will Result in … More Criminals Being Sentenced to State Prison, and More Protection for the Law-Abiding Citizenry …."

The defendant implicates the argument that the voters were misled or confused in requiring the more difficult standard of proving both prongs of the *M'Naghten* test. Such an argument can only be based upon the improbable assumption that the people did not know what they were doing. In our judicial review, we should not lightly presume that the voters were unaware of the consequences of their actions in approving Proposition 8….

…I can find nothing in the statute, the entire initiative, the arguments presented in favor of, in rebuttal to, or in explanation of the text of the initiative, that would imply that the voters did not intend the conjunctive to be the requirement rather than by implication the disjunctive. Under the statute, criminally insane persons, that is those who know neither the nature of their act nor its wrongfulness, would presumably be unable to benefit from the punishment imposed by way of a criminal sentence or to be rehabilitated or deterred thereby. Conversely, persons who know the nature and consequences of their act, *or* know the act they are committing is wrong, could presumably benefit from or be deterred by the imposition of criminal punishment. As a result, the criminally insane as established under § 25(b) are different than the noncriminally insane with respect to the legitimate purpose of the law.

Since the defendant failed to establish by a preponderance of the evidence that she met both standards enunciated in the statute, I would affirm the judgment.

Notes and questions on *People v. Horn*

1. Apparently, Daniel M'Naghten, the man who tried to kill the Prime Minister of England in 1843 and the man for whom the most common definition of insanity is named, was inconsistent with the spelling of his own name. Courts have been similarly inconsistent; older opinions sometimes refer to McNaughton, M'Naughten, or McNaughten. Whatever spelling is adopted, the underlying legal doctrine is the prevailing test for insanity in the United States: a defendant can be relieved of criminal liability on grounds of insanity if "at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, … he did not know he was doing what was wrong." This test is often described as one that focuses on cognition, or the defendant's knowledge of the nature or wrongfulness of his own acts.

2. The “irresistible impulse” test adopted by some courts as an expansion of *M’Naghten* focuses on volition rather than cognition. The question is whether the defendant was “unable to choose between right and wrong, or [unable] to conform his conduct to the requirements of the law.” The Model Penal Code combined both the cognitive inquiry of *M’Naghten* and the volitional inquiry of irresistible impulse, but broadened both. Traditional interpretations of *M’Naghten* required a total failure of cognition (the defendant did not know his own acts or that they were wrong), and the irresistible impulse test required a total failure of volition (the defendant was “unable” to control his own conduct). In contrast, MPC § 4.01 allows a defendant to establish insanity by showing a lack of “substantial capacity” with regard to either cognition or volition:

Model Penal Code § 4.01. Mental disease or defect excluding responsibility

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

3. *People v. Horn* concerns a new statutory definition of insanity, adopted as part of Proposition 8, that seems close to *M’Naghten* but uses the word “and” where *M’Naghten* used “or.” To require a defendant to show both prongs of the *M’Naghten* test, rather than just one, would significantly narrow the definition of insanity. The *Horn* court’s conclusion that the “and” was a drafting error and should be read as “or” was subsequently endorsed by the California Supreme Court in *People v. Skinner*, 704 P.2d 752 (1985).
4. As of 2015, the majority of states and the federal government used some version of *M’Naghten* to define insanity. A minority of states use some version of the Model Penal Code’s definition, and just one state, New Hampshire, uses the *Durham* or “product” test described in *People v. Horn*. Four states have “abolished” the insanity defense altogether, as discussed below. For a history of insanity law and an overview of current law, with a specific focus on “deific decrees” or claims by a defendant that he acted under God’s command, see Rabia Belt, *When God Demands Blood: Unusual Minds and the Troubled Juridical Ties of Religion, Madness, and Culpability*, 69 U. Miami L. Rev. 755, 784 (2015).
5. Insanity is usually understood as a true affirmative defense, meaning that a defendant can avoid criminal liability even if she had the mental state (and engaged in the conduct) specified in the charged offense. Betty Horn was convicted of vehicular manslaughter, a crime that required proof that defendant killed “the victim ‘without malice but with gross negligence … while driving a vehicle ….” In a footnote, the *Horn* court explained “the definition of gross negligence in vehicular manslaughter as ‘the failure to exercise any care, or the exercise of so little care that [the jurors] are justified in believing that the person whose conduct is involved was wholly indifferent to the consequences of his conduct and to the welfare of others.’” Could a defendant have the mens rea required for this offense and yet still be insane? The *Horn* court noted, “Presumably the trial court found that defendant failed to prove by a preponderance of the evidence that she was incapable of knowing or understanding that she was driving a motor vehicle with gross negligence.” Because the trial court had found that both prongs of *M’Naghten* were required for insanity, and the trial court found only one of those prongs (inability to know that one’s actions are wrong) to be established, the trial court rejected the insanity claim and convicted Horn. The appellate court held that only one prong of *M’Naghten* need be established and reversed Horn’s conviction, as you know, but this issue illustrates the close connection between insanity claims and mens rea inquiries.
6. Given the close connection between a claim of insanity and a claim about one’s mental state, a few states have abolished a separate affirmative defense of insanity altogether. Under “the mens rea approach,” as it sometimes called, a state allows a defendant to introduce evidence of mental disease to show that he or she lacked the mental state required for the charged offense. But evidence of mental disease or defect is not otherwise admissible. In *Kahler v. Kansas*, 140 S.Ct. 1021 (2020), the U.S. Supreme Court considered and rejected a constitutional challenge to the mens rea approach. The defendant had argued that the Due Process Clause of the federal constitution was violated if he was punished despite a mental illness that prevented him from distinguishing right from wrong. The court held that the Constitution did not require adoption of the M’Naghten rule or any specific definition of insanity:

[J]ust decades ago Congress gave serious consideration to adopting a mens rea approach like Kansas’s as the federal insanity rule. See *United States v. Pohlot* (C.A.3 1987). The Department of Justice at the time favored that version of the insanity test. Perhaps

more surprisingly, the American Medical Association did too…. Although Congress chose in the end to adhere to the *M'Naghten* rule, the debate over the bill itself reveals continuing division over the proper scope of the insanity defense.

Nor is that surprising, given the nature of the inquiry. As the American Psychiatric Association once noted, "insanity is a matter of some uncertainty." Across both time and place, doctors and scientists have held many competing ideas about mental illness. And that is only the half of it. Formulating an insanity defense also involves choosing among theories of moral and legal culpability, themselves the subject of recurrent controversy. At the juncture between those two spheres of conflict and change, small wonder there has not been the stasis Kahler sees—with one version of the insanity defense entrenched for hundreds of years.

And it is not for the courts to insist on any single criterion going forward. We have made the point before…. Just a brief reminder: "[F]ormulating a constitutional rule would reduce, if not eliminate, [the States'] fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." Or again: In a sphere of "flux and disagreement," with "fodder for reasonable debate about what the cognate legal and medical tests should be," due process imposes no one view of legal insanity. Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time. And it is a project, if any is, that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve. Which is all to say that it is a project for state governance, not constitutional law.

We therefore decline to require that Kansas adopt an insanity test turning on a defendant's ability to recognize that his crime was morally wrong. Contrary to Kahler's view, Kansas takes account of mental health at both trial and sentencing. It has just not adopted the particular insanity defense Kahler would like. That choice is for Kansas to make—and, if it wishes, to remake and remake again as the future unfolds. No insanity rule in this country's heritage or history was ever so settled as to tie a State's hands centuries later.

Kahler v. Kansas, 140 S.Ct. at 1037.

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1. [Fn. 5 by the court:] While the portion of section 35.15(2)(b) pertaining to the use of deadly physical force to avert a felony such as robbery does not contain a separate "retreat" requirement, it is clear from reading subdivisions (1) and (2) of section 35.15 together, as the statute requires, that the general "necessity" requirement in subdivision (1) applies to all uses of force under section 35.15, including the use of deadly physical force under subdivision (2)(b). ↵
2. [Fn. 1 by the court:] For example, the "true man" doctrine basically provides that "an individual need not retreat, even if he can do so safely, where he has a reasonable belief that he is in imminent danger of death or great bodily harm, is without fault, and is in a place that he has a right to be. The rationale behind this rule comes from a policy against making a person act in a cowardly or humiliating manner." *State v. Renner*, 1994 WL 501778.... ↵
3. [Fn. 1 by the Court:] Title 18 U.S.C. § 751(a) provides: "Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both." ↵
4. [Fn. 3 by the Court:] Respondents asked the District Court to give the following instruction:

   "Coercion which would excuse the commission of a criminal act must result from:

"1) Threathening [sic] conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm; "2) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant; "3) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and "4) The defendant committed the act to avoid the threathened [sic] harm." ↵

- [Fn. 9 by the Court:] ... Our holding here is a substantive one: an essential element of the defense of duress or necessity is evidence sufficient to support a finding of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity has lost its coercive force. As a general practice, trial courts will find it saves considerable time to require testimony on this element of the affirmative defense of duress or necessity first, simply because such testimony can be heard in a fairly short time, whereas testimony going to the other necessary elements of duress or necessity may take considerably longer to present.... ↵
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CHAPTER OVERVIEW

8: Criminal Punishments

Learning Objectives

- Up to this point, we have spent much time on understanding crime, how it is policed, and how it is prosecuted in the courts. This section will cover the last third of the justice system, corrections. This section will focus on a brief history of corrections, to include the philosophical underpinnings of why and how we punish people. After reading this section, students will be able to:
- Understand where the basic concept of punishment comes from
- Recognize the different ideologies of why and how people are punished
- Understand how punishment has evolved in the world, and how that has shaped punishment in the United States

Critical Thinking Questions

1. Why are we more punitive at times than others? What changes our punitive values?
2. What are some of the pros/cons of each of the four correctional ideologies?
3. Does crime change depending on our collective correctional ideology, or practice?
4. Does punishment change, based on our correctional ideology? How?
5. What are some key explanations for the rise in the prison population in the U.S.?

8.1: A Brief History of The Philosophies of Punishment
8.2: Retribution
8.3: Deterrence
8.4: Incapacitation
8.5: Rehabilitation
8.6: Prisons and Jails
8.7: A Brief History of Prisons and Jails
8.8: Types of Jails
8.9: Who Goes to Jail?
8.10: Growth of Prisons in the United States
8.11: Types of Prisons
8.12: Prison Levels
8.13: Who Goes to Prison?

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8.1: A Brief History of The Philosophies of Punishment

A Brief History of Punishment

Feeling safe and secure in person and home is arguably one of the most discussed feelings in our nation today. The “fear of crime” influences how we think and act day to day. This has caused great fluctuation in the United States in regards to how we punish people who are convicted of violating the law. In part, punishment comes from the will of the people, which is then carried out through the legislative process, and converted into sentencing practices. People have differing views on why people should be punished, and how much punishment they should receive. These correctional ideologies, or philosophical underpinnings of punishment, have been prevalent throughout history, and are not brand new in the United States. This section details basic concepts of some of the more frequently held punishment ideologies, which include: retribution, deterrence, incapacitation, and rehabilitation.

In the News: One of the more frequently used statistics in the news about crime is homicides in the United States. Often, you will hear something about a homicide rate or the number of homicides in a state, or a city for a particular year. An interesting clarifier about this number is that it typically does not include a number of deaths in prison. Deaths in prison occur every year, yet these are not normally counted in any statistic. In 2014, there were approximately 3,927 deaths that occurred in prisons in the United States. There are a variety of reasons for these deaths, to include homicide. For more information on this, look up – Mortality in Correctional Institutions (MCI). This is also formerly known as Deaths in Custody Reporting Program (DCRP). The Bureau of Justice Statistics houses and publishes data on this phenomenon. Additionally, this is a voluntary reporting structure, which may actually not capture all deaths that occur in prison. https://www.bjs.gov/index.cfm?ty=dcdetail&iid=243

Philosophies of Punishment Example

Two stories come on during the crime section of the 6 o’clock news. In the first story, a man is described as a convicted sex offender. He is living at an address that you know is in your city. Citizens that live on the streets nearby his address are shown picketing in front of his house, voicing their displeasure that he is allowed to live there. The video shows how angry the neighborhood is, and you can visibly see their frustration and angst on the people’s faces in the news clip.

The second story is of a woman who was detained (shown in the back of a squad car) for stealing food from a local grocery store, apparently to feed her children. The store manager is then on the screen describing that he is offering to donate the food to her so that she does not have to spend time in jail or get into any more trouble.

How do these two stories make you feel? Is it the same feeling for each story? Does one of these stories make you feel more afraid of crime? More angry or upset? Which one? Who deserves to get punished more? How much punishment should they get? The answers to questions like these instantly flood our thoughts as we are watching news blurbs like this, and in general, when we hear about a crime. This is all normal. And, this process is what generates our own personal punishment ideology.

Now, which one of these two individuals has actually committed a crime? A second point to this story is that our perceptions of punishment can be influenced by the narrative (what is presented to us).

Although the change in our overall perception or use of the rehabilitation ideology is slow, it is necessary. As we will see in the next sections, our reliance on the “Brick and Mortar” approach to punishment comes at a great cost, and the results are less than desirable.

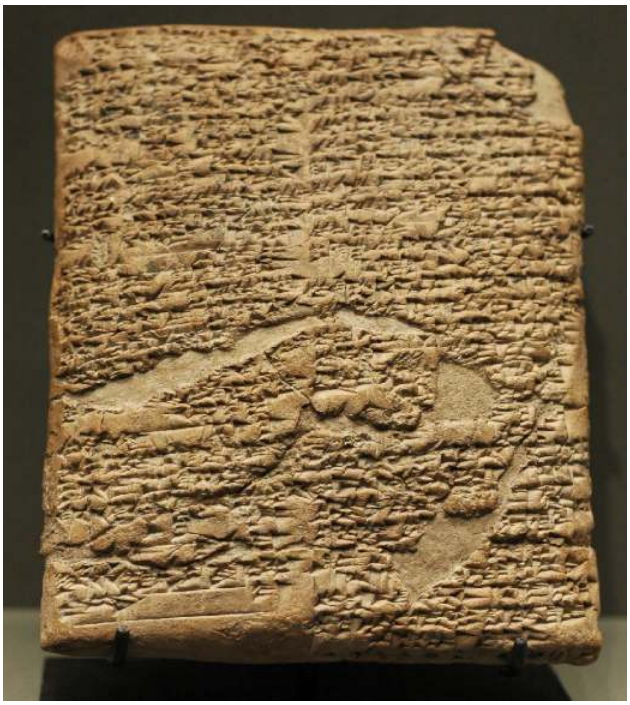
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8.2: Retribution

Retribution

Retribution, arguably the oldest of the ideologies/philosophies of punishment, is the only backward-looking philosophy of punishment. That is, the primary goal of retribution (in its original form) is to ensure that punishments are proportionate to the seriousness of the crimes committed, regardless of the individual differences between offenders, other than *mens rea* and an understanding of moral culpability. Thus, retribution focuses on the past offense, rather than the offender. This can be phrased as "a balance of justice for past harm." People committing the same crime should receive a punishment of the same type and duration that balances out the crime that was committed. The term-backward-looking means that the punishment does not address anything in the future, only for the past harm done.

It is argued as the oldest of the main correctional/punishment ideologies because it comes from a basic concept of revenge, or "an eye for an eye." This concept of an eye for an eye, or vengeance, basically means that if someone perceives harm, they are within their right to retaliate at a proportional level. This idea that retaliation against a transgression is allowable has ancient roots in the concept of Lex Talionis, which roughly translates into the law of retaliation. A person who injures someone should be punished with a similar amount of harm (punishment). This concept was developed in early Babylonian law, and it is here that we see some of the first written forms of customs and practices. Thus, around 1780 b.c., the Babylonian Code, or the Code of Hammurabi, is considered the first attempt to codify practices by individuals of a group. We recognize these today to be our first attempt at written laws. These laws (pictured below) represent a retributive approach to punishment. That is proportional punishments for past harms done.


Hammurabi Code

The retributivist philosophy also calls for any suffering beyond what was originally intended during sentencing to be removed. This is because the dosage of punishment is the core principle of retribution: offenders who commit the same crime must receive the same punishment. Punishments beyond the original balancing of justice for the past harm is outside of the scope of retribution, and thus, does not fit with retribution. This also helps to explain why retribution is a backward-looking ideology. As we continue forward in the history of punishment, we see changes to our perceptions of how to react to crime. This includes our changing views of punishment, to include punishment ideologies that are more forward-looking.

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8.3: Deterrence

Deterrence

Forward-looking ideologies are designed to provide punishment, but also to reduce the level of reoffending (**recidivism**) through some type of change, while the backward-looking approach is solely for the punishment of the offender's past actions. This change in how we view punishment is a large shift that has ripples in culture, the politic of the times, and even religion. Moving many eras forward from Hammurabi, deterrence is the next major punishment ideology. Rooted in the concepts of classical criminology, deterrence is designed to punish current behavior(s), but also ward off future behaviors through sanctions or threats of sanctions. Moreover, it can be focused on a group or on one individual. Thus, the basic concept of **deterrence** is "the reduction of offending (and future offending) through the sanction or threat of sanction."

When looking at punishment through this deterrent design, it can be split into two distinct categories: general and specific. **Specific deterrence** is geared towards trying to teach the individual offender a lesson. It is meant to better that individual so they will not recidivate. By punishing the offender (or threatening a sanction), it is assumed they will not commit a crime again. It is this point that makes deterrence a forward-looking theory of punishment. General deterrence runs along the same track as specific deterrence. However, **general deterrence** differs by when one person offends, the punishment received is going to be the same for all. In this way, the group doing the punishing attempts to relay the message of future events to the masses. If someone commits this act, they will be punished; this is part of the core design for deterrence.

Some other principles of deterrence to discuss in brief are: marginal, absolute, and displacement. Marginal deterrence works on the principle that the action itself is only reduced in amount by the offender, not removed. An example of this would be, a person sees a police officer sitting on the side of the freeway. If they are driving 70 mph, they might slow to 58 mph. Technically, they may still be breaking the law, yet their level of criminal behavior has been reduced. Absolute deterrence is a surrealistic concept often thought to be created by Robert Peel, in his idea of creating a police force to remove all crime. In today's standards, we know this to be false. There is little to no evidence to support that all crime can be deterred within a specific area, or even in general. Displacement argues that crime is not deterred, but rather, it is shifted on three levels. It may be shifted by time, location, or the type of crime committed. Instead of someone stealing cars on the weekend, they may sell drugs during the day. Although the weekend crime carjacking rate will decrease, the daily drug trade will increase.

In order for all of these principles of deterrence to work, the people who are involved (meaning society as a whole) must have a conceptual (perceived) idea of the level of punishment they will receive. For the efficacy of this theory, three key things must be instilled within each individual in society. They must have free will, some amount of rationality, and felicity. Free will refers to everyone's ability to make choices about their future actions, like choosing when to offend and not offend. They must also have a rationalistic ability (ability to be rational) to see what the outcomes of their choices will be. The third element, hedonism (or a hedonistic calculus), is essential. We must desire more pleasurable things than harmful ones. It is more probable that crime will be deterred if all three of these elements are in place within society. This is both a strength and weakness of the deterrence theory.

Deterrence theory works on these three key elements: **certainty, celerity**, and **severity,** in incremental steps. First, by making certain, or at least making the public think that their offenses are not going to go unpunished, then there will be a deterrent factor. As Beccaria relates, this is the most important of these three elements within deterrence theory. The celerity, or swiftness of punishment, is a secondary factor in rationalizing for the offender. If they know how swift the punishment will be, they will not offend. These concepts were cornerstones to the works of Cesare Beccaria (1738-1794), an Italian philosopher in the latter half of the 18th century. Beccaria's works were profound, and many of his concepts helped to shape the U.S. Bill of Rights. He is also considered the Father of the Classical School of Criminology, and a prominent figure in penology. According to Beccaria, "For punishment to attain its end, the evil which it inflicts has only to exceed the advantage derivable from the crime… All beyond this is superfluous and for that reason tyrannical." [1]



Cesare_Beccaria_1738-1794.jpg

In saying this, Beccaria refers to the severity or amount of punishment. It is not how much punishment that is the primary motivator of deterrence, rather, the certainty. If deterrence is to work, the ideology of the punishment is what should drive this goal of corrections.

Today, we have a better understanding of the effectiveness of deterrence. It does appear to work for lower level offenses, and for individuals that are generally prosocial. However, the overall effect of deterrence is limited. For more detail on things to know about deterrence, please see: https://www.ncjrs.gov/pdffiles1/nij/247350.pdf

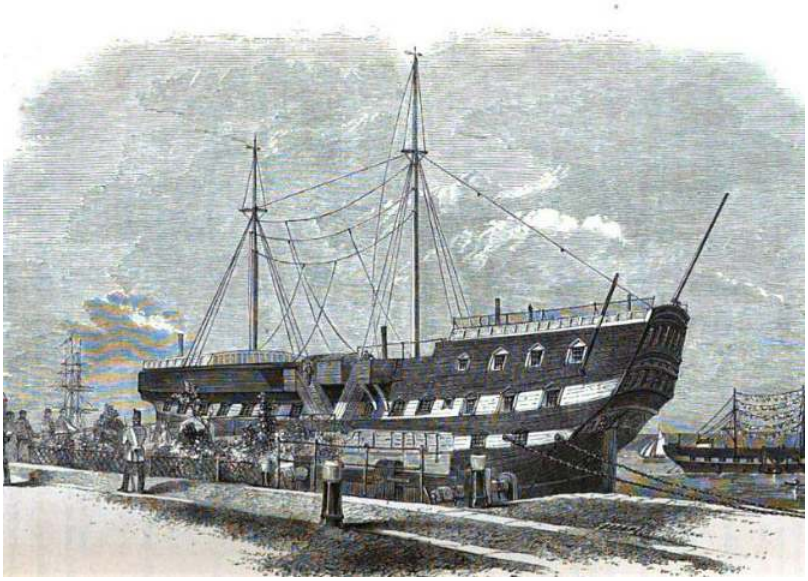
1. Beccaria, 1764/1963, 43. ↵

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8.4: Incapacitation

Incapacitation

Rooted in the concepts of banishing individuals from society, **incapacitation** is the removal of an individual (from society), for a set amount of time, so as they cannot commit crimes (in society) for an amount of time in the future. In British history, this often occurred on Hulks. **Hulks** were large ships that carried convicted individuals off to far away lands. The point was to not allow them to be able to commit crimes in their community any longer.


The_Warrior_prison_ship.JPG

In the 1950s, punishment became much more of a political topic in the United States, and this is one of the issues that started this section, our perceptions of the fear of crime. Lawmakers, justicians, and others began to campaign with their toughness on crime, using the fear of crime and the criminal element to benefit their agendas. One of the examples of being tough on crime was the use of long periods of incarceration in general. This could be considered as **collective incapacitation**, or the incarceration of large groups of individuals to remove their ability to commit crimes for a set amount of time in the future.

Since this time, and most greatly exacerbated in the 1980s and 1990s, there has been the increasing use of punishment by prison sentences. Thus, we saw rapid growth in the prison population in the United States. The 'politicization of punishment' increased the overall prisoner levels in two ways. First, by changing the views toward the discretion allowed to decision makers, we have gotten tougher on crime. In turn, more people are being sentenced to prison that may have otherwise gone to a specialized probation or community sanction alternatives. Second, these same attitudes have led to harsher and lengthier punishments for certain crimes. Offenders are being sent away for longer sentences, which has caused the intake-to-release ratio to change, causing enormous buildups of the prison population.

The incapacitative ideology followed this design for several decades. In the early 1990s, policies were implemented that would target individuals more specifically. These would come to be known as "three-strikes" policies. These policies would incarcerate an individual for greater lengths of time, based on prior offenses. The **selective incapacitation** philosophy incarcerated individuals for longer periods of time than others. Thus, it removed their individual ability to commit crimes (in society) for greater periods of time in the future than others.

There are mixed feelings about selective and collective incapacitation. Policymakers would promote their utility through anecdotal examples of locking certain offenders away, in order to help assuage the fear of crime. Others have offered that there are minimal savings at best, stating that these goals do not achieve the intended results as previously suggested. [1] Future styles of selective incapacitation that have evolved include tighter crime control strategies that incorporate variated sentencing strategies to selectively incapacitate the higher rate offender. Others opt for tougher parole procedures to retain the hardened criminals longer. In sum, we do see a definite shift from the insignificance of collective incapacitation, to a more selective approach.

In all, we are still left with the same questions, does it work? And, at what cost? Do these lengthier punishments for particular crimes have an effect by selectively incapacitating hardened criminals? Are there other methods that seem the same or are more effective than the ones already in practice? This takes us to the last of the four main punishment ideologies, rehabilitation.

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1. Blokland, A.A.J., & Nieuwbeerta, P. J (2007). Selectively incapacitating frequent offenders: Costs and benefits of various penal scenarios. *Journal of Quantitative Criminology, 23*: 327. https://doi.org/10.1007/s10940-007-9033-3 ↵

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8.5: Rehabilitation

Although not as old as some of the older ideologies, **rehabilitation** is not brand new. Additionally, it is the only one of the four main ideologies that most accurately attempts to address all three goals of corrections, which are:

1. Punish the offender
2. Protect Society
3. Rehabilitate the offender.

Certainly, all four ideologies address the first two goals, punishment, and societal protection. However, the goal of rehabilitating the offender is either silent, or not addressed in retribution, deterrence, or incapacitation. This does come as a cost. As we will talk about in more detail when covering prisons and jails, there is a great paradox that is happening in our society when we heavily rely on jails and prisons. Most offenders will come out of institutions (roughly 95% of all people who enter prisons are released), and little is done to change them while they are there. This is mostly due to our attitudes towards offenders, the policies that are necessarily placed on individuals while they are locked up, and the institutions themselves. And yet, there is the expectation that these individual leaving prisons will not commit crimes in the future.

The question here is this: what have we done to change them so that they are not reoffending? Without the incorporation of some form of rehabilitation, the answer is fairly clear… Nothing. Yet, we expect it.

Rehabilitation has taken on different forms through its history in the United States. We have considered individuals out of touch with God, and so offenders needed to be penitent, in order to get right with God. One of America's earliest prisons was designed with this in mind. The Eastern State Penitentiary, opening in 1829, included outside reflection yards; so that offenders could look up to God for penance.

To see more of this prison, visit https://www.easternstate.org/.

Reformatories were another example of how rehabilitation was viewed in the past. The reform movement tried to rehabilitate the offender through more humane treatment, to include basic education, religious services, work experience, and general reform efforts. This was done in an effort to reform individuals, thus allowing them to come back to society. The Elmira Reformatory was one of the earliest efforts of the reform ideal, and many prisons built in the United States were based on this prison. Below is a picture of Elmira.


Elmira Reformatory

Other attempts at rehabilitation included more medical approaches. In the past, offenders were viewed as sick, and in need of medical cures. This medical approach, while greatly reduced, is still used in some areas today. For example, the chemical castration

of certain offenders does still occur. For example HB 2543, in Oklahoma, in September of 2018, focuses on the mandated use of medroxyprogesterone acetate as a treatment, and is required before appropriate release of convicted sex offenders.

Rehabilitation, as an ideology has had critics. This is in large part due to how it is perceived. Many have voiced an objection, as it is seen as being "soft" on offenders. This is also how it has been discounted when coupled with the fear of crime. Several examples are presented as to its ineffectiveness, and weakness to the problem of crime. Probably the most notable example of the ineffectiveness of rehabilitation came in the 1970s. In 1974, Robert Martinson provided support for many that were clambering to demonstrate that the ideas of rehabilitation were ineffective. In a review of over 230 programs, Martinson concluded that "With few and isolated exceptions, the rehabilitative efforts that have been undertaken so far have had no appreciative effect on recidivism" (Martinson, 1974, p. 25). [1] This was the spark that many needed to turn toward the more punitive ideologies that we have so far discussed. However, it did help some to ask more detailed questions about why rehabilitation was not working. Additionally, it helped researchers to ask more critical questions about measurement, how to more properly evaluate rehabilitation and to understand the difference of what does not work versus what does work for offenders. These principles of effective intervention become the cornerstone of modern rehabilitation.

Understanding Risk and Needs in Rehabilitation

Today's rehabilitative efforts do still carry punishment and societal protection as goals, but the focus of rehabilitation is on the changing of offenders behaviors so that they are not committing crimes in the future. This is done by understanding what are the items that make offenders at risk for offending. Additionally, based on the levels of risk items, some offenders are at higher risk for offending than other offenders. This includes items like prior criminal history, antisocial attitudes, antisocial (pro-criminal) friends, a lack of education, family or marital problems, a lack of job stability, substance abuse, and personality characteristics (mental health and antisocial personality). Collectively these are considered as risk factors for offending (re-offending). While we can change the number of priors someone already has, all of these other items can be addressed. These are considered as criminogenic needs. Criminogenic needs are items that when changed, can lower an individual's risk of offending. This is a core component of Paul Gendreau's (1996) principles of effective intervention, and are at the heart of most modern effective rehabilitation programs. [2] Additionally, thousands of offenders have been assessed on these items, which has helped to develop evidence-based rehabilitation practices. These are efforts that are based on empirical data about offenders. When these criminogenic needs are addressed, higher-risk offenders demonstrate positive reductions in their risk to offend.

Over the last 40 years, efforts to change these characteristics, in order to reduce offending have been varied. One of the most useful approaches to changing the antisocial attitudes and behaviors of offenders has come in the form of behavioral and cognitive behavioral change efforts. Cognitive behavioral change for offenders is based on the concepts that the behaviors that one exhibit can be changed by changing the thinking patterns behind (before) the behaviors are exhibited. That is (criminal) behavior is based on cognition, values, and beliefs that are learned vicariously through the interactions and observations of others. It is especially relevant since we are receiving individuals from prison, where these ideas, peers, values, and beliefs may dominate the institution. For a more detailed explanation, please see https://www.apa.org/ptsd-guideline/patients-and-families/cognitive-behavioral.pdf.

Today, evidence-based rehabilitative efforts are now used as benchmarks when establishing programs that are seen as effective, versus ones that show little to no (or even negative) results. Rehabilitation programs that follow these principles of effective intervention are showing that they can achieve these three goals of corrections (punishment, societal protection, and offender change). In fact, the U.S. Federal Government has a section of the National Institute of Justice devoted to these evidence-based practices, and what programs are seen as effective, promising, and not effective. This site is called "CrimeSolutions," and can be visited at https://www.crimesolutions.gov/. This resource provides invaluable information for individuals making decisions on what works for offenders and is based on empirical studies of hundreds of different approaches.

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1. Martinson, R. (1974). What works? Questions and answers about prison reform. *Public Interest* 35, 22-54. ↵
2. Gendreau, P. (1996). Principles of effective intervention with offenders. *Choosing correctional options that work: Defining the demand and evaluating the supply*, 117-130, Alan T Harland, ed. -- See NCJ-158983) https://www.ncjrs.gov/App/Publicatio...aspx?ID=158988 ↵

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8.6: Prisons and Jails

Learning Objectives

- This section focuses on prisons and jails in the United States. We start with a brief historical account of prisons and jails in America. We then turn to our current situation of prisons and jails, to include types, function, and volume. After reading this section, students should be able to:
- Understand the emergence of prisons and jails in the United States
- Recognize the different types of jails
- Recognize the different types of prisons

Critical Thinking Questions

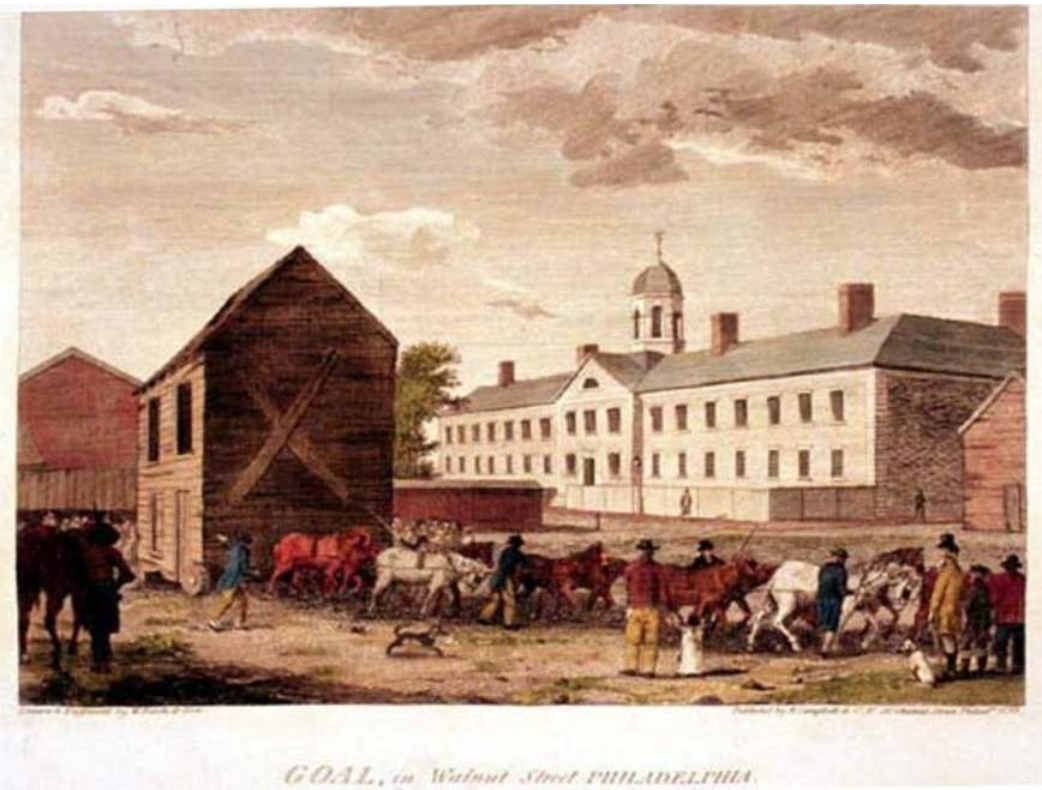
1. Explain the operational process of most jails in the United States today. Where does this come from historically?
2. How does the difference in the type of jail influence how the jail is managed?
3. Explain the similarities and differences in the two early types of prisons in the United States.
4. Explain the current operational process of most State prisons in the United States today. Where does this come from historically?

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8.7: A Brief History of Prisons and Jails

The Growth of Jails in the United States

The concept of a **jail** (GOAL – old English spelling) is yet another concept that we have carried with us from Western Europe (England, etc…) when the United States was first forming. Spawning from the County-level establishment and management of jails in England; these have largely been run by County Sheriffs in the United States, ever since we began to have them. They have had various names, depending on their function and use, such as **Bridewells**, and Workhouses. Pictured below is what is commonly accepted as the first "built" structure to house individuals that have been processed through the courts, the Walnut Street Jail. Opening around 1790, this facility housed both jail inmates, and at some points in time convicted offenders.



Goal_in_Walnut_Street_Philadelphia_Birch's_views_plate_24_(cropped).jpg

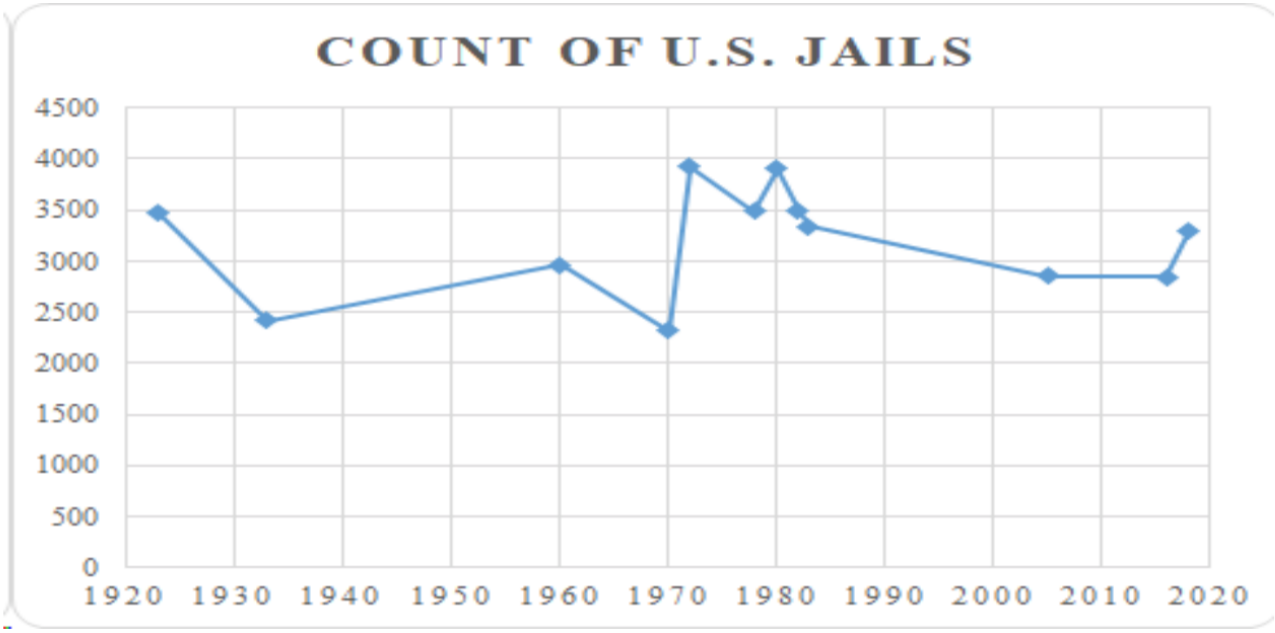
Later, labeled as a prison (as depicted by the historical marker below), the Walnut Street Jail was a blueprint for later prison construction, which we discuss in the latter half of this chapter.



Walnut Street Prison Historical Marker

As the United States began to populate, county lines began to be drawn up for States earning Statehood. Sheriffs began to police their Counties, and also be responsible for managing the lower level infractions (misdemeanors) within their jurisdictions. Thus, County Jails began to flourish in the United States. Initially, many jails were nothing more than parts of a Sheriff's office, literally, cells in the back room. Today, large structures (even multiple structures in a single county) constitute jails in the United States. Overall, we have seen changes in the growth of jails in the United States. While we were certainly growing in the number of jails as States gained Statehood, there has been a shift in jails structures. The vast majority of jails are small in size. There are few larger jails, but they hold more individuals. As can be seen in a report from Cahalan and Parsons (1986), and reports by Harrison and Beck of the Bureau of Justice Statistics (2005), the numbers of jails has changed immensely. [1][2]

Table 2-1 Jails in the United States



This is due to a variety of reasons, to include: inclusion or exclusion of Youth Facilities, Native American Facilities, Privately Owned Facilities, and reporting structures (who reports a jail in a given year). Based on these fluctuations, it is difficult to get an exact count of jails each year. However, it appears that there are roughly 3,300 jails in the United States today.

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1. Cahalan, M. W., & Parsons, L. A. (1986). Historical corrections statistics in the United States, 1850-1984. *U.S. Department of Justice.* https://www.bjs.gov/content/pub/pdf/hcsus5084.pdf ↵
2. Harrison, P. M., & Beck, A. J. (2005). Prisons and jail inmates at midyear, *2005.BJS Bulletin*. https://www.bjs.gov/content/pub/pdf/pjim05.pdf ↵

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8.8: Types of Jails

Jails vary greatly in function and size. For example, the vast majority of jails hold less than 50 jail detainees each (roughly 2,000 jails). Yet, the 50 biggest jails hold over half of the total number of detainees, more than 350,000 in the 50 biggest jails. [1] For example, Los Angeles County Jail is actually a system of buildings spread across LA County, which includes the Inmate Reception Center, North Facility, South Facility, LOMA, Twin Towers, Men's Central, just to name a few of the facilities. For a more detailed description of the jail facilities in L.A. County Jail, please see http://shq.lasdnews.net/pages/tgen1.aspx?id=as1.

While most jails are run by County Sheriff, there are some jails that are managed by cities or jurisdictions. For example, Chicago, New York, Philadelphia, and Washington D.C. all have their own jails, which are not managed directly by the county in which they reside.

Jails also vary by how they are designed. While there are others, jails can be separated into two broad types, the older generation, and the new generation. **Older generation jails** are jails that are typically linear in design, with cell doors separating rooms or sections down long corridors. Many jails operate with this design. **Newer generation jails** are more podular in design, where multiple cells face a central area. Additionally, when these podular designs are used, a direct supervision approach is also often used. Direct supervision is where there are no particular barriers between the deputies and the detainees within a facility. For example, the image below depicts what a direct supervision jail may look like.

New Generation Jail Design



As you can see in the image, the operational booth (immediate left) is open to access the day area or common area, and the doors of the cells for this jail section open to this space. Below is an image of the older generation, linear style of jail. This typically uses the indirect supervision approach.

Older Generation Jail Design



1. Minton, T. D. (2012). Jail inmates at midyear, statistical tables. *U.S. Department of Justice.* https://www.bjs.gov/content/pub/pdf/jim11st.pdf ↵

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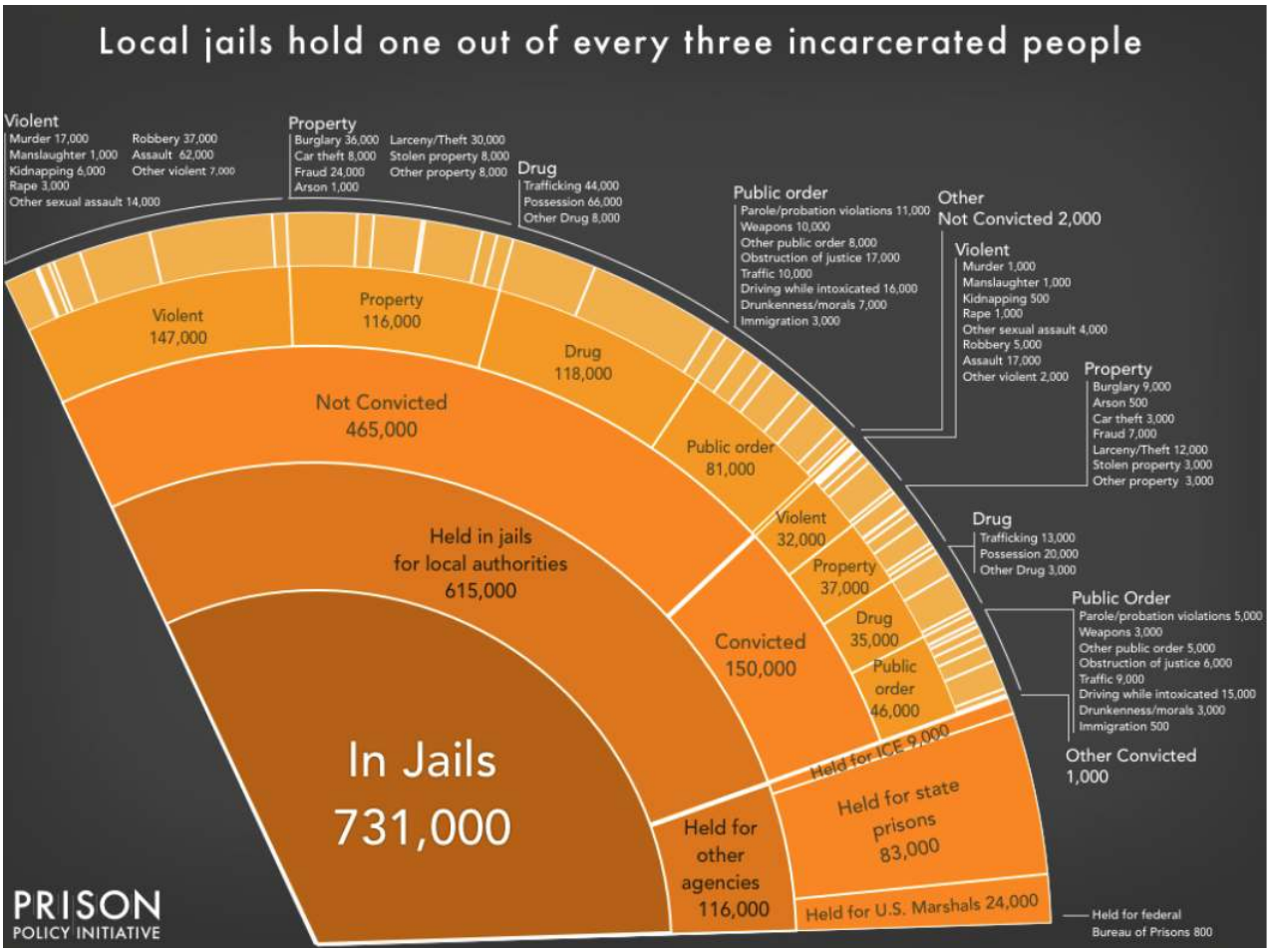
8.9: Who Goes to Jail?

One of the more fascinating aspects of jails in the United States is who gets placed in them. The short answer is everyone. Whenever someone is arrested, this typically starts their process in the criminal justice system. While it might not be the first time they have been arrested, this action places them en route to a jail. Thus, jails are a collection point for many differing agencies, to include: County Sheriff's Office, Municipal, local, City – Police. State Police may send individuals directly to jail, even Federal agencies may use a local jail as a point of entry. For example, ICE (immigration and customs enforcement) houses many thousands of ICE-holds in jails across the country. Jails hold all kinds of individuals. While this list is not comprehensive, it does present many of the types of people held in jails:

- Felons and Misdemeanants
- First time and repeat offenders
- Those awaiting arraignment or trial
- Accused and Convicted
- Parolees stepping down from prison
- Juveniles pending transfer
- Those with mental illness awaiting transfer
- Chronic alcoholics and Drug abusers
- Those held for the military
- Those held for federal agencies
- Protective custody
- Witnesses
- Those in contempt of court
- Persons awaiting transfer to state, federal or other local authorities
- Temporarily detained persons

As one can see from this list, there are many types of people in the 3,300 plus jails at any given time. In fact, at any given point in time, there are 700,000 plus individuals within jails in the United States. This number has steadily increased since the 1970s. While there have been some decreases in recent years, it generally fluctuates around 725,000 to 750,000 jail inmates. However, this is only one portion of the people in jails. It is estimated that roughly 11 million people process through America's jails annually. Average lengths of stay vary by jurisdiction, but a general average is that a person spends around 25 days in jail. As Wagner and Sawyer (2018) depict in the picture below, the types of people in jail at a point in time is varied. [1]

Snapshot of Individuals in Jail



Who goes to jail?

Probably one of the most notable items in the snapshot above is the proportions of individuals that are or are not convicted. Roughly 63% of individuals in jails at any given time are not convicted. Other notable groups are individuals held for other agencies. This could be a matter of processing time or allocations of bed space. In all, it is relatively easy to see the volumes and different types of people that pass through a jail in this graphic. Still, jails only make up one portion of the brick-and-mortar approach to punishment. Prisons are the other large part.

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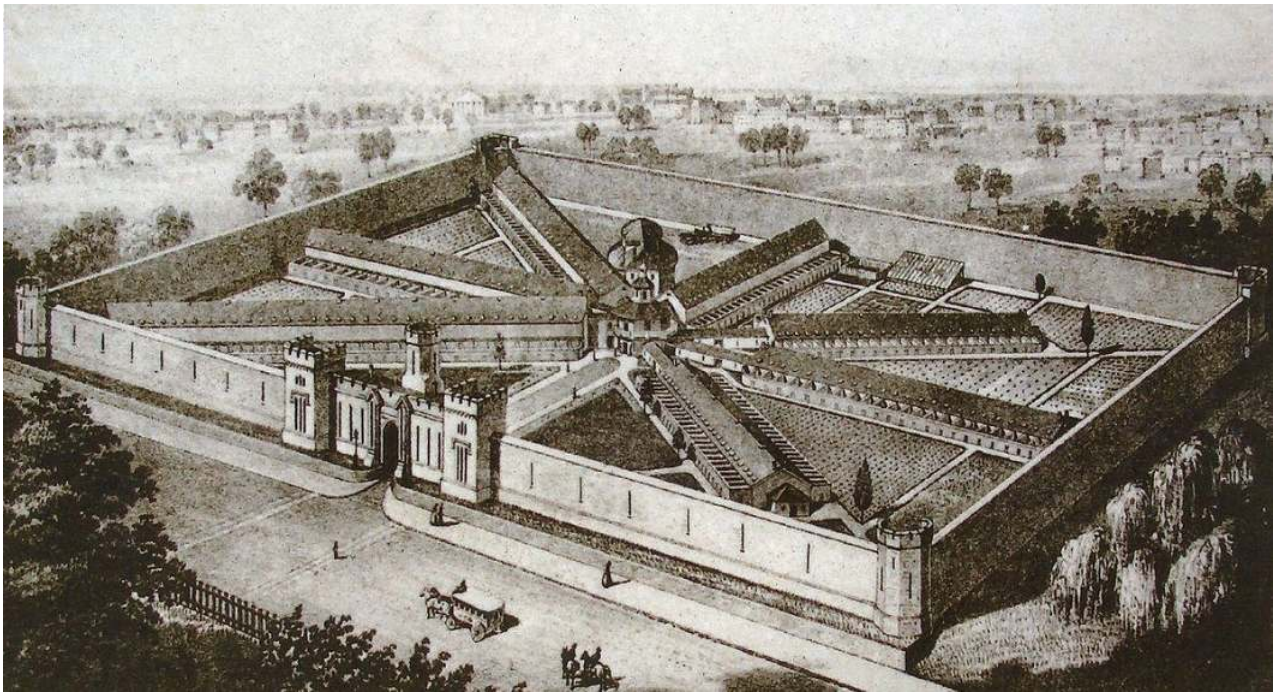
1. Wagner, P., & Sawyer, W. (2018). Mass incarceration: The whole pie 2018. Available at the Prison Policy Organization https://www.prisonpolicy.org/reports/pie2018.html ↵

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8.10: Growth of Prisons in the United States

As mentioned at the beginning of this section on jails and prisons, the Walnut Street Jail is recognized as the first built institution in the United States to house individuals. Soon after, another prison was built, the Eastern State Penitentiary (ESP), and it ran like a prison for nearly 150 years. Many of the prisons today were first built on this idea of a separated penitent prison. Many of the cells in the prison (as depicted below) would open to individual courtyards where individuals could look up and "get right with God," hence the concept of penitentiary (penance).

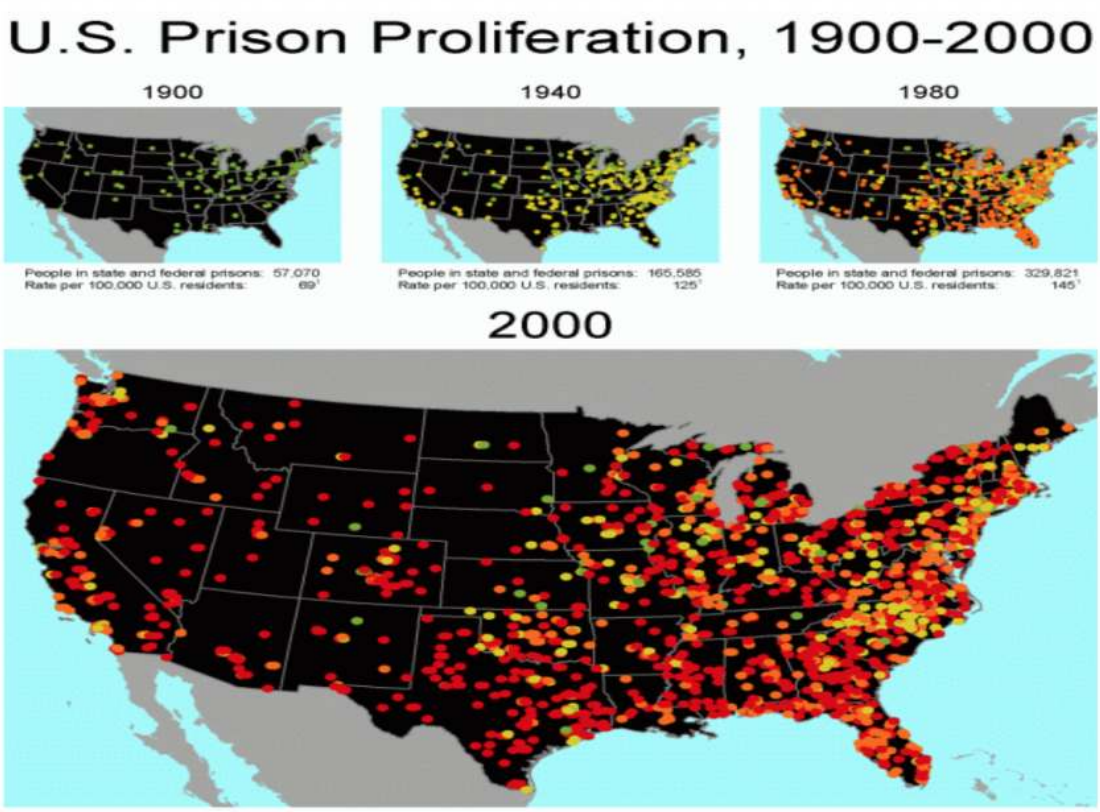
Eastern State Penitentiary Design



The State Penitentiary for the Eastern District of Pennsylvania, Lithograph by P.S: Duval and Co., 1855.

Individuals in ESP spent much of their time in their cells, or in their own reflection yards, reading the bible, praying, and always in silence. The solitude was also a way to serve penance. Shortly after the implementation of ESP, another prison was built in New York, in 1819, named the Auburn prison. This prison would become the leader of the second main prison style, the Auburn prison system. Many of the facets of the ESP were in the Auburn, save one. Auburn utilized a congregate system, which meant that (still in silence) the inmates would gather to do tasks or work.

Prison Growth in the United States



Proliferation1900-2000

This concept of labor eventually replaced the ideals of constant solitude. The congregate system took hold as the dominant model for many prisons, and many states began to model their prisons on the Auburn prison. Notably, Auburn was also the prison where the first death by electric chair was executed in 1890. Today, there are roughly 1,700 State or municipal prisons in the United States. As the images demonstrate, it is clear that many of the prisons in the U.S. have been built more recently.

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8.11: Types of Prisons

Prisons in the United States can be parcelled out by jurisdiction and by intensity. By jurisdiction, this is referring to who manages the prisons. A prison warden is generally considered the managerial face of the institution. However, a prison warden and the prison itself is usually within a much larger organizational structure. Although not always, these are usually separated by State. There are a few jurisdictions not at the State level that manage or operate prisons. This includes places like New York, Chicago, Philadelphia, and Washington D.C. Puerto Rico (not a State) also has a prison, as does the U.S. territory of the Virgin Islands.

State Prisons

The normal label for the organizational structure of prisons in a particular State is often called Departments of Corrections and are run by a Director, who is usually appointed by a Governor. For example, in Oregon, it is the Oregon Department of Corrections, and Director Peters is the current head of this organization (2012-present). The Oregon Department of Corrections currently overseas 14 State prisons. More information about the ODOC can be found here: https://www.oregon.gov/doc/Pages/default.aspx. California has the California Department of Corrections, and Secretary Diaz is the head of this organization (2018 to present). CDCR oversees 34 adult institutions. For more information about CDCR, see https://www.cdcr.ca.gov/.

Federal Prisons

The Federal Bureau of Prisons was established in the early 1930s as a result of the need to house an increasing number of individuals convicted of federal crimes. There were already some federal prisons in place, but it was not until 1930 that the U.S. Congress passed legislation to create the BOP, housing it under the justice department. Sanford Bates became the first Director of the Federal Bureau of Prisons (FBOP or BOP), based on his long-standing work as an organizer and leader at Elmira Reformatory in New York. As more federal legislation was passed, the need for more prisons became apparent.

Today, the BOP has 109 prisons, along with numerous additional facilities (camps) adjoining at these locations. There are also military prisons, and alternative facilities, reentry centers, and training centers, that are managed by the BOP. The federal prisons are separated into six regions., which include: the Mid-Atlantic Region, the North Central Region, the Northeast Region, the Southeast Region, the South Central Region, and the Western Region.

Within these regions are regional directors, which is similar to state-level directors of departments of corrections. Below is a detailed map of the regions of the Federal Bureau of Prisons. As is depicted, there are several different types of facilities within each region. A central office is also designated for each of the six regions. Click on the link in the annotation of the map to see it in a larger scale.

FBOP Regional Map



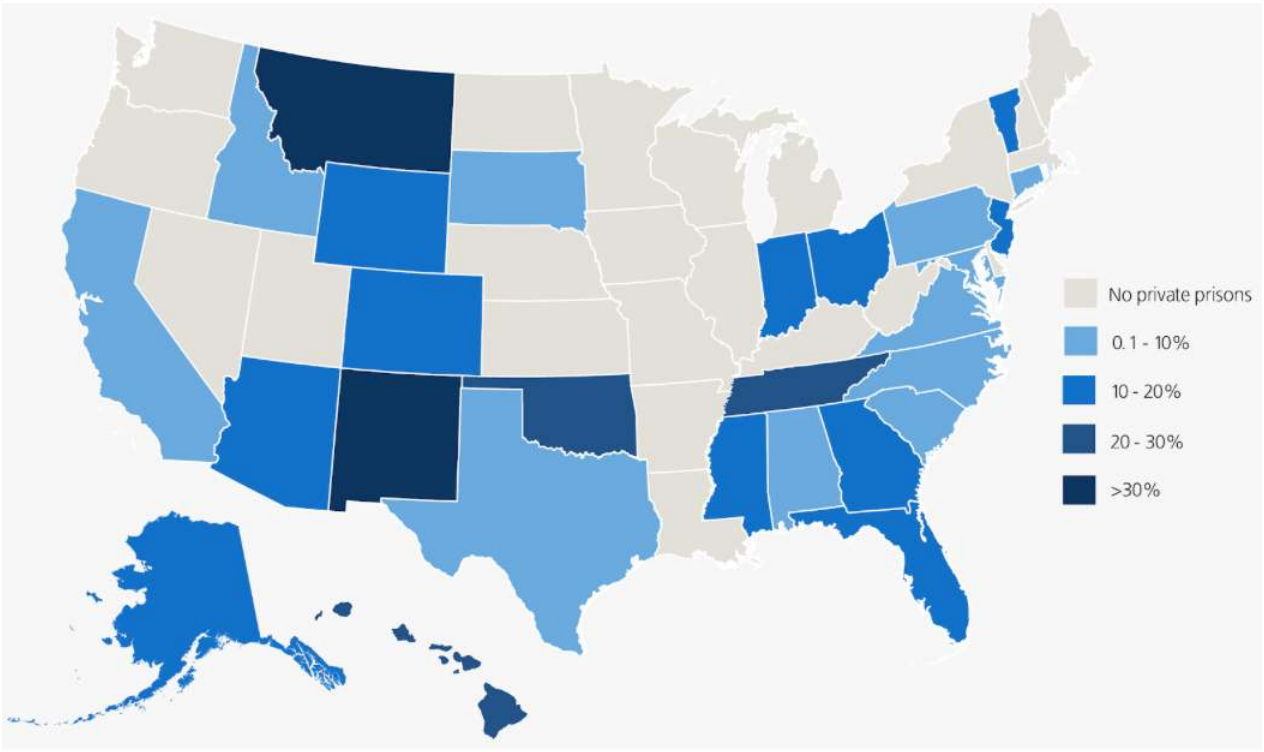
BOP

Regional map

Private Prisons

The privatization of goods and services has long been a staple of state departments of corrections, as it allows these organizations to subcontract specific tasks within their prisons. This includes services like food and transportation services, medical, dental, and mental health services, education services, even laundry services. As mentioned in the previous section on punishment, there was much ado about crime in the United States in the 1970s and 1980s. This brought on an increased fear of crime and a more punitive state within the United States. It was during this time that a small company known as Wackenhut, a subsidiary of The Wackenhut Corporation (TWC) sought to privatize the entirety of a prison, not just services within the prison. A second company, Corrections Corporation of America ultimately won the contract and became the first privately owned prison in the United States (1984). Today, Core Civic (formerly Corrections Corporation of America) runs approximately 128 facilities in the United States. [1] The GEO Group, the other primary private prison company runs 136 correctional, detention, or reentry facilities. [2] Pictured below, roughly half of the 50 States in America use private prison industry prisons.

States Using Private Prison Industry



Private Prison State Map

Much debate has come from the incorporation of private prisons. The critics of private prisons denote the lack of transparency in the reporting processes that would come from a normal prison. Still, others tackle a bigger issue – punishment for profit. That is – while taxpayers ultimately pay for all punishment of individuals, either at the State or Federal level, shareholders and administrators of the companies are making money by punishing people, under the guise of capitalism. For a more in-depth review of this, see a report presented by the Sentencing Project: https://www.sentencingproject.org/publications/private-prisons-united-states/ and on NPR: https://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law

1. See Core Civic facilities map: http://www.corecivic.com/facilities ↵
2. See Geo Group facilities map: https://www.geogroup.com/LOCATIONS ↵

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8.12: Prison Levels

Each of these jurisdictions of prisons also has varying degrees of intensity or seriousness. These are often considered prison levels or classifications. Depending on the State, the BOP, or even in the private sector, it is usually associated with the seriousness of the offenders that are housed within these institutions. For example, many States have three classification levels: minimum, medium, and maximum. Some States have a fourth level called super-maximum. Others call this close, or administrative level. The BOP has five levels, minimum, low, medium, high, and unclassified. Although not a true designation, and would be considered an unclassified, administrative control, ADX Florence is a United States Penitentiary (USP) that would be counted as a super-max. It houses the most dangerous individuals at the Federal level. Although not in operation today, Alcatraz was probably the most famous Federal USP (also considered a super-max at one point). It too housed the most dangerous federal inmates. Below are two images of this iconic prison, known as the “rock.”

Alcatraz



Alcatraz

Alcatraz in the Bay against the Backdrop of San Francisco



Alcatraz in the Bay against the Backdrop of San Francisco

Other States use a simple number designator to assign prison intensity, such as Level I, Level II, Level III, Level IV, and sometimes Level V. While still, other States incorporate a Camp to their list of designations, indicating a specific purpose within the low level, such as a Fire Camp. These types of camps are dedicated to fighting fires. In all there are some basic concepts to point out for each type:

Minimum – These prisons usually have dorm style housing, typically for only non-violent offenders, with shorter sentences (or sentence lengths left after downgrading). The fencing or perimeters of these types of facilities are usually low levels. The BOP generally refers to these as camps.

Low – These types of prisons are similar to minimums, to include some kind of dormitory style housing. However, there are normally more serious or disruptive offenders in these types of prisons. The fencing around the perimeter of these is generally higher, and maybe even a double fence. Offenders are typically in these institutions for longer periods.

Medium – Here, there is a transition from dorm-style housing to cells. Normally, there are two persons to a cell, but not always. The perimeter is usually a high fence, and may even have barbed wire, or there are large walls surrounding the institution. Freedom of movement within the institution is reduced, seen as privilege. Inmates here typically longer sentences, and include violence convictions.

High or Maximum – Similar to medium, but most of these offenders have violence convictions, and longer sentences, including life. Many of these individuals will spend most of their day in a cell, and more often than not, these are single occupancy.

Super-Max or Administrative Control – Depending on what the mission is for that particular prison, the prisoners in these institutions could be vastly different. For instance, if it is a facility that is designated for mental health, it would not operate the same as one that is a super-max. The super-max facilities would have individuals in their cells for almost all of every day. Many services would come to them at their cell, instead of them going somewhere (i.e., sick call), the cells would almost all be single occupancy. Visitation of these inmates would be much more regimented and monitored. Most of these individuals are also classified as extreme threats to the successful operations of the prison and are long-term inmates (LWOP – life without the possibility of Parole).

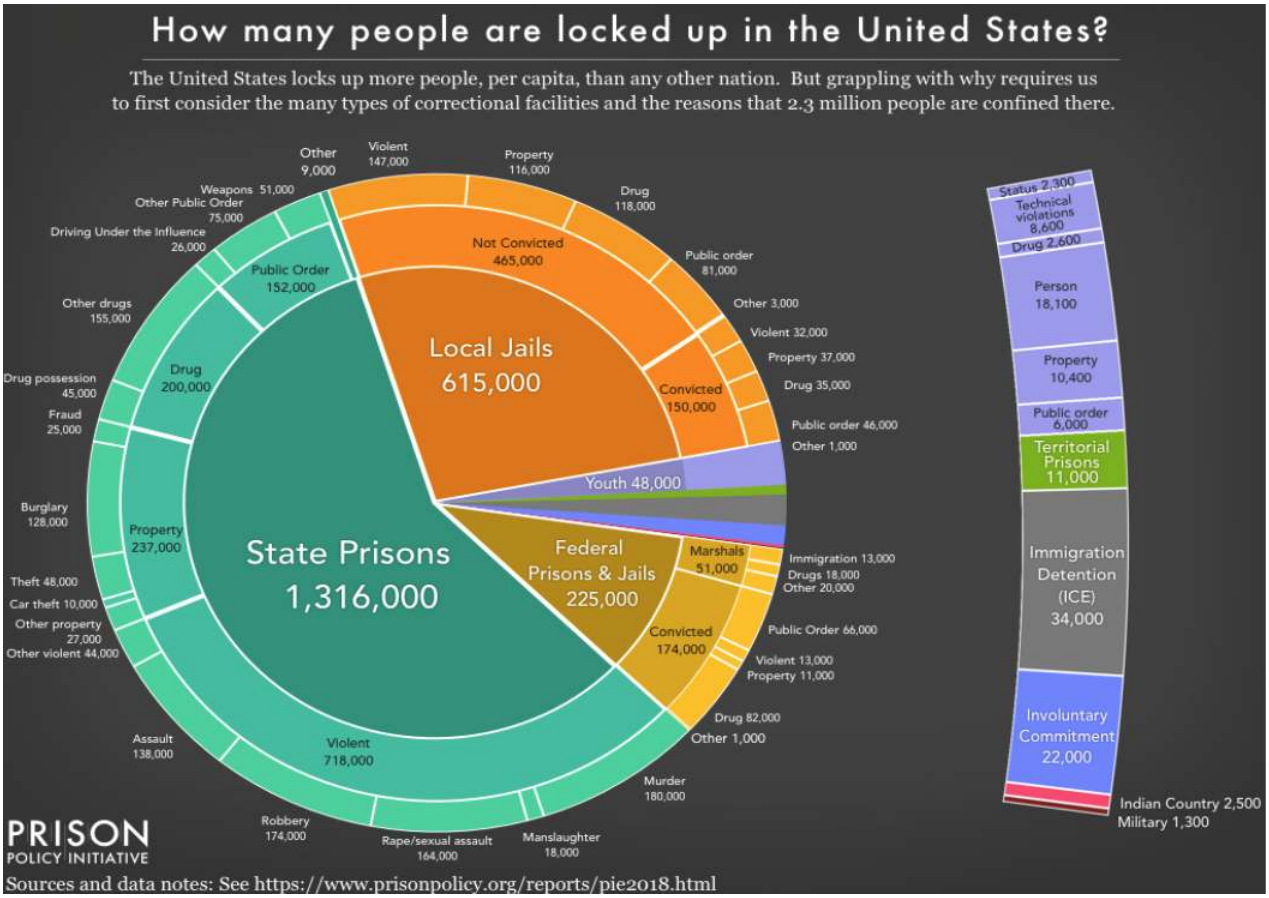
Intake Centers – An intake center can be part of an institution, running alongside the normal operations of an institution. The purpose of an intake center is to classify the offenders coming from the various courts in the jurisdiction, post felony conviction. The offender has an initial classification, where they are getting assigned to one of the jurisdiction's prisons, based on a point system for that agency. This assessment is looking at priors, prior and current violence, escape risk, and potential self-harm. For example, Coffee Creek Correctional Facility in Oregon is their intake of prison. It also is the women's prison for Oregon. Inmates come to CCCF and are assessed, then shipped off to one of the other institutions in Oregon (or placed in a level there if female). Inmates will gain later classifications at their destination prison, in terms of work assignments, mental health status, cell assignments, and other items.

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8.13: Who Goes to Prison?

The types of people that end up in prison are quite different than individuals that go to jail. Almost all people that go to prisons in the United States are people that have been convicted of felony-level crimes and will be serving more than a year (or they could have multiple years on their jail sentence). To give you a more detailed depiction of this, see the image below.

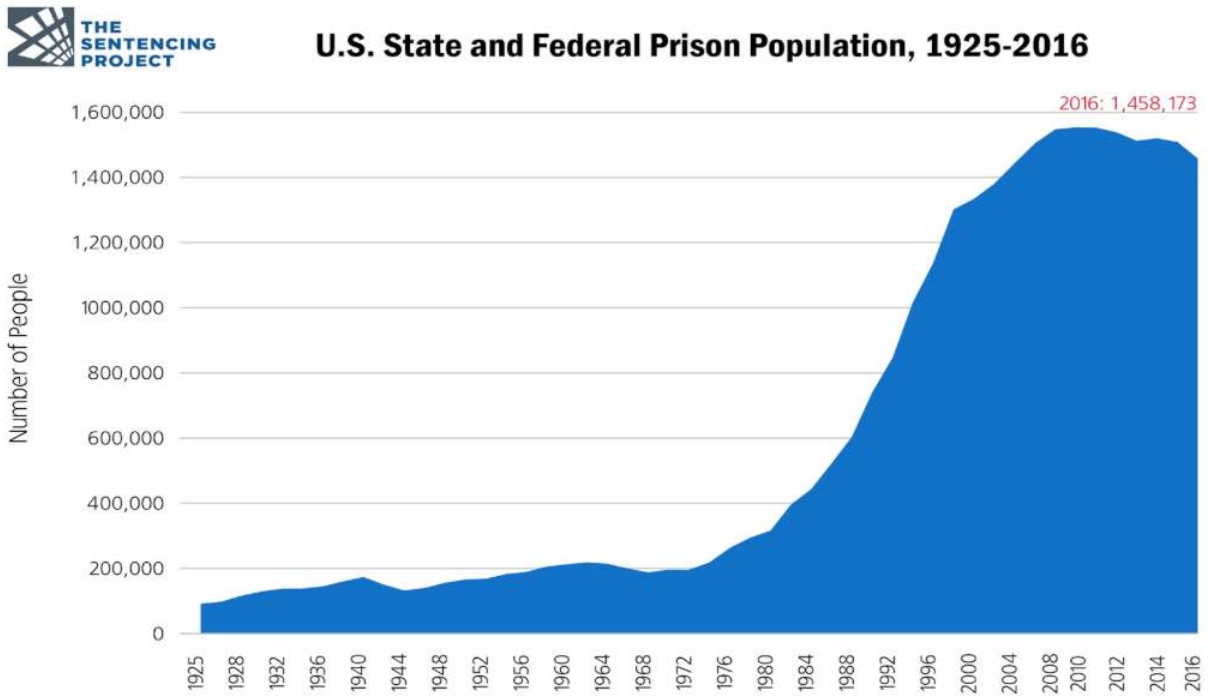
People Incarcerated in the U.S.



People Incarcerated in the U.S.

Focusing in on the left side of the graphic, there are roughly 1,316,000 State Prisoners. Here we can see the types of crimes that they are convicted of. A little over half (54-55%) are incarcerated for violent crimes. Drug crimes and property crimes make up the next big sections for the state prisoners. When you add in the federal prisoners (about 180,000) and the private sector prisoners (another 150,000+), territorial prisoners (11,000), Indian Country prisoners (2,500), we start to see how that number changes to about 1,700,000 prisoners.

One of the more notable items here, and what is different from the jails, roughly 93% of the prisoners are male. In jail, that number is roughly 85% male. While the total volume of prisoners has dropped slightly in the last few years (since 2015), this following graphic shows that we have increased our number substantially over the last 45 years.



u.s.-state-and-federal-prison-population-1925-2016.jpg
Source: https://www.sentencingproject.org/wp-content/uploads/2018/07/u.s.-state-and-federal-prison-population-1925-2016.png
License: public domain, https://www.sentencingproject.org/criminal-justice-facts/
Attribution - Bureau of Justice Statistics http://www.sentencingproject.org/wp-content/uploads/2018/07/u.s.-state-and-federal-prison-population-1925-2016.png

US State and Federal Prison population

This growth of the prison population will be discussed in greater detail in the final section on corrections, Special Issues. However, in the next section, we will discuss where the largest volume of individuals under correctional control resides, probation and community corrections.

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9: Family Law

What is Family Law?

The practice of Family Law deals with laws, regulations, and court procedures that impact both marital and non-marital family units. The laws dictate how certain relationships are created, the rights and obligations arising from those relationships, and how those relationships are terminated. The types of relationships impacted include those between married and unmarried adult partners, between parents and children, and between other "parent-like" adults and children. When people need information about family law, it is usually because they are going through—or considering—significant changes in their lives, such as getting married, divorced, or separated; becoming a parent; or adopting a child.

In Wisconsin, Family Law generally includes the following topics:

- Requirements for marriage
- Premarital, post-marital, cohabitation, and separation agreements/contracts
- Treatment of income and property during marriage
- Rights and obligations of parents and children in marital and non-marital relationships
- Determination of parentage outside of a heterosexual marital relationship (paternity, adoption, surrogacy)
- Treatment of income and property upon termination of marriage
- Rights and obligations of parents, children, and other adults upon termination of marriage

Legal practitioners engaged in family law practice may also provide legal services related to

- Actions relating to abused or neglected children
- Actions relating to juvenile crime and justice matters

Typical Paralegal Family Law Tasks and Responsibilities

As with most litigation-based practice areas, paralegals working with family law attorneys are responsible for many different types of tasks, including:

- Pre-client screening and conflicts-checking
- Client interviews
- Opening and managing the client's internal file
- Assisting the client with locating, obtaining, producing, and organizing information and documentation relevant to the client's legal matter
- Drafting legal correspondence to the client, witnesses, court personnel, and other parties/counsel involved in the client's legal matter
- Conducting factual investigation and legal research regarding the client's legal matter
- Drafting contracts, pleadings, discovery, and other documents necessary to fulfill the agreed-upon legal services to the client
- Receive, organize, and summarize documents and other information received from third parties in response to document requests, interviews, and discovery
- Liaison between the client and the attorney with respect to providing legal information to the client and requesting legal advice from the attorney
- Maintaining contact with lay witnesses, expert witnesses, agencies, and other personnel as needed to effectuate the attorney's plan and client's wishes
- Assisting the attorney with court proceedings, negotiation/mediation, and preparing the client for court hearings/trials
- Managing deadlines, calendars, and tasks lists relating to the client's legal matter
- Staying current in State and Federal laws, regulations, and case law impacting the client's legal matter
- Maintaining awareness of current trends in technology and social media that may impact the client's legal matter

Family Law is one of the most client-contact intensive practice areas for paralegals. It can also be one of the most emotionally charged practice areas. As such, successful family law paralegals have strong empathy and interpersonal skills, as well as the ability to set aside personal biases toward various situations or diverse persons. Maintaining a healthy work/life balance by placing appropriate boundaries and compartmentalizing is also key to a rewarding practice. Other personal attributes and skills necessary to

providing effective legal services include strong written and oral communication skills, attention to detail, time management skills, ability to work independently and as a member of a legal team, flexibility, adaptability, ability to work in a fast-paced and sometimes stressful environment, and well-developed research and investigation skills.

Ethics in Family Law Practice

As with all practice areas, the American Bar Association's *Model Rules of Professional Conduct* and Wisconsin's *Rules of Professional Conduct* apply to Family Law practice. Attorneys are responsible for their own conduct and have the duty to ensure personnel they supervise – associate attorneys, paralegals, and other legal staff – do not engage in conduct that would violate the rules. While all of the rules apply, it is helpful to examine the rules that come up the most often and that can be particularly troublesome in a Family Law practice.

Rule 1.1: Competence

This Rule requires legal practitioners to provide clients with competent representation, which is defined as "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." (Wisconsin Supreme Court Rule 20:1.1). As mentioned above, family law matters can sometimes implicate other areas of law; thus, it is important that legal practitioners do not attempt to represent clients in complex legal matters requiring legal knowledge and skill outside of their actual competence. For example, Bankruptcy is a highly specialized area of law that often comes up in family law matters involving a significant amount of debt. Legal practitioners without training and experience in Bankruptcy law should consider referring family law clients with potential Bankruptcy concerns to a bankruptcy attorney.

Rule 1.4: Communication

This rule requires legal practitioners to keep clients informed about their legal matters by promptly communicating and consulting with clients and providing information as requested. (Wisconsin Supreme Court Rule 20:1.4). Especially in an emotionally charged family law matter, clients are much more satisfied with their representation – and much less likely to lodge ethical complaints – when they are regularly informed about the status of their case.

Rule 1.5: Fees

This rule requires legal practitioners to charge reasonable fees based on time, labor, and skill required to competently perform the desired legal services (among other factors). The rule also requires that the scope of the representation and how the fee is calculated be explained in writing unless the total cost will be less than $1,000. Finally, with respect to Family Law matters, contingent fees are prohibited. (Wisconsin Supreme Court Rule 20:1.5). Most fee agreements for Family Law matters are based on hourly charges for attorney and paralegal time. Additionally, a chargeable advance fee (also sometimes called a retainer fee) is typically collected when the client signs the fee agreement. The amount of the advance/retainer fee varies, but its purpose is to act as a "deposit" sufficient to cover anticipated costs and time required for at least the early stages of the representation. Fees for time spent by attorneys and paralegals are deducted from (or charged against) the advance/retainer fee at first, and then are typically billed to the client monthly.

Rule 1.6: Confidentiality

This rule ***prohibits*** legal practitioners from ***ever*** revealing or disclosing ***any and all information*** relating to the client's representation, regardless of the source of the information, without the client's express consent. There are circumstances, however, that require legal practitioners to reveal otherwise confidential information. (Wisconsin Supreme Court Rule 20:1.6). Sometimes during a family law matter it becomes clear that the client intends to commit "a criminal or fraudulent act that … is likely to result in death or substantial bodily harm or … substantial injury to the financial interest or property of another." For example, a client may communicate a threat to physically harm someone or to fraudulently dispose of assets; in that situation, the legal practitioner is required to take action to prevent those circumstances from occurring, or, if they have already occurred, to rectify or minimize the damage. A related rule requires legal practitioners to prevent perjury (lying under oath) or to reveal to the Judge when perjury has occurred. (Wisconsin Supreme Court Rule 20:3.3: Candor toward the tribunal.)

Attorney-Client Privilege

Although not technically an ethical rule, the attorney-client privilege is one of the ways confidential client *communication* is protected. The privilege prohibits disclosure of any communications (written or oral) between the client and the attorney or the

attorney's staff that relates to legal services provided to the client. This privilege becomes effective if confidential information is obtained, even if the person does not subsequently retain the law office in the legal matter. For that reason, it is important not to obtain confidential information from persons until they have signed our fee agreement officially establishing a paid attorney-client relationship.

Attorney Work Product Protection

The attorney work product rule protects *activities* performed by the legal team on the client's behalf from disclosure. Protected activities include factual investigation, legal research, notes, memoranda, strategies, preparation and organization performed by the attorney, paralegal, or other legal staff.

Rule 1.7: Conflicts of Interest – Current Clients

This rule prohibits representation that is adverse to or could injure the interests of another client. The rule requires legal practitioners to avoid situations in which they may need to choose between the interests of:

- Multiple current clients
- A current client and a former client or other person from whom the legal practitioner has obtained confidential information
- A current client and the business or personal interests of the legal practitioner

(Wisconsin Supreme Court Rule 20:1.7).

Tricky situations arise when multiple persons involved in a Family Law matter want to use the same attorney for legal advice/representation; this is known as **multiple representation**. Most often, this occurs when both spouses want a divorce and they have no children and no marital assets to divide, which is sometimes called a "friendly" or uncontested divorce. Even in this circumstance, the representation of both parties is ill-advised, even if both parties sign a statement explaining and waiving this conflict of interest. Unanticipated conflicts can arise during or after the divorce proceedings, putting the legal practitioner in jeopardy of violating this rule.

Rule 1.9: Duties to Former Clients

Equally important is the need to avoid the **former client/current adversary** conflict of interest. In Family Law, the two most common ways this conflict arises are:

Example 9.1

A new client wishes to hire the legal practitioner to modify or challenge an order or judgment previously entered in a case in which the legal practitioner represented the opposing party (the former client). For example, suppose that our office represented Lia in her divorce from Shaun; five years later, Shaun wants our office to represent him in requesting a reduction in the amount of child support he was ordered to pay to Lia. Even though our representation of Lia terminated five years ago when the judgment of divorce was entered, we would be using confidential information we obtained from Lia during the divorce proceedings against her in the post-judgment proceedings.

Example 9.2

An employee of the law office represented the opposing party while employed with a different law office in the same legal matter or in a legal matter substantially related to the current legal matter. For example, suppose that after our office represented Lia in her divorce from Shaun, we hired Mateo, a paralegal who previously worked for the law office that represented Shaun in the divorce action. Three years after the final judgment was entered Lia again retains our office to seek an increase in her spousal support. The confidential information Mateo obtained from Shaun travels with him, again making Shaun a former client/current adversary, even though our office never represented Shaun. This would be the case even if Mateo's previous employer represented Mateo in a personal injury claim that occurred while Lia and Shaun were married. Because a judgment in the personal injury claim might impact a claim for spousal support, the matters are closely related and Mateo may possess confidential information obtained from Shaun that could be used against Shaun in the spousal support claim. In that case, our office would need to inform Shaun of the potential conflict and take steps to screen Mateo from any involvement in the spousal support claim. This is accomplished by implementing an ethical wall around Mateo so that he never

> works on the spousal support case and does not discuss any aspect of either that case or Shaun's personal injury case with anyone.

Rule 4.2: Communication with Person Represented by Counsel and Rule 4.3: Dealing with Unrepresented Person

These rules govern contact with persons involved in the legal action who are not clients. Typically, these are opposing parties. If the opposing party is represented by an attorney, all communication between our law office and that party must occur through and be directed to that party's attorney. When the opposing party is ***pro se*** (self-represented without an attorney), our office is required to inform that party that we do not represent that party and cannot give that party legal advice of any kind (other than advice to retain another attorney). (Wisconsin Supreme Court Rules 20.4.2 and 20:4.3). Many times one of the parties in a family law matter may decide not to hire their own attorney as a way to save money. In that situation, it is imperative to inform that party in writing that we do not represent that party, that our client's interests may be adverse or in conflict with that party's interests, and that we are prohibited from representing that party or providing legal advice.

Unauthorized Practice of Law

As you've learned in other classes, there are certain tasks and activities that can only be performed by a licensed attorney; anyone else who performs them has engaged in unauthorized practice of law, or UPL. Non-lawyers are prohibited from doing the following:

- **Accepting or rejecting a client/legal matter**. In other words, establishing the attorney-client relationship, communicating an intent to establish (or not establish) it, and signing fee agreements, contracts, or correspondence relating to establishing (or not establishing) an attorney-client relationship
- **Setting legal fees**. Only the attorney is allowed to decide the amount and manner (hourly, flat fee, task-based, etc.) in which to charge a client for legal services.
- **Providing legal advice**. Legal advice includes recommending actions or inactions, interpretation of law or documents, evaluation of legal claims or likelihood of success, explaining legal rights or obligations, and the like.
- **Preparing legal documents without attorney supervision**. In other words, any document, pleading, letter, etc., must be reviewed and approved by the attorney before it leaves the law office.
- **Representing clients in Court**. This not only includes personal appearances at hearings or trials but also signing pleadings, motions or other legal documents to be filed in the Court.
- **Terminating the attorney-client relationship**. Only the attorney can determine whether a legal matter has been concluded according to the retainer/fee agreement and communicate its completion with the client. This restriction especially applies to decisions to terminate the attorney-client relationship before the conclusion of the legal matter, for whatever reason.

Ethical Use of Social Media and other Electronic Data in Family Law

The advent of social media has added a whole new dimension to ethical family law practice, and it is continuously evolving. Legal practitioners need to be aware of the evidentiary implications of social media and other electronically stored information on clients in family law matters.

Social media posts, texting, and other forms of electronic messaging are notorious for causing damage to marital and other family relationships. Increasingly, they are also becoming potential sources of evidence for contested cases involving parental fitness, child custody, child placement/visitation, child support, spousal or child abuse, and other legal issues. Care must be taken to make sure clients do not erase or delete electronic information, as that could result in penalties being imposed against the client by the court on the basis of **spoliation of evidence** (intentionally destroying, altering, or concealing evidence).

As a result, with respect to social and electronic media, legal practitioners frequently advise their clients to

- Change their social media privacy settings to "private" and block opposing parties from accessing their social media pages
- Change all of their passwords for social media and email to prevent others from accessing them
- Refrain from posting any information (positive or negative) that relates to the relationship with the other party, children, or matters involved in the legal representation
- Set as private (but do not remove or delete!) past posts to social media

- Do not delete past emails, text messages or other electronic communications with the other party or with other persons that relate to the relationship with the other party, children, or matters involved in the legal representation

Additionally, caution must also be exercised to stay within the limits of the ethical use of social media by legal practitioners during the pendency of a family law matter. As previously mentioned, social media can provide a treasure trove of information that often cannot be accessed through traditional means of discovery such as **depositions** and **interrogatories**.

Definition: Terms Relating to Discovery

Deposition: Oral questions to another person that must be answered under oath.

Interrogatories: Written questions to the other party that must be answered under oath.

While it is perfectly ethical and acceptable for a paralegal to access and use information that is "public" on social media platforms, it is less clear when the information is "private" or accessible only to "friends." Would it be ethical for a legal practitioner to "friend" the person with the sole intent of gaining access to otherwise private information? On the one hand, it could be argued that anyone who accepts what appears to be a random friend request does so at their own peril. However, the ethical rules would likely prohibit this contact if the person is an adversary party represented by an attorney. Additionally, legal practitioners have an ethical duty to refrain from engaging in deceptive practices, particularly with respect to non-represented persons. As such, it is probably unethical for a legal practitioner to send a "friend" request that would not have been sent for reasons unrelated to the family law matter. An even murkier question arises if the client is the one who sends the "friend" request. Although the legal practitioner would not be ethically responsible if the client does so without the legal practitioner's knowledge, it would likely be unethical to direct the client (or any other person) to do so. The rules are definitely not always black and white.

Now you have a basic understanding of what is involved in an ethical Family Law practice. The next chapter will introduce you to the sources of law relevant to family law matters, as well as some of the interplay between other practice areas and Family Law.

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9.1: Introduction to Marriage

Although many people cohabit without marrying, most adults in the United States will marry at least once. In addition to being a personal relationship, **marriage is a legal status created by the State that forms a union of two persons as spouses**. As such, marital status impacts each person's rights and obligations with respect to many aspects of life including property ownership, financial support, insurance coverage, health care and other benefits, inheritance, income tax liabilities and benefits, government benefits, and rights to pursue certain legal claims (such as wrongful death or loss of consortium), to name a few. This chapter examines the legal status of marriage and issues commonly arising relating to the formation of marriage.

Formation of Marriage

Marriage is a state-created legal status; each State has an interest in regulating the legal status of marriage based on the state's duty to protect and provide for the general welfare of its citizens. Each State has laws establishing specific requirements and procedures for entering into a marriage that will be legally recognized by that State. However, the power to make laws creating and regulating marriage is not unlimited; it is important to understand the interplay between states' (and individuals') rights regarding marriage and the United States Constitution.

Marriage and the US Constitution

As previously mentioned, the right to marry is a fundamental right protected by the United States Constitution. Thus, any restrictions imposed on the right to marry – either by states or by contracts or conditions in agreements by individuals – are treated by the law with disfavor.

State laws that restrict marriage are subject to **strict scrutiny**: **the restriction must be narrowly tailored to serve a compelling State interest**. In the context of marriage, this means rules and restrictions regarding the formation of marriage cannot exceed the minimum level of restriction, and those restrictions must be absolutely necessary for the State to effectively regulate marital status and the rights and obligations that go along with it. Here are some examples of State laws restricting marriage that have been struck down:

- Banning interracial marriage. *Loving v. Virginia*, 388 U.S. 1 (1967).
- Prohibiting fathers who are behind in their child support obligations from marrying. *Zablocki v. Redhail*, 434 U.S. 374 (1978).
- Limiting the rights of prison inmates to marry. *Turner v. Safley*, 482 U.S. 78 (1987).
- Refusing to allow or recognize same-sex marriage. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

States can, however, impose other requirements on the right to marry without violating the US Constitution. Thus, each State has basic and procedural regulations that persons desiring to enter into marriage within that State must follow. These regulations relate to the age, intent, and capacity of persons to marry, as well as requirements for the marriage ceremony itself.

As you might expect, the difference between legal requirements for marriage in each of the 50 states may potentially cause issues for people who marry in one state and then move to another state – especially if their new home state has stricter requirements for marriage. The US Constitution has an answer to this problem as well. Article IV Section 1 of the US Constitution is known as the **Full Faith and Credit Clause,** which states: **"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."** In the context of marriage, this means that a marriage that was validly entered into in one State must be recognized and treated as valid in every other State (with a few exceptions, discussed later).

Essential Requirements for Marriage

Although State technical regulations for marriage may differ, there are certain essential requirements that apply to all marriages. Interestingly, these requirements very closely mirror the requirements for valid contracts. They are intent to marry, capacity to marry, and legality.

Intent to marry requires that both parties, at the time of the marriage, actually and specifically intended to enter into a marriage voluntarily, with full knowledge of the rights and obligations that marriage entails.

Capacity to marry requires that both parties possess the legal power to enter into marriage. Mental competence (the ability to understand the nature, rights, and obligations of marriage) is a major component of this requirement. Capacity not only requires

that both parties be free of mental health conditions and the influence of alcohol, drugs, or medications that could impact mental competence; it also requires both parties to be a certain age (the actual minimum age varies by State).

Legality in the context of marriage has its foundation in both Federal and State law. The Federal Edmunds Anti-Polygamy Act of 1882 prohibits anyone in the United States and its territories from being married to more than one person. State law requirements for legal marriages usually relate to restrictions based on the parties' existing family or blood relationships. Which family or blood relationships are "too close" for a valid marriage varies by State.

Procedural/Technical Requirements for Ceremonial Marriage

In addition to the essential requirement for marriage, each State imposes its own procedural or "technical" requirements for entering into a valid marriage in that State (also known as **solemnization of marriage**). **Ceremonial marriages are those entered into under State statutes**, though an actual ceremony as we commonly envision it may not be required. Typical statutory requirements include:

- Marriage license issued by the State
- Waiting period between the date the license is obtained/applied for and the date of the wedding (typically between 1 and 5 days, if one is required)
- Authorized officiant to perform the ceremony (members of the clergy, judicial officials, certain ranks of the military, or others specifically authorized by State law)
- Witnesses to the ceremony
- Declaration by the parties of intent to marry, in the presence of the officiant and the witnesses
- Recording of the marriage license in official State records

Access an overview of ceremonial marriage requirements in different states.

Requirements for Common Law Marriage

A **common law marriage** is an informal marriage where couples do not have a marriage license, marriage ceremony, or marriage certificate. In addition to the **essential requirements for marriage** described above, all that is required for common law marriage is that the couple actually **cohabitate** (live together) as spouses and **publicly hold themselves out as spouses.** In other words, the couple needs to behave the way our culture expects married persons to behave: for example, by introducing themselves as spouses and sharing income, property, debts, and liabilities. While there is no specific period of time required, the longer the couple behaves in this way, the more likely it is that they will be considered to have entered into a common law marriage. If the status of common law marriage is challenged, in most states the couple must prove they meet these requirements by **clear and convincing evidence**. This is the middle burden of proof between preponderance of the evidence (which is slightly more likely than not) and beyond a reasonable doubt (the highest burden of proof, used in criminal cases).

As of 2024, only a handful of States still allow persons to enter into common law marriages (Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, Texas, and the District of Columbia). Other States recognize common law marriages that couples entered into within their borders prior to a specific date (Alabama, Florida, Georgia, Idaho, Indiana, New Hampshire, Ohio, Pennsylvania, and South Carolina). Most States, however, prohibit persons from entering common law marriages within the State (however, pursuant to the Full Faith and Credit Clause, these States must recognize common law marriages legally entered into in other states, with some exceptions).

I Thought I was Married, But ...

Sometimes people honestly believe they are legally married and have behaved as a married couple for a period of time, but they actually are not. This person is known as a **putative spouse**.

Definition: Putative Spouse

Putative spouse: A person who believes in good faith that they have entered into a valid marriage when the marriage is actually unlawful due to a legal impediment.

Legal impediment: A requirement that has not been met or some other legal obstacle that makes the marriage unlawful.

The law provides a few ways to rectify this problem, depending on the reason the marriage is invalid.

In Wisconsin, “immaterial irregularities” with respect to the authority of the officiant will not render a marriage void if all of the other requirements for a lawful marriage have been met. Section 765.21, Wis. Stats. Similarly, “immaterial irregularities” with respect to the marriage license will not render a marriage void if all of the other requirements for a lawful marriage have been met. Section 765.22, Wis. Stats.

One of the most common impediments to a lawful marriage is that, at the time they entered into the current marriage, one party believed in good faith (incorrectly) that their prior marriage was legally terminated by annulment, divorce, or death of the other spouse. The subsequent marriage will be considered lawful once the impediment is removed as long as the parties continue to live together as spouses. Section 765.24, Wis. Stats. This is known as **putative marriage**.

But what if one of the putative spouses now wants to use the impediment against the other spouse? For example, suppose that Spouse A was previously married, and obtained an invalid divorce from Spouse A’s first spouse prior to marrying Spouse B. Years later, Spouse B files for divorce from Spouse A and requests property division and spousal support. Spouse A now claims the marriage to Spouse B was void because Spouse A was still legally married to Spouse A’s first spouse. Because it is Spouse A’s “fault” that the first divorce was invalid, Spouse A will not be allowed to now use that invalid divorce against Spouse B. **Marriage by estoppel** prevents the “guilty party” from taking advantage of circumstances that the party wrongfully created in the first place.

Definition: Marriage by estoppel

Marriage by estoppel: An equitable doctrine of law that treats parties as married because fairness prevents the party with "dirty hands" from asserting the marriage is invalid (even though it actually is invalid).

"Clean hands doctrine”: An equitable doctrine that is intended to prohibit someone from obtaining judicial relief when that person is also guilty of behaving in bad faith, unethically, or illegally.

Dirty hands: Wrongdoing or other inappropriate behavior that would make it unfair or inequitable to allow a person to assert a right or defense otherwise available to that person.

When the claimed valid marriage is a common law marriage, it’s a bit trickier. In states that recognize common law marriage, a few states will recognize as a valid marriage a relationship in which a couple lived together in a marriage-like relationship but did not otherwise meet the requirements of a common law marriage – even if the parties did not believe that they had met those requirements – **as a *de facto marriage*** (marriage in fact). Typically, it will only be for limited purposes, such as allowing a cohabitating survivor to receive death benefits even though there was no putative marriage. Most states, however, do not recognize *de facto* marriages.

Definition: *De Facto* Marriage

De facto marriage: An equitable doctrine of law that allows a court to recognize as a valid marriage a relationship in which a couple lived together in a marriage-like relationship but did not otherwise meet the requirements of a common law marriage – even if the parties did not believe that they had met those requirements.

Full Faith and Credit and Conflicts of Laws

The validity of a marriage is determined by the laws of the **state in which the marriage was entered into, also known as the State of Celebration**. Although the Full Faith and Credit Clause requires states to recognize marriages legally entered into in other states, there are some limited exceptions to this requirement. The most important limitation applies when a couple gets married in another State for the sole purpose of avoiding their home State’s marriage requirements. The **Conflict-of-Law rule** allows a State to refuse to recognize the validity of a marriage performed by another State when recognizing that marriage would violate a strong public policy of the State being asked to recognize the out-of-state marriage.

When confronted with a conflict of laws question, the first question that must be answered is in which State the couple was domiciled at the time of the marriage.

Definition: Domicile

Domicile: The place where a person intends to make their legal, permanent home. A person can have only one domicile.

Definition: Residence

Residence: A place where a person is living at any given time.

A person can have many residences, but only one domicile. A person's intended domiciliary state is demonstrated by:

- Voter registration (a person can be registered to vote in only one State)
- Driver's license and motor vehicle registration
- Income tax filings (address on the forms, State to which the person pays State income tax)
- Address listed on the person's estate planning documents (wills, trusts, powers of attorney, etc.)
- Objective evidence of the person's intent to make the State the person's permanent home
- To a lesser extent: billing address for credit cards and other bills, location of the party's employment, where the person does their banking, goes to church or school, where the person owns or rents real property

The key to determining domicile is weighing indicators of permanence vs. temporariness. Vacations, visits, and "seasonal" dwellings are residences. Living in a state for the purpose of attending school or for limited-term employment does not make that state the person's domicile, even if the person has lived there for several years. If the person intends to return to another state after finishing school or when the employment terminates, the State to which the person intends to return is that person's domicile.

If a couple is married outside of their domiciliary State, the next question that must be answered is whether the parties' sole reason for marrying out of state was to avoid a marriage requirement imposed by their home State based on that State's strong public policy. For example, some states do not allow a person under the age of 18 to marry in any circumstances. Other states allow persons under the age of 18 to marry, but only with parental consent and/or other restrictions (usually based on age difference between the spouses). One of the "strong public policies" behind the prohibition of marrying under the age of 18 is the desire to protect minors from exploitation. Suppose a 16-year-old person is domiciled in State A, which prohibits that person from marrying. The 16-year-old person, the 16-year-old person's parents, and the spouse-to-be all drive to State B, which allows 16-year-olds to marry when there is parental consent. The 16-year-old and the spouse-to-be enter into a ceremonial marriage, fully intending to return to State A afterward. State A would be allowed to refuse to recognize the marriage performed in State B because State B was not the couple's domicile and the only reason the couple married in State B was to avoid State A's marriage requirements.

Individuals' Attempts to Restrict Marriage of Other Individuals

Sometimes it isn't the State that is attempting to restrict someone's right to marry; parents or other persons sometimes attempt to use conditional gifts or contracts to do so. While the intent behind such conditions may be benevolent, the law still treats these attempts to limit marriage with disfavor.

General restraint of marriage, defined as a **total or near total prohibition of marriage,** is unenforceable because it prohibits the exercise of the fundamental right to marry. Examples of unenforceable restraints on marriage include:

- A person agrees never to marry, in exchange for a large sum of money to be given to that person by someone else
- Money will be paid out of a trust to a person as long as the person remains unmarried. If the person marries, the person must repay any money that was previously paid

Reasonable limitations of marriage, defined as **limits that are partial, useful, and not otherwise illegal**, may be enforceable. Even if the partial limits are fairly broad, as long as they don't totally prohibit marriage, they are considered partial. A limit is "useful" if it is intended to provide a benefit to someone, to protect someone, or to preserve a valuable tradition or culture. Finally, a limit is legal as long as its impact and/or purpose does not violate any other laws. Examples of reasonable limitations that might be enforced include:

- A person promises not to marry someone who is of a different religious faith
- Money will be paid out of a trust to a person as long as the person remains unmarried until the person earns a college degree
- A person agrees not to marry between the ages of 18 and 21 without the consent of the person's parents.

- A person agrees not to marry someone with a criminal conviction
- A person's parent agrees to pay the entire cost for the person's medical education if the person marries a doctor or a medical student
- A workplace policy does not allow employees to be married to one another; if two employees marry, one or both of them must be terminated. (This is a type of anti-nepotism policy)

Marriage in Wisconsin

Wisconsin's statutes governing the formation of marriage are contained in Chapter 765 of the Wisconsin Statutes. Wisconsin permits otherwise competent persons who are 18 years of age and older to marry; if a person is between 16 and 18 years old, written consent from the person's parents, guardian, or custodian is required. Wisconsin further regulates marriage as follows:

- Restrictions on marital, family, and blood relationships of persons wanting to marry. Section 765.03, Wis. Stats. (persons more closely related than 2nd cousins cannot marry)
- Marriage license requirements. Section 765.08, Wis. Stats., (3-day waiting period), and Section 765.12(2), Wis. Stats. (60-day expiration date)
- Authorized officiants. Section 765.16, Wis. Stats. (only certain types of persons may perform marriage ceremonies)
- 3-day deadline for filing of the marriage license, marriage certificate, and other required information with the Register of Deeds. Section 765.19, Wis. Stats.

Wisconsin's Marital Property Law

Wisconsin's Marital Property Law (Chapter 766 of the Wisconsin Statutes) recognizes that both spouses contribute to supporting a marriage – regardless of their actual incomes earned. The law says that, with limited exceptions, whatever the couple acquires during their marriage should belong to both of them equally.

Definition: Marital Property

Marital property: All income and property that comes into a marriage while the couple lives in Wisconsin.

Unless otherwise stated in the statutes, each person "owns" 50% of all income and possessions earned or acquired during the marriage (**marital property**). Even if only one spouse's name is on the title or other document showing ownership, if it was acquired during the marriage or purchased with marital funds, it is presumed to be marital property (although the spouse whose name is on the title has the right to manage and control the property).

Definition: Individual Property

Individual property: Personal gifts or inheritance to one spouse, and property owned prior to the marriage.

Individual property includes personal gifts or inheritance to one spouse, and property owned prior to the marriage. If the property meets these requirements, it belongs solely to one spouse and the other spouse has no right to own, manage, or control that property. Great care must be taken to keep individual property separate from marital property during the marriage. If individual property is mixed or combined (**commingled**) with marital property, it becomes marital property (with some exceptions based on proof of sources of individual property).

Credit and Debts

In Wisconsin, when making decisions about whether and under what terms to issue loans or credit, creditors (such as banks, loan institutions and credit cards) must consider the value of all marital property, even if only one spouse earns income. The downside of this, of course, is that debts and obligations incurred during a marriage are presumed to be marital debts. As a result, if one spouse owes credit card debt, the creditor can go after not just that spouse's individual property, but also all marital property – including the other spouse's income.

Testamentary Impact

A married person's estate at death includes all of that person's individual property, plus half of all marital property. One spouse can't completely give away in a will any item of property that is classified as marital property, even if only that spouse's name is on the title to the property. An attempt to do so may result in co-ownership between the person receiving the gift and the surviving spouse.

If a married person dies without a will, the surviving spouse will receive all of the deceased spouse's individual and marital property, unless the deceased spouse has children from outside the marriage to the surviving spouse. If the deceased spouse has children who were not born during the marriage to the current surviving spouse, those children will receive half of the deceased spouse's marital property and half of the deceased spouse's individual property; the surviving spouse receives the rest.

"Opting out" of Wisconsin's Marital Property Law

Spouses can also enter into a marital property agreement to avoid the application of Wisconsin's marital property law. The agreement can be included as part of a marital contract as described above, or the parties can use the Wisconsin Statutory Individual Property classification agreement.

Promises to Marry and the Law

As you know, promises to marry can be sufficient consideration to support a prenuptial agreement. Unfortunately, promises to marry are like pie crusts – easily made, easily broken. The consequences of those broken promises, however, are not easily borne and can be financially and emotionally significant. What is the remedy when an engagement is broken?

Breach of Promise to Marry

When parties agree to marry one another, costly circumstances typically arise. One or both parties may receive an engagement ring or other gifts from the other party in contemplation of the upcoming marriage, as a symbol of their commitment to the promise to marry. Significant non-refundable expenses may be incurred relating to the wedding celebration itself (wedding gown, reservation of the reception venue, caterers, wedding cake designers, floral and other decorations, wedding invitations, etc.) by the parties or by third parties. Third parties might incur travel and lodging costs to attend the wedding celebration and may purchase gifts for the soon-to-be spouses. State laws vary in terms of whether and to what extent these losses can be recovered.

Heart balm actions, where the **jilted person sues the other person to recover damages based on a broken heart due to a breach of promise to marry**, are allowed by only a few states. States that allow heart balm actions typically allow the jilted party to recover compensatory damages – the costs incurred by that party in anticipation of the wedding celebration. Some states also allow damages for humiliation and mental anguish. In very rare cases, punitive damages can be awarded if the breaching party acted with the intent to humiliate or harm the jilted party out of animosity, ill will, or malice. However, no states allow the aggrieved party to be compensated for the "loss of lifestyle" the person would have enjoyed if the marriage had occurred.

Many states have enacted statutes that prohibit heart balm actions between parties who promised to marry each other. Wisconsin is one of those states (see Section 768.01, Wis. Stats.). The legislature believed that heart balm actions do "not encourage stable marriages, and … sanction conduct that borders on extortion." General Report, Wisconsin Legislative Council, 1959, Bill No. 151A, at 70.

Return of gifts

Claims for the return of gifts are separate from heart balm actions. There are several factors impacting whether someone can successfully force the return of gifts or money given to one or both would-be spouses.

Definition: Terms Related to Gifts

Irrevocable: Gifts that are not capable of being altered, canceled, rescinded, or recalled.

Revocable: Gifts that are able to be altered, canceled, rescinded, or recalled.

Whether a gift is irrevocable or revocable depends on the circumstances surrounding the giving of the gift.

For a gift to be **irrevocable**, there must be a voluntary delivery of something from one person to another. The **giver** (also known as a **donor**) must intend, at the time the item is delivered to the other person, to immediately transfer title, ownership, and control of the item to the **recipient** (also known as a **donee**). There must be no payment or other consideration provided by the recipient to the giver in exchange for the item, and the recipient must accept the gift. A statement of intent to give a gift in the future, or only if certain circumstances occur, is not an irrevocable gift. Loaning something to someone with the expectation that it will be returned also is not an irrevocable gift.

Revocable gifts are also sometimes called **conditional** gifts. The gift is not complete unless or until something occurs (or does not occur) in the future. There were some examples of conditional gifts provided in the discussion of partial restraints on marriage earlier in this chapter.

Most states (including Wisconsin) agree that gifts given to a person in contemplation of marriage are conditional gifts that must be returned if the marriage does not occur, regardless of the reason it does not occur (or who is "at fault"). Engagement rings and other engagement gifts exchanged between the parties promising to marry are classic examples of conditional gifts. The deciding factor is the intent of the party giving the gift to a would-be spouse, as evidenced by that party's words and actions at the time the gift was given. If there are circumstances demonstrating reasons other than contemplation of marriage for the giving of the gift (for example, a person gives their soon-to-be spouse a birthday gift), a court could determine the gift is irrevocable.

In most states, it is even easier for third parties (families and friends of the betrothed) to force the return of their gifts as being conditioned on the future occurrence of the marriage. With respect to payments of money, many of these states also allow compensation pursuant to a claim for unjust enrichment.

Paralegal Roles

In Wisconsin, legal practitioners typically aren't involved in assisting people with entering into the actual marriage itself. Questions regarding marriage validity typically come up in the context of annulment or divorce, which are covered in later chapters.

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9.2: Marital Contracts

According to a 2022 Harris Poll survey, around 15% of married couples have a prenuptial agreement, a significant increase from just 3% in 2010. Due to cultural shifts, prenuptial and other marital contracts are no longer just for the rich and famous. There are four types of contracts that impact domestic relationships: **Prenuptial agreements, postnuptial agreements, cohabitation agreements, and separation agreements.**

Definition: Domestic Relations Contracts

Prenuptial agreements: A contract between two unmarried persons who intend to marry that is effective upon marriage. It covers financial and related matters during the marriage and upon termination of the marriage by separation, annulment, divorce, or death.

Postnuptial agreements: A contract between two married persons who intend to remain married that is effective immediately. It covers financial and related matters during the marriage and upon termination of the marriage by separation, annulment, divorce, or death.

Cohabitation agreements: A contract between two unmarried persons who intend to remain unmarried indefinitely that is effective immediately. It covers financial and related matters while they live together and upon termination of the cohabitation by separation or death.

Separation agreements: An agreement between two married persons who have separated or who intend to separate. It covers financial and related matters after the termination of the marriage.

In this chapter, we'll explore three of the types of contracts that impact domestic relationships: **Prenuptial agreements, postnuptial agreements, and cohabitation agreements.** Separation agreements are covered in a later chapter.

Basic Introduction to Contracts

Contracts are legally enforceable agreements between persons. Like any contract, contracts impacting domestic relationships must meet certain requirements to be valid. These **elements** (or requirements) are **mutual agreement, consideration, capacity,** and **legality**.

- **Mutual agreement** is defined in the law as a "meeting of the minds" and requires that the parties to the contract agree on the contract's essential terms, conditions, and obligations. In business-based contracts, mutual agreement is demonstrated by one party making an **offer** (a promise to do or refrain from doing a specific act) and another party's **acceptance** (an agreement to the terms of the offer). The agreement must also be **voluntary**: entered into by both parties freely and without **duress** (unlawful use of force, threats, or pressure) or **undue influence** (taking advantage of a powerful or special relationship).
- **Consideration** is something of value that is exchanged between the parties to a contract. Consideration can be money, action, forbearance (not performing an act), or promises relating to any of those things.
- **Capacity** is the legal ability or power to do something, such as enter into a relationship or contract. Contractual capacity typically has two components: mental competence and minimum age. **Mental competence** refers to a person's ability to understand the nature of the relationship or contract, which can be impacted by mental health conditions, alcohol, or drugs. The **minimum age** for contracts is determined by State law and is typically 18 years of age.
- **Legality** prohibits parties from agreeing to contractual terms that violate federal or state laws. For example, a contract in which one person agrees to pay another person to kill a third person would violate both federal and state criminal laws prohibiting homicide.

Any contract that does not meet all four of these requirements is invalid and cannot be enforced by either party. A determination that the contract is valid, however, does not guarantee its enforceability. You may recall learning in a previous legal studies class that certain types of documents must be in writing to be enforceable pursuant to the statute of frauds. One memory trick for the types of documents is **MYLEGS**: **M**arital contracts**;** contracts in effect for at least one **Y**ea**r**; transactions involving Land; transactions involving an **E**xecutor (or an **E**state**)**; transactions involving **G**oods worth more than $500; and transactions involving

a **S**urety. Trusts involve an Estate, and so they are required to be in writing. Thus, according to the **Statute of Frauds**, contracts impacting domestic relationships must be in writing and signed by both parties to be enforceable.

Special Considerations for Marital Contracts

Due to the emotional and financial nature of the marital relationship, special rules and procedures uniquely apply to marital contracts to ensure the voluntariness and fairness of these contracts. A marital contract should specifically address how these considerations were addressed within its written terms.

Financial Disclosure

Wisconsin requires a full and complete disclosure of assets, income, debts, liabilities, and other financial information between the parties prior to signing a marital contract. Typically, this involves written documentation that may be accompanied by permission to meet with the other party's financial advisors. The right to full financial disclosure can be waived by either or both parties; if a party decides to waive this right, there should be a written, signed waiver. This is much more of an issue in prenuptial contracts than in postnuptial contracts.

Unconscionability and Fairness

Any contract that is shockingly one-sided, unfair, or unjust is **unconscionable** and cannot be enforced.

Definition: Unconscionable contract

Unconscionable contract: Any contract that is shockingly one-sided, unfair, or unjust toward one party.

In marital contracts, there are two kinds of fairness required:

1. **Procedural fairness.** The focus here is on the circumstances existing prior to and at the time the agreement was signed. The contract must have been voluntarily and intelligently signed. Procedural fairness asks the following questions:
   - Was there complete and accurate financial disclosure?
   - Did other circumstances provide each party the reasonable opportunity to acquire complete and accurate knowledge of the other party's finances? For example, if the parties lived together and shared income or property for a period of time that might be enough opportunity to acquire knowledge. Similarly, if one party worked as a bookkeeper in the other party's business, that might be enough opportunity to acquire knowledge.
   - Did each party have sufficient time to read, study, and understand the terms of the agreement?
   - Did each party have sufficient time and opportunity to seek advice from independent professionals (attorneys, financial advisors, etc.) prior to signing the agreement?
   - Was there any undue pressure on the party to sign the agreement? For example, financial, physical, mental, emotional, or other threats; unequal bargaining power (due to different education or business backgrounds, age, language barrier, "take it or leave it" or absence of meaningful choice); severe time constraints; or other high-pressure circumstances. **Note**: a threat to call off the engagement/marriage is typically not enough "pressure" to establish involuntariness. The same is true for pregnancy alone (unless there are other aggravating factors)
2. **Substantive fairness**. The focus here is on the actual terms of the agreement and their impact on each party. Substantive fairness asks the following questions:
   - Are the terms equitable to both parties, mutually favorable, and not unduly one-sided?
   - Are the terms reasonable toward both parties, particularly with respect to how income, assets, debts, and liabilities would be treated upon termination of the marriage?

Substantive Fairness and the "Second Glance Doctrine"

With most contracts, the courts are only concerned about the circumstances present just before and at the time the contract is signed (the first glance). With marital contracts, however, courts are also concerned about the circumstances existing at the time a party wishes to enforce the contract (the second glance). Under the **Second Glance Doctrine**, the marital contract will not be enforced if a significant and unexpected change in the parties' circumstances after the contract was signed would result in "substantial injustice" such as spousal impoverishment or other circumstances making enforcement unduly harsh.

Legality

Again, due to the unique nature of marital relationships and the State's interest in governing marital relationships, there are certain types of clauses that, if contained in a marital contract, likely would not be legally enforceable:

- Agreement that one or both parties would not be required to pay child support in the event of an annulment or divorce,
- Agreements regarding child custody or physical placement of children born or adopted into the marriage in the event of an annulment or divorce
- Agreements that no children will be born into the marriage; or, that no birth control will ever be used by the parties during the marriage (violates constitutional protections regarding reproduction)
- Agreements relating to the nature and/or frequency of sexual relations (in most states)
- Agreements that go against a State's "no-fault divorce" laws (for example, a liquidated damages clause requiring payment of $50,000 if a spouse is sexually unfaithful)

Guidelines for Drafting Marital Contracts

Most law offices have templates they use for drafting marital contracts; the paralegal's primary job is accurately completing the templates with the client's information and facilitating the signing of the agreement. The following are guidelines for steps to take at each point in the process:

Preliminary preparation

- Double-check the accuracy and correct spelling for all names, addresses, and other contact information, and relationships of each individual who will be referenced in the contract
- Confirm both parties' ages, level of education, business experience, etc., and the amount of current income from all sources
- Obtain a list of the client's financial or other professional advisors with whom the client has consulted regarding the client's assets, debts, and property
- Determine whether the other party to the agreement has ever been treated for or is currently receiving treatment for a mental health condition that could impact the other party's ability to understand and voluntarily sign the agreement
- Confirm whether the other party to the agreement is represented by counsel
- Inform the client that the other party to the agreement will need to be given ample time to consult with independent professionals regarding the agreement after it is drafted and presented to the other party (typically several weeks)

Documentation for the client's file

- Prepare a detailed list of the client's personal and business assets, with the current exact or approximate fair market value of each. Include real property, vehicles, jewelry, household furniture, financial investments (checking/savings accounts, certificates of deposit, stocks, bonds, mutual funds, annuities, cash), retirement accounts (IRA, 401k, pension, etc.), other personal property, and intellectual property. Indicate whether each item is individually or jointly owned. Include account numbers and legal descriptions.
- Prepare a detailed list of the client's current personal and business debts, liabilities, and obligations
- Prepare a detailed list of the client's known future assets that the client expects to acquire during the marriage, with the exact or approximate fair market value of each. Include future employment contracts, purchase options, or other anticipated purchases.
- Obtain copies of the client's documentation regarding the above items, such as bills, statements, deeds, titles, contracts, purchase agreements, etc.
- Obtain copies of the client's recent personal and business tax returns
- Obtain a list from the other party of the other party's current and known future personal and business assets, debts, and liabilities as described above

Documentation to provide to the other party to the agreement

- Draft correspondence (to be signed by your supervising attorney) ensuring the other party understands that your supervising attorney does not represent the other party and cannot give the other party legal or financial advice, and encouraging the other party to retain independent legal counsel
- Provide a list of the client's current and known future personal and business assets, debts, and liabilities as described above. ***Remove*** account numbers, legal descriptions, or confidential information from the list. Keep only enough information to

adequately identify each item and its value (for example, 2003 Polaris Pro X 800 snowmobile, with an approximate value of $4,000)
- Provide a separate list of personal and business assets, debts, and liabilities jointly owned by the client and the other party

Provisions to include in a Wisconsin agreement

- Statement regarding the date on which the parties intend to marry (or date of the marriage, for postnuptial agreements)
- General acknowledgement that both parties own separate property, that both parties acknowledge is “Individual Property”, and that they played no role in accumulating the other’s Individual Property
- Statement of domicile in Wisconsin and election of Wisconsin law as the choice of law to be applied to the agreement regardless of either party’s future domicile
- Statements that each party understands the impact of the agreement on present and future assets, and their rights related to those assets
- Statement that the mutual promises contained in the agreement are the sole consideration forming the basis of the agreement
- Statement that full and complete disclosure of assets and liabilities has been made and/or waived by both parties
- Separate list of currently owned Individual Property of each party, with only enough information to adequately identify each item and its value
- Separate list of anticipated future owned Individual Property of each party, with only enough information to adequately identify each item and its value
- Statements regarding each party’s rights to their Individual Property and its management and control
- Separate list of currently owed individual debts and liabilities of each party, with only enough information to adequately identify each item and its value
- Definition of “Earnings” and what is included or excluded as Marital Property
- Separate list of property currently jointly owned by the parties (if any); definition of what shall be considered Marital Property that is accumulated during the marriage
- Description of how the parties intend to pay household and other expenses during the marriage
- Provisions regarding property disposition, division, or distribution upon the death of either party, and in the event of divorce, annulment or legal separation
- Provisions regarding spousal support in the event of divorce, annulment, or legal separation
- Necessary severability clauses, as determined by the attorney. A **severability clause** states that if any part of the agreement is later determined to be invalid, the remaining valid portions of the agreement should still be enforced.
- Statement that each party acknowledges the agreement was signed voluntarily, with no duress or undue influence
- Statement that prior to signing the agreement, each party had the opportunity to consult with the party’s own individual independent legal counsel regarding the agreement’s terms and legal impact on the party. Alternatively, that the other party chose not to hire individual independent legal counsel to review and explain the agreement.

Procedure for signing the agreement

- Confirm that each party has read the agreement, understands it, and voluntarily intends to sign it
- Confirm that each party is not currently under the influence of alcohol, drugs, or any medication that might affect the party’s mental capacity
- Witness each party signing the agreement; notarize (using proper procedure) as applicable
- Provide original agreement to the parties; retain a copy for the client’s file

Access additional information from the Madison State Counsel regarding Marital Agreements

Special Considerations for Cohabitation Contracts

In general, because cohabitating couples are not married and have no intention to marry, cohabitation contracts are treated more similarly to non-marital contracts. Marital property laws do not apply to unmarried couples in Wisconsin, and the requirements of financial disclosure and the “second glance” doctrine do not apply. As long as the contract is in writing and meets the four requirements for validity, terms of cohabitation contracts regarding the division of property between the parties upon termination of their cohabitation will most likely be enforced. As with marital contracts, provisions regarding children (child support, child custody, child placement) will not be enforced. However, *as long as sexual relations are not part of the consideration (that is, are*

not a condition of the contract), Wisconsin courts may enforce property, debt, and income terms of cohabitation agreements. Wisconsin law also recognizes the right of cohabitating partners to recover financial contributions toward property owned by their partners.

See the following for more information about cohabitation agreements:

- Sample Cohabitation Agreement - FindLaw
- Cohabitation Contracts: What to Include and How to Write One | Nolo
- Free Cohabitation Agreement Template | PDF & Word (legaltemplates.net)
- Free Cohabitation Agreement Template | LegalZoom

✔ Case in Point: *In re the Marriage of Bonds*, 24 Cal. 4th 1, 5 P.3d 815 (2000).

Synopsis

Barry Bonds was a major league baseball player in the 1980s, 1990s and early 2000s. When he married Susann (who went by the name of Sun) in 1988 he was a second-year outfielder with the Pittsburgh Pirates earning $106,000 per year. When the parties divorced in 1994, Bonds had just signed a then-record 6-year contract with the San Francisco Giants worth $43.75 million. Sun was a Swedish native who had emigrated to Canada two years before meeting Barry. She worked as a waitress and bartender; although her native language was Swedish, she spoke both French and English in her employment, education, and personal relationships when she lived in Canada. Although Sun had completed some cosmetology training, she was unemployed from the time she moved in with Barry in 1987 through the date of their divorce. In January 1988, Barry and Sun decided to marry. On February 5, 1988, Barry and Sun signed a prenuptial agreement drafted by Barry's attorney in which both parties waived any interest in the other party's marital earnings and acquisitions. Sun was not represented by an attorney. The day they signed the agreement Barry and Sun flew to Las Vegas where they were married the next day (February 6, 1988). Sun challenged the enforceability of the prenuptial agreement, claiming she was not represented by an attorney and lacked sufficient knowledge and understanding to enter into the contract voluntarily.

Excerpts

Following are excerpts from the opinion affirming the trial court's determination that the prenuptial agreement was enforceable against Sun: (citations and references to other authorities within the opinion are omitted)

Barry testified that he … recalled that from the beginning of his relationship with Sun he told her that he believed his earnings and acquisitions during marriage should be his own. He informed her he would not marry without a premarital agreement, and she had no objection. He also recalled that from the beginning of the relationship, Sun agreed that their earnings and acquisitions should be separate, saying "what's mine is mine, what's yours is yours." Indeed, she informed him that this was the practice with respect to marital property in Sweden. She stated that she planned to pursue a career and wished to be financially independent.

[Sun] testified that her English language skills in 1987 and 1988 were limited. Out of pride, she did not disclose to Barry that she often did not understand him. She testified that she and Barry never discussed money or property during the relationship that preceded their marriage. She agreed that she had expressed interest in a career as a cosmetologist and had said she wished to be financially independent. She had very few assets when she took up residence with Barry, and he paid for all their needs … She testified that only at the parking lot of the law office where the agreement was to be entered into did she learn … that Barry would not marry her unless she signed a premarital agreement …. She was under the impression that Barry wished to retain separate ownership of property he owned before the marriage, and that this was the sole object of the premarital agreement. She was unaware the agreement would affect her future….

Barry [and his attorneys] testified that … at the meeting the attorneys informed Sun of her right to independent counsel. All three recalled that Sun stated she did not want her own counsel, and [Barry's attorney] recalled explaining that he and Brown did not represent her. Additionally, all three recalled that the attorneys read the agreement to her paragraph by paragraph and explained it as they went through it, also informing her of a spouse's basic community property rights in earnings and acquisitions and that Sun would be waiving these rights. [I]t was clearly explained that Barry's income and acquisitions during the marriage would remain Barry's separate property, and … Sun stated that such arrangements were the practice in Sweden.

Furthermore, Barry and the two attorneys each confirmed that Sun … asked questions during the meeting … that Sun did not exhibit any confusion, and that Sun indicated she understood the agreement. They also testified that changes were made to the agreement at Sun's behest. [Barry's attorneys] experienced no difficulty in communicating with Sun, found her confident and happy, and had no indication that she was nervous or confused, intimidated, or pressured. No threat was uttered that unless she signed the agreement, the wedding would be cancelled, nor did they hear her express any reservations about signing the agreement.

The trial court determined that there had been no coercion. It declared that Sun had not been subjected to any threats, that she had not been forced to sign the agreement, and that she never expressed any reluctance to sign the agreement. It found that the temporal proximity of the wedding to the signing of the agreement was not coercive, because under the particular circumstances of the case, including the small number of guests and the informality of the wedding arrangements, little embarrassment would have followed from postponement of the wedding. It found that the presentation of the agreement did not come as a surprise to Sun, noting that she was aware of Barry's desire to "protect his present property and future earnings," and that she had been aware for at least a week before the parties signed the formal premarital agreement that one was planned.

With respect to the presence of independent counsel, although Sun lacked legal counsel, the trial court determined that she had a reasonable opportunity to obtain counsel. The trial court stated: "[Sun] had sufficient awareness and understanding of her right to, and need for, independent counsel. [Sun] also had an adequate and reasonable opportunity to obtain independent counsel prior to execution of the Agreement. …. On at least two occasions during the February 5, 1988, meeting, [Sun] was told that she could have separate counsel if she chose. [She] declined. [She] was capable of understanding this admonition."

With respect to the question of inequality of bargaining power, the trial court determined that Sun was intelligent and, evidently not crediting her claim that limited English made her unable to understand the import of the agreement or the explanations offered by Barry's counsel, found that she was capable of understanding the agreement and the explanations proffered by Barry's attorneys. There is ample evidence to support the trial court's determination regarding Sun's English-language skills, in view of the circumstances that for two years prior to marriage she had undertaken employment and education in a trade that required such skills, and before meeting Barry had maintained close personal relationships with persons speaking only English. … we observe that the evidence supports the inference that Sun was intrepid rather than a person whose will is easily overborne. She emigrated from her homeland at a young age, found employment and friends in a new country using two languages other than her native tongue, and in two years moved to yet another country, expressing the desire to take up a career and declaring to Barry that she "didn't want his money." These circumstances support the inference that any inequality in bargaining power—arising primarily from the absence of independent counsel who could have advised Sun not to sign the agreement or urged Barry to abandon the idea of keeping his earnings separate—was not coercive.

Think About It ...

Based on what you've learned:

1. A client brings a proposed prenuptial contract to the office and is wondering whether it would be a good idea to sign it.
   - What kinds of questions would you ask the client about the client's background and current and future circumstances?
   - What kinds of questions would you ask the client about the other party's background and current and future circumstances?
   - In addition to the proposed contract, what kinds of documentation should the client bring for the supervising attorney's review?
2. A client is seeking a divorce and has a signed prenuptial contract that the soon-to-be ex-spouse is seeking to enforce.
   - What kinds of questions would you ask the client about the client's background, and the client's past, current, and future circumstances?
   - What kinds of questions would you ask the client about the other party?
   - How would you investigate questions of voluntariness and fairness?
   - In addition to the proposed contract, what kinds of documentation should the client bring for the supervising attorney's review?
   - Are there any other persons whom you'd like to speak with regarding the client's situation?

Paralegal Roles

Whether a client comes to the law office requesting a marital contract, asking about the advisability of signing a proposed marital contract, or seeking to enforce a marital contract, the paralegal's role is to support the supervising attorney in providing legal services and acting as a liaison between the client and the supervising attorney. Typical tasks include interviewing the client, requesting documents and other information from the client, conducting factual investigation and/or legal research, drafting documents as directed by the supervising attorney, and facilitating the signing of documents.

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9.3: Introduction to Spousal Support

Married couples often make financial decisions about their careers and education based on an expectation that they will support one another financially, and also make decisions to share property (unless they have agreed otherwise in a marital contract). These decisions can sometimes result in a disparity in income and property ownership in the event of a divorce. When this occurs, the court is often asked to enter orders addressing the potentially unfair economic impact a divorce may have on a spouse's income-earning potential. The following discussion assumes that the parties have not entered into a marital contract or separation agreement that covers these issues in the event of a divorce.

What is Spousal Support/Maintenance?

Spousal support (also known as maintenance, spousal maintenance, or alimony) is defined as money paid by one spouse to another spouse as financial support during legal separation or after a divorce. In the past, orders for long-term spousal support were fairly common, especially after long-term marriages; however, such orders are not automatic and are becoming rarer.

Definition: Spousal Support

Spousal support: Money paid by one spouse to another spouse as financial support during a legal separation or after a divorce.

When spousal support is ordered, it is typically either based on spousal rehabilitation or reimbursement.

- **Rehabilitative spousal support** is awarded to provide financial stability to the lower-earning spouse to allow the spouse to go back to school or undergo career training that will increase their earning capacity. The spouse may have stayed home to raise the family and care for the home instead of pursuing a career. This is short-term support until the spouse becomes self-sufficient and meets their financial needs.
- **Reimbursement spousal support** is intended to repay one spouse for their contributions to the marriage. For example, one spouse may have financially supported the other while they attended school or training to increase the other spouse's income. This spouse may have even paid for the other spouse's training and higher education costs. This form of spousal support helps to balance the benefits the other spouse receives from that support.

Investigation Relating to Spousal Support/Maintenance.

Information relating to spousal support is obtained from many sources. Although the client should be the starting point of information gathering (see Chapter 3), legal practitioners also should plan to investigate

- Public employment, education, and business records for both spouses
- Income tax records for both spouses
- Court records (including judgments, bankruptcy, and pending claims) for both spouses
- Credit reports
- Social media

Once a divorce action has been filed, discovery tools such as **interrogatories,** and **depositions** can be used. The parties can also use **Requests for Production** to obtain information.

Definition: Terms Relating to Discovery

Interrogatories: Written questions that must be answered in writing and signed under oath.

Depositions: Oral questions that must be answered under oath.

Requests for Production: Written requests for copies of documents or to inspect computers or premises.

Suggested topics and document requests include

- Employment information for the past 10 years, including
  - employer contact information

  - job title and job description
  - salary and other compensation, deferred compensation, benefits (including insurance, retirement, profit sharing, etc.)
  - expectations of future promotions, raises, bonuses, etc.
  - pre- and post-tax deductions from paychecks of current employer
  - copies of employment contracts
- Business information (especially if self-employed), including
  - description of ownership (including purchase and sale of business)
  - contact information for all financial and legal advisors consulted regarding the business
- Other income information including
  - copies of federal, state, and local income tax returns and supporting schedules and documentation for the individual and any business in which the spouse has an ownership interest
  - names of all banks and other financial institutions where the spouse makes deposits has investments, or receives money; include account numbers and copies of statements
  - detailed description of government benefits such as social security, unemployment compensation, workers' compensation
  - information regarding current or potential litigation
  - information regarding any other source of income, including trusts, contracts, and previous court orders
- Health and disability insurance policies
- Education, training, licensing, and certification information
  - describe each credential, including when and from which entity it was earned/received
  - state who paid the costs associated with obtaining each credential, including by providing indirect or direct financial or other support/assistance
- Physical and mental health status (past, present, anticipated future)
- Description of any past or present disabilities that limit the ability to perform work, including details regarding treatment, treatment providers, etc.

Initial Order for Spousal Support/Maintenance

The amount of spousal support is based on many factors, which vary by state, and courts have a lot of discretion with respect to whether to order spousal support and if so, how much and for how long. Most state statutes require the court to consider the following factors:

- Length of the marriage
- Age, physical condition, emotional state, and financial situation of both spouses
- Earning capacity of both spouses, based on education, training, skill, and experience
- Length of time the payee spouse would need to acquire education or training to become self-sufficient
- The ability of the payer spouse to support themselves while paying spousal support
- Standard of living established during the marriage

Wisconsin's statutory factors for granting spousal support (maintenance) are located in Section 767.56. Wis. Stats.

Payment of spousal support can take many forms, which can be negotiated by the parties. The most common form of spousal support is expressed as a fixed amount of monthly payments. Payments are usually required to be made pursuant to the payer spouse's regular pay schedule, which might be weekly (52 paychecks per year), bi-weekly (26 paychecks per year), or bi-monthly (24 paychecks per year). This means that the monthly amount must be converted to the correct periodic payment. In Wisconsin, the amount of monthly spousal support ordered is multiplied by .23 for weekly payers, by .46 for bi-weekly payers, and by .5 for bi-monthly payers. Additionally, in Wisconsin, spousal support is required to be paid by income assignment directly from the payer's employer to the Wisconsin Support Collections Trust Fund (WI SCTF). The payer is only allowed to make direct payments to the WI SCTF if the payer is self-employed.

Other, less common ways of calculating the amount of spousal support include

- Payment of a lump sum of the entire obligation, or larger sums based on an agreed-upon schedule. For example, suppose the total support obligation would be $120,000. The parties could agree that the payer would make a single payment of $120,000.

The parties could also agree that the payer would pay $60,000 when the divorce is granted, with the remaining payments being made in equal payments ($10,000 per month for the next six months).

- Payment of a lower lump sum or "stepped-up" payments. For example, if the payee is concerned that the payer may fall behind or stop making periodic payments, this would require the payee to take expensive and time-consuming court action to collect delinquent payments. A lower, yet guaranteed and quicker payment might be a more acceptable alternative to a higher total payment that may end up requiring the payee to expend time, money, and mental/emotional strain to collect.
- Payment of a fixed percentage of the payer spouse's earnings. This method might be used when the payer spouse's income fluctuates seasonally or due to earnings being based primarily on commission.
- Payment amounts that gradually decrease over a specified period of time ("Step-Down" support). This method might be used to "front load" support payments if the payer is nearing retirement, or as an extra incentive to the payee to become self-sufficient more quickly.
- Spousal support can also include payment toward the payee spouse's medical and dental insurance premiums or other payments as negotiated by the parties.

Additionally, spousal support orders in Wisconsin must include the requirements that, within 10 business days

- Payer and payee must notify the county child support agency of any change of address
- Payer must notify both the payee and the county child support agency of any change in employer and any substantial change in the amount of income (including bonuses)
- Payee must notify the court and the payer of the payee's remarriage.

Modifications of Orders for Spousal Support/Maintenance

Many times, a separation agreement will include a waiver by both parties of a right to seek modification of the agreed-upon spousal support. Such a provision, if incorporated into the original judgment of divorce, often results in courts refusing to modify a spousal support order unless to do so would be unconscionable pursuant to the "second look" rule. As with entering an initial spousal support order, a court must have personal jurisdiction over both parties before it can modify an existing order.

Once the court has determined it has personal jurisdiction to modify a spousal support order, the court will not do so unless there is a substantial change in circumstances justifying the modification. The change must be significant and unforeseeable at the time of the original order. Additionally, the change cannot be the result of intentional unreasonable actions by the person seeking the change, or actions taken by the payer with the intent to avoid paying spousal support. Examples of **substantial change in circumstances** may include

- Decreased earning capacity due to long-term serious illness or disability
- Bankruptcy of the payer
- Payer's reasonable decision to change jobs, retire, or go back to school
- Payer dies
- Payee cohabits, remarries, or dies
- Substantial change in the cost of living as measured by the Federal Bureau of Labor Statistics

Generally, the following ***are not*** considered substantial changes in circumstances that would justify a modification

- Payer's income has increased
- Payer cohabits or remarries
- Payer's decision to change jobs, retire, or go back to school is unreasonable or designed to avoid paying spousal support
- Payer is incarcerated
- Bankruptcy of payee
- Payee decides to quit work, change jobs, retire, or go back to school
- Either party violates orders regarding child custody, child placement/visitation, or child support

Enforcement of Orders for Spousal Support/Maintenance

Unfortunately, as previously alluded to in this chapter, spouses sometimes attempt to avoid paying ordered spousal support. If a person has not paid spousal support when it is due, the obligation is in **arrears**.

Definition: Arrears

Arrears: Payments that are due but have not been paid.

When this occurs, there are several options available to the payee to attempt to force payment:

- **Garnishment:** a court proceeding that forces a third party, such as an employer or a financial institution, to pay money owed to or owned by the debtor (the non-paying spouse) to the creditor (the payee spouse).
- **Execution:** a writ issued to an officer (usually the sheriff) to seize the debtor's property/asset (such as a boat or a car), sell it, and turn over the sale proceeds to the creditor
- **Contempt action:** a complaint to the court that the debtor has violated the court's order to pay and should be punished by imposing interest on the outstanding amount, imposing a fine, or incarceration

Some states also provide assistance to spouses seeking to enforce spousal support orders through agencies established under the Uniform Interstate Family Support Act (called IV-D agencies).

Tax Impact of Spousal Support/Maintenance

Previously, amounts paid as spousal support were considered taxable income for the payee and were deductible from the payer's gross income. As of January 1, 2019, this taxation/deduction was eliminated for new orders or agreements regarding spousal support. If the order modifies an agreement or order entered into before January 1, 2019, the pre-existing taxation/deduction continues unless the new order or agreement expressly states that the new law applies. This change in the law eliminated the incentive for some couples to disguise spousal support as property division (or property division as spousal support) as a way to gain tax advantages (property division is a non-taxable event that does not result in tax deductions or increases to taxable income).

Paralegal Roles

With respect to spousal support, the paralegal's primary roles are investigation, coordination, documentation, and management of information relating to income. The paralegal will assist the client in gathering information about the client's income and earning potential. Investigation of the other party's income and earning potential may also be necessary. Paralegals may work with investigators, accountants, and other vocational or financial experts. Once the information and supporting documentation are obtained, the paralegal will index and organize the information in preparation for negotiating the terms of the separation agreement and/or for presenting evidence during a contested divorce hearing.

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9.4: Jurisdiction Over Divorce, Spousal Support, Property Division

A marriage can only be terminated by the state, and then only if the state has power over the marriage. **Jurisdiction** is the general power a court has to act and enter orders or judgments. There are three types of jurisdiction involved in family law matters: (1) subject-matter jurisdiction, (2) *in-rem j*urisdiction, and personal jurisdiction.

Definition: Terms Relating to Jurisdiction

Jurisdiction: The general power a court has to act and enter orders or judgments.

Subject-matter jurisdiction: The power of a court over certain types of disputes or legal actions.

In-rem jurisdiction: The power of a court over a thing that is located within the State.

Personal jurisdiction: The power of a court over a person, such that the court has the authority to make someone appear in the court and obey its orders.

Venue: The particular place, County, or Court in which the legal matter can/should be heard.

Subject-Matter jurisdiction

Subject-matter jurisdiction over divorce is exclusive to the states and is governed by state statutes. In many states, including Wisconsin, all trial courts within the state have subject-matter jurisdiction over all types of civil or criminal actions, including divorce actions. Challenges to a court's subject-matter jurisdiction in divorce are rare.

In-Rem jurisdiction

In the context of divorce, the "thing" over which the court must have power is the marriage. A court will have *in-rem* jurisdiction as long as one of the parties is **domiciled** in the State. Because *in-rem* jurisdiction only requires that one of the parties be domiciled within the state, parties can easily demonstrate that the court has power to terminate their marriage. Remember, a **domicile** is a person's permanent, "legal" home, and a person can have only one (Review how domicile is established and how domicile is different from residence in Chapter 5).

Example 9.4.1

Anatoly lives in Arkansas. After he hears about a high-paying job in Oregon, he decides he no longer wants to live in Arkansas; he sells everything he owns, moves to Oregon, and signs a 1-year apartment lease. The cost of living is high and he decides that if he doesn't find a job paying at least $100,000 by November, he makes plans to move to his cousin's house in Arizona. In October Anatoly dies without having found steady employment. In this scenario, Anatoly was domiciled in Arkansas until he moved to Oregon. When he moved, he clearly intended to establish his domicile in Oregon. Although he had a potential future intent to leave Oregon and establish a domicile in Arizona, he had not yet taken definitive steps to do so when he died; in fact, his plan was not to do so until November, and then only if he didn't have the type of employment he wanted. As a result, Anatoly was domiciled in Oregon when he died.

Personal jurisdiction

In the context of divorce, personal jurisdiction is required over both parties, and particularly the person who is being asked to pay something, or whose rights or duties are being impacted by the order. In addition, to enter orders regarding the parties' income, property, or children, the court must have power over the parties being impacted by those orders. If there are challenges to a court's power in a divorce action, therefore, they most often relate to personal jurisdiction.

There are several ways a court can obtain personal jurisdiction over the spouses in a divorce:

- **Consent**: If a party starts a divorce action by filing a petition for divorce, that party (the petitioner) is agreeing that the court has personal jurisdiction over them. If the other party (the respondent) is domiciled in the state and appears in court to contest any part of the divorce action, that constitutes an agreement by the respondent that the court has personal jurisdiction over them. If both parties sign and file a joint petition for divorce, then both parties have agreed to personal jurisdiction over themselves.

- **Personal Service of Process**: After the petitioner starts the divorce action, the respondent must be given **official notice of the legal action** by hand-delivery of the petition to the respondent while the respondent is within the **state where the action was filed** (**the forum state**). This is true even if the respondent is domiciled in a different state and is within the forum state only temporarily.
- **Long-arm Jurisdiction:** If the respondent has at least some contact with the forum state, personal jurisdiction can be acquired through official notice even if the respondent is not present in the forum state. Long arm jurisdiction requires that the respondent have **minimum contacts** with the forum state, such as:
  - Respondent was previously domiciled in the forum state
  - Respondent cohabited with the petitioner in the forum state (even if only temporarily)
  - Respondent has visited the forum state

Example 9.4.2

Ted and Helen are married in Texas. After five years of a tumultuous marriage, Helen moves to California. Several months later, Helen filed a divorce action in California. Ted has never lived in nor visited California. The California court enters a judgment of divorce and orders Ted to pay spousal support (alimony) to Helen. In this scenario, because Helen is domiciled in California, the California court had the power to dissolve the marriage (in-rem jurisdiction). However, unless the California court had personal jurisdiction over Ted, the alimony order is not enforceable. If Ted has not lived in, visited, or done business in California, there are no minimum contacts with California sufficient for long-arm jurisdiction. Thus, the only way California could obtain personal jurisdiction over Ted is through his voluntary appearance in the court action and consent to the court's personal jurisdiction.

Jurisdiction: Judgment of Divorce or Annulment

As you have seen, to enter a valid judgment of divorce terminating a marriage, a court only needs subject-matter jurisdiction over divorce actions and *in-rem* jurisdiction over the marriage. As long as one spouse is domiciled within the state, these requirements have been met.

Once it has been established that a particular state has jurisdiction, we must determine the proper **venue** for the divorce or annulment action. In most states, including Wisconsin, the venue is determined by the residence of the spouses. In Wisconsin, at least one of the spouses must have resided in the County for at least 30 days, and in the State of Wisconsin for at least 6 months, prior to starting the divorce or annulment action. Section 767.301, Wis. Stats.

If one of the spouses is not domiciled in the state in which a judgment of divorce is entered, that spouse might attempt to challenge the validity of the dissolution of the marriage. There are two types of attacks against the validity of a divorce judgment: a **direct attack** and a **collateral attack.**

Definition: Attacks Against Divorce Judgment

Direct attack: An attack raised in an appeal of the original divorce proceeding in the forum state.

Collateral attack: An attack raised in a different, later proceeding, sometimes in a different state.

Whether the spouse will be successful in attacking the portion of a divorce judgment that dissolves the marriage depends on the spouse's role in the original proceeding.

A person will not be allowed to attack the validity of the judgment dissolving the marriage if that person

- Is the person who started the initial divorce action
- Appeared in court during the initial divorce action and did not raise jurisdictional challenges at that time
- Accepted other benefits (such as spousal support) based on the initial judgment
- Married someone else after entry of the initial judgment dissolving the person's first marriage, and is now seeking to invalidate the second marriage based on jurisdictional challenges to the dissolution of the person's first marriage
- Married someone who was previously divorced, and is now seeking to invalidate their marriage to that spouse by claiming the spouse's initial judgment of divorce dissolving the spouse's first marriage was invalid

This discussion applies only to jurisdiction over the portion of the judgment that dissolves the marriage. There are different requirements for the portions of the judgment ordering property division (discussed below), spousal support (discussed below), child custody and placement (discussed in later chapters), and child support (discussed in later chapters).

Order for Property Division or Spousal Support

There are two times when a jurisdictional analysis can become necessary. The first instance is when a party is starting a new legal action for divorce or annulment that seeks an initial judgment or order. The table below summarizes the types of jurisdiction necessary (in addition to subject-matter jurisdiction) for the different orders that can be a part of an action for divorce or annulment.

Initial Orders	Jurisdiction Required	How this Jurisdiction is Acquired
Property division	Personal jurisdiction over both spouses	• Personal service of process (or) • Consent to personal jurisdiction (or) • Long-arm jurisdiction over out-of-state respondent
Spousal support	Personal jurisdiction over both spouses	• Personal service of process (or) • Consent to personal jurisdiction (or) • Long-arm jurisdiction over out-of-state respondent

As long as the court entering the initial judgment of divorce had proper jurisdiction to enter these types of orders, the Full Faith and Credit Clause of the United States Constitution requires other states to enforce them.

Example 9.4.3

The spouses marry in Virginia, where they are both domiciled. A few years later, Spouse A files for divorce in Virginia, and completes proper service of process on Spouse B in Virginia. A judgment of divorce is granted and Spouse B, over Spouse B's objections, is ordered to pay spousal support to Spouse A. Spouse B moves to Nevada, establishes domicile there, and stops paying the ordered spousal support. Spouse A sues Spouse B in Nevada to enforce the Virginia spousal support order. In this scenario, Virginia had personal jurisdiction over Spouse B when the original order was entered; therefore, Nevada must enforce the spousal support order.

Example 9.4.4

The spouses marry in Colorado, where they are both domiciled. A few years later, Spouse A moves to Florida and establishes domicile in Florida. Spouse B remains in Colorado. Spouse A files for divorce in Florida. Spouse B receives notice of the divorce action in the mail; however, Spouse A does not complete proper service of process on Spouse B and Spouse B does not appear in the Florida court. Spouse B has never been to Florida. The Florida court grants a judgment of divorce and orders Spouse B to pay spousal support to Spouse A. Spouse B refuses to pay spousal support. Spouse A files an action in Colorado to enforce the Florida spousal support order. In this scenario, the Florida court had *in-rem* jurisdiction to dissolve the marriage. However, there was no personal jurisdiction over Spouse B when the original order was entered; therefore, Colorado does not have to enforce the spousal support order.

Modification of Spousal Support Order

What if a party wants a court to modify an existing order for spousal support that was entered as part of a judgment for annulment or divorce? This is the second scenario requiring a jurisdictional analysis. If the original order was entered after a trial in a contested divorce, a court may be willing to consider a party's request for a modification. The party seeking the modification must demonstrate that the modifying court has power over the original order for spousal support. Courts in the same state as the court that entered the original order (the **initiating state**) have *in-rem* jurisdiction over the original order. Courts from other states will only have jurisdiction over the original order if the spouse seeking the modification is domiciled in the new state and takes steps to certify the order to the new state.

Regardless of where the modifying court is located, it must also have personal jurisdiction over the responding party (the one who is not seeking modification). Thus, a similar jurisdictional analysis to what we saw above becomes necessary.

If the order for spousal support was entered based on the parties' separation agreement, the terms of that agreement may prevent its modification. If, in the agreement, the parties agreed to waive their right to seek modification of property division or spousal support, most courts will enforce that waiver unless to do so would be unconscionable under the "second look" doctrine.

Impact of Other Circumstances on Property Division or Spousal Support

Circumstances outside of attempts to enforce, attack, or modify spousal support or property division orders can also impact those orders. The impacts can differ depending on if they affect the **payee (the recipient of property division or spousal support)** or the **payor (the person obligated to provide property or payment).** The table below summarizes some of them.

Circumstance	Spousal Support	Property Division
Bankruptcy	No impact on payee or payor; spousal support order continues	• Chapter 7: no impact on payor • Chapter 13: payor's obligation can be discharged if all outstanding spousal and child support obligations have been met
Remarriage	• Payee's remarriage terminates spousal support payments • Payor's remarriage does not terminate spousal support payments	No impact on payee or payor; property division order continues
Cohabitation	• Payee's cohabitation may terminate spousal support payments • Payor's cohabitation does not terminate spousal support payments	No impact on payee or payor; property division order continues
Death	• Payee's death terminates spousal support payments • Payor's death terminates spousal support payments unless a separation agreement provides otherwise	No impact on payee or payor; property division order continues

Next, we will explore the differences between spousal support and property division.

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9.5: Introduction to Property Division

When a marriage is terminated, the property owned by the couple (as well as their debts), must be divided. Most of a couple's property, including assets such as retirement interests, can be divided in a divorce. **Property** includes real property, personal property, pensions/retirement assets, and business interests. The following discussion assumes that the parties have not entered into a marital contract or separation agreement that covers property division in the event of a divorce.

The Process of Property Division

The process of dividing property between the spouses can be complex. Generally, there are four steps:

1. Identifying and locating all property owned by the spouses
2. Determining the value of each item of property
3. Classifying each item of property as divisible or non-divisible
4. Applying equitable distribution factors

1. Identifying and Locating Property

Helping a client identify all the property owned by the client and by the client's spouse is one of the most difficult and time-consuming tasks in a divorce matter. The existence of physical property is sometimes "forgotten" and/or concealed by one or both spouses. Although the client should be the starting point of information gathering (see Chapter 3), legal practitioners also should plan to investigate

- Public real property, personal property, and business records for both spouses
- Income tax records for both spouses
- Social media

Using interrogatories, depositions, and requests for production (written requests for copies of documents or to inspect computers or premises) is essential to locating property owned by the other spouse. Suggested topics and document requests include

- Copies of federal, state, and local income tax returns and supporting schedules and documentation for the individual and any business in which the spouse has an ownership interest
- Detailed description of any residences or other real property, including
  - Location, address, and legal description
  - Description of interest, including nature (ownership, possession, lease, etc.), when, from whom, how, and why it was acquired
  - Source and amount of funds or other consideration used to acquire the interest
  - Description of improvements made (new or renovated structures, repairs, etc.) including when, by whom, and how they were made, as well as source and amount of funds or other consideration expended
  - Liens or loans associated with the property, including lienholder, amount owed, and source of payment toward principal
  - Value, including market value at the time of acquisition, tax-assessed value, and current value
  - Income generated by the property
  - Current condition of the property, including repairs or other improvements needed
  - Documentation relating to all of the above, including titles, loan applications, loan statements, tax records, etc.
- Detailed description of interests in personal property (similar questions and documentation to that for real property) including
  - Vehicles of any kind
  - Bank accounts, annuities, mutual funds, securities, stocks, retirement accounts, educational accounts, or financial investments of any kind (include monthly statements)
  - Personal property such as jewelry, art, collectibles, furnishings, appliances, tools, etc.
  - Intellectual property, including licensing and royalties
  - Trusts created by the other spouse or in which the spouse has an interest of any kind
- Detailed description of all debts, liabilities, or other obligations under contracts, promissory notes, and loans of any type (including purchase, private, or government loans), using questions and documentation requests similar to those above

- Detailed description of outstanding judgments and pending or potential lawsuits against the other spouse. Include all case information and documentation
- Insurance policies (life, property, disability, annuity, etc.), including copies of policies and descriptions of claims made in the past 5 years

2. Determining Value of Property

The value of a property needs to be determined at several points in time: the date on which the property was purchased/acquired, the date of the spouses' separation, and the date of the divorce. Purchase documents, account statements, and the like are a good starting point. Some types of property can **appreciate** (**increase in value**), or **depreciate** (**decrease in value**), or are subject to fluctuations in market value. In those circumstances, hiring a financial expert such as an accountant, appraiser, or other advisor is recommended.

Definition: Terms Relating to Property Value

Appreciate: Increase in value

Passive appreciation: Increase in value due to inflation or other market conditions

Active appreciation: Increase in value due to efforts of the owner, such as capital improvements

Depreciate: Decrease in value

Dissipation: Intentional and improper reduction or waste of property or property value

Classifying Each Item of Property

In other classes, you may have learned about different classifications of property, such as real property (land, permanent buildings, permanent fixtures, permanent plants/trees) and personal property (all other items of property including tangible things, money, and intellectual property). In the context of divorce, property is classified as either divisible or non-divisible. Whether an item of property is divisible or non-divisible depends on a variety of factors relating to how and when the property was acquired and what happened to the property during the marriage.

Under Wisconsin's Marital Property Law (Chapter 766 of the Wisconsin Statutes), **all property owned or acquired by a couple during their marriage** is presumed to be **marital property**. Marital property is generally divisible.

Individual property is defined as

- Property a spouse owned before the marriage
- Property given by a third party to only that spouse during the third party's life or as a disposition at the third party's death (for example, under a will, trust, or a life insurance policy)
- Any increase in value (appreciation) of individual property (unless it became mixed with marital property)
- Money received as a result of injury claims unless the recovery relates to repair or replacement of marital property or marital income/earnings
- Property removed from the marital property law pursuant to an "opt-out" agreement that the couple signed

Individual property generally is not divisible unless it has been commingled (**mixed or combined**) with marital property. There are several ways individual property can become commingled with marital property. For example, suppose one spouse had a financial investment prior to the marriage, like a mutual fund, that the spouse inherited from the spouse's parent. It remains the individual property of that spouse unless it becomes mixed with marital property. This can happen if, after the marriage, the spouse makes additional contributions to the mutual fund out of the spouse's paycheck; the same is true if the spouse receives money from the mutual fund to pay family expenses. Another example would be a spouse who owned real property with a small cottage on it prior to the marriage (and there was no lien or mortgage on the property). After the marriage, if marital funds or labor are used to significantly upgrade or build an addition to the cottage, the increased value would be marital property (though the value of the land and cottage prior to this activity would remain individual property).

In Wisconsin, all property in possession of the spouses is presumed to be divisible (in the absence of a marital contract to the contrary). If a spouse wants to claim any item of property as non-divisible property, that spouse must be prepared to provide

detailed information regarding

- Date the property was acquired
- The manner in which the property was acquired (gift from a third party, purchase, exchange for other property interest, etc.)
- Source of funds used to purchase the property
- The market value of the property when acquired
- Appreciation of the property's value, and whether the appreciation was **passive or active**
- Source of funds used for capital improvements

If marital property of any kind (including income, other property, or even labor of one of the spouses) was used to purchase, maintain, or improve individual property, there is a possibility that the individual property may have become commingled with marital property and thus be treated as marital property to some extent. A spouse wanting to claim commingled property as non-divisible will need documentation allowing all or part of the property to be traced to individual property.

Applying Equitable Distribution Factors

The goal of property division is **equitable distribution: the fair and just – but not necessarily equal – distribution of property between the spouses.** Similar to spousal support, the equitable distribution of property depends on many factors, such as:

- Length of the marriage
- Contribution of each spouse to the acquisition, preservation, or increase/decrease in value of all assets (including contributions of stay-at-home spouses)
- Contribution of each spouse to the other spouse's education, training, or increased earning power
- Income and property of each spouse at the time the marriage was entered
- Current and future sources of income (including ordered spousal support) for each spouse, including employability and vocational skills, as well as retirement, insurance, and other benefits
- The amount of spousal support awarded to either spouse
- The desirability of keeping any asset (for example, a business) intact and undivided
- The importance of allowing one spouse to keep the marital home, especially if there are minor children
- Intentional and improper reduction or waste of marital assets (**dissipation**) by a spouse
- Age, physical condition, mental/emotional state, and financial situation of both spouses
- Standard of living established during the marriage

In Wisconsin, the court is required to presume that all divisible property should be divided equally between the spouses. Also, Wisconsin Statutes allow the court to consider the following factors in addition to those listed above:

- Whether one of the spouses has substantial non-divisible assets
- Whether refusal to divide a spouse's non-divisible property would create a hardship for the other spouse or for the children of the marriage.

Thus, it is possible that even individual property may be divided in some circumstances.

What About Debts?

In most cases, when it comes to division at divorce, debts are treated the same as property. Debts existing at the time of separation are presumed to be martial debts and can be assigned to either spouse (or both) upon divorce. Courts will apply the same classification rules and equitable distribution factors to debts. One important caveat: ***assignment of debt pursuant to a property division order or judgment of divorce is not binding on creditors.*** Thus, if one spouse is ordered to pay off debt owed on a credit card issued jointly to both spouses, the creditor can choose to take action against either or both spouses if the debt is not paid. If a spouse ends up paying a debt that was assigned to the other spouse, the remedy is to seek reimbursement through court action against the spouse to whom the debt was assigned.

Modification and Enforcement of Orders for Property Division

Because property division is usually "one and done" and is not an order for ongoing payment, orders for property division are almost never modified unless the payor/payee demonstrates that the original order was the result of fraud. Similarly, the enforcement of property division orders also looks different from the enforcement of spousal support orders.

Enforcing, or more accurately, putting into effect, a property division order usually involves the following steps:

- Physical transfer of possession of property between the spouses
- Changing the title to real property and any personal property that has ownership documentation (such as a title for a vehicle)
- For property that is subject to an existing lien (such as a mortgage or vehicle financing agreement), the recipient spouse must pay off the existing lien, or release the other spouse from the lien by refinancing the remaining balance of the existing lien
- Payment of a lump sum designed to "equalize" unequal total value of property actually distributed to the spouses
- Close all joint bank, credit card, and other financial accounts (and open individual accounts)
- Execute and implement a **Qualified Domestic Relations Order (QDRO),** which orders a spouse's company or plan administrator for a pension, 401k or similar retirement plan to divide the value of the plan and provide it to the other spouse.

Paralegal Roles

With respect to property division, the paralegal's primary roles are investigation, coordination, documentation, and management of information. The paralegal will assist the client in gathering information about the client's property and its value. Substantial investigation of the other party's property and its value may also be necessary. Paralegals may work with investigators, appraisers, accountants, and other financial experts. Once the information and supporting documentation is obtained, the paralegal will index and organize the information in preparation for negotiating the terms of the separation agreement and/or for presenting evidence during a contested divorce hearing.

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9.6: Introduction to Legal Actions Impacting Marriage

Unfortunately, not everyone who marries stays married. Sometimes marriages deteriorate beyond repair or weren't properly entered into in the first place. Other times, married persons know something is wrong in their marriage but they aren't yet sure they want to terminate the marriage. Because there are multiple circumstances that can lead to marital troubles, there are multiple legal actions the parties can take that will impact their marriages in different ways. These legal actions are annulment, divorce, and legal separation.

Definition: Terms Relating to Legal Actions Impacting Marriage

Annulment: A court declaration that a valid marriage never existed, despite the fact that the parties may have completed most or all of the steps required to enter into a marriage. This is not the same as a religious or "church" annulment; it is a court order obtained pursuant to state law. It is based on a determination that either the essential requirements of marriage were not met, or that there were significant irregularities that resulted in the procedural/technical requirements of marriage not being met

Divorce: A court declaration terminating an existing valid marriage. There is no question whether the parties entered into a valid marriage; however, when a divorce judgment is entered, the parties are no longer married to each other.

Legal separation: A court declaration that allows the parties to live apart from one another without terminating their marriage. Similar to a divorce, there is no question whether the parties entered into a valid marriage; however, unlike a divorce, a judgment of legal separation does not terminate the parties' marriage.

Aside from the impact on the parties' marital status, annulments, divorces, and legal separations look very similar to one another. The table below shows a side-by-side comparison.

Legal Action	Definition	Impact on Marital Status	Potential Court Orders
Annulment	A court declaration that a valid marriage never existed	"Like it never even happened" The parties were never married	• Marriage is dissolved • Property division • Spousal support • Child custody, placement and visitation • Child support
Divorce	A court declaration terminating an existing valid marriage	"It's over now" The parties used to be married and now they are no longer married	• Marriage is terminated • Property division • Spousal support • Child custody, placement and visitation • Child support
Legal Separation	A court declaration that allows the parties to live apart from one another without terminating their marriage	"It's complicated" The parties are still married, but they don't live together anymore	• Property division • Spousal support • Child custody, placement and visitation • Child support

Annulment

Annulment is fairly rare, due to the limited **reasons that are legally sufficient (grounds)** required to obtain an annulment. Historically, the grounds for annulment have been divided into two categories: (1) grounds that render the marriage void and (2) grounds that render the marriage voidable. Though both categories are comprised of serious problems with the marriage, problems that render a marriage void are far more serious.

Definition: Terms Relating to Annulment

Void marriage: A marriage that is invalid from the beginning, even if there is never a court judgment of annulment.

Voidable marriage: A marriage that is invalid only if a court enters a judgment of annulment.

Legal standing: The right to file a claim or bring an action seeking that judgment.

A **void marriage** is invalid from the beginning, even if there is never a court judgment of annulment. That being said, in reality, the courts are often asked to enter judgments of annulment for void marriages so that there is a public record.

In contrast, a **voidable marriage** is invalid only if a court enters a judgment of annulment. That means the marriage can continue and will be treated by the law as if it were valid unless and until someone files a court action to have the marriage declared invalid. Voidable marriages can be **ratified (or approved retroactively) through action, inaction, or other conduct or agreement by the parties that can be reasonably interpreted as an approval.** For example, suppose that Spouse A was underage when the marriage occurred, and Spouse B was not aware that Spouse A was underage. If Spouse B continues to live with Spouse A after discovering that Spouse A is underage, this would be interpreted as a ratification or approval of the marriage by Spouse B.

When a marriage is voidable, a person seeking a judgment of annulment must demonstrate **legal standing.** Generally speaking, only the "innocent party" has standing to seek an annulment. The equitable "clean hands doctrine" (which you learned about in previous chapters) provides that it would be unfair to allow a person to profit from their own wrongdoing or other inappropriate behavior. As a result, if a marriage is voidable due to deceitful, coercive, or other wrong behavior by one of the parties, that party is estopped (legally prevented) from asserting a right, a cause of action, or a defense.

At this point, it may be helpful to review Chapter 5 with respect to the requirements for marriage, as well as for an explanation of marriage by estoppel. The Tables below summarize the different grounds for annulment.

Void Marriages

Grounds	Definition	Marriage requirement impacted	Can the marriage be ratified by the parties?	Who can seek annulment?
Prior existing marriage	At the time of the current marriage, one or both parties was still legally married to someone else.	Legality of marriage	No However, the marriage can be validated if the prior spouse is "presumed dead"	Either party
Improper relationship by blood or marriage	The parties are too closely related by blood (may include adoption) or through marriage of other family members (may include step-family relations)	Legality of marriage	No	Either party
Sham marriage	One or both parties never had actual intent to marry and live as spouses. Instead, they married for improper reasons (for example, to avoid deportation or gain financial benefits)	Intent to marry	No	Either party

Voidable Marriages

Grounds	Definition	Marriage requirement impacted	Can the marriage be ratified by the parties?	Who can seek annulment?
Underage	One or both parties did not meet statutory age requirements	Capacity to marry	Yes, by cohabiting as married persons after reaching the minimum required age and/or after discovering that the other person was underage	Either party, unless one party lied about their age. A parent or legal guardian may also have standing, but must bring action within 1 year of obtaining knowledge of the marriage
Mental disability	One or both parties suffered from a mental health condition (capacity) or influence of drugs, alcohol, or medication that prevented the person from understanding the rights and obligations of marriage	Capacity and/or intent to marry	Yes, during a "lucid interval" of the affected person (mental health condition). Yes, by cohabiting as married persons after the influence no longer impairs the person's understanding	The "innocent" or impaired party. A parent or legal guardian of a person lacking capacity to consent may also have standing Action must be started within 1 year of obtaining knowledge of the condition
Duress	A party was coerced to marry by unlawful force or threat	Intent to marry	Yes, by cohabiting as married persons after the condition causing the duress no longer exists	Only the "innocent party" Action must be started within 1 year of obtaining knowledge
Fraud	A party's intent to marry was based on the other party's intentional misrepresentation or concealment of an essential fact	Intent to marry	Yes, by cohabiting as married persons after discovery of the fraud	Only the "innocent party" Action must be started within 1 year of obtaining knowledge
Physical disability	One or both parties has a physical condition preventing consummation of the marriage through sexual intercourse	Capacity to marry	Yes, by cohabiting as married persons after discovery of the physical disability	Only the "innocent party" who lacked knowledge of the other's condition. Action must be started within 1 year of obtaining knowledge

Once a judgment of annulment is entered, the parties are free to marry other persons (after a 6-month waiting period, in Wisconsin). Parties wishing to "reconcile" must complete the process to enter into a valid marriage according to Wisconsin statutes (in other words, they must remarry each other).

Divorce

In many respects, divorce is much simpler than annulment. Most states have adopted statutes that provide for **no-fault divorce, meaning that a divorce will be granted without the need to prove any type of marital misconduct wrongdoing.** In fact, allegations of marital misconduct (other than physical or mental abuse) are irrelevant in no-fault divorce states and have no impact on any court orders that may be entered as part of a divorce judgment.

In Wisconsin, a court may enter a **judgment of divorce** based on ***any one*** of the following **grounds**:

- Both parties state under oath that the marriage is "**irretrievably broken**."
- Only one party states oath that the marriage is "irretrievably broken." (The other party denies that the marriage is irretrievably broken) and the parties have voluntarily lived apart continuously for at least 12 months
- Only one party states an oath that the marriage is "irretrievably broken." (The other party denies that the marriage is irretrievably broken) and the court determines there is no reasonable prospect of reconciliation

In other words, Wisconsin does not allow one spouse to prevent the entry of a judgment of divorce by objecting to the termination of the marriage or denying that the marriage is irretrievably broken. Although the court may delay the matter for up to 60 days and suggest the parties undergo marital counseling, if after that time one of the parties continues to state under oath that the marriage is irretrievably broken, a divorce judgment may be entered.

Wisconsin does allow the parties to seek a court order suspending the divorce proceedings for up to 90 days if they want to attempt to reconcile. If the parties are unsuccessful and the suspension is revoked by either party or the court, the action continues as if there had been no attempt to reconcile.

Once a judgment of divorce is entered, the parties are free to marry other persons (after a 6-month waiting period, in Wisconsin). Parties wishing to "reconcile" must complete the process to enter into a valid marriage according to Wisconsin statutes (in other words, they must remarry each other).

Legal Separation

Sometimes one or both parties simply are not ready to terminate their marriage. The parties may not be emotionally ready to accept the finality of a divorce or may have spiritual or religious reasons for being opposed to divorce. Financial or other practical circumstances might also make divorce unappealing. For these people, legal separation is seen as a "trial divorce" that gives the parties physical and emotional space to consider whether they wish to seek a "full and final" divorce.

In Wisconsin, the grounds for **legal separation** are similar to the grounds for divorce, except that a party only needs to state that the marriage is "**broken**" rather than stating that it is irretrievably broken. If, prior to judgment, the parties change their minds, they can request that the action for legal separation be dismissed. Once a judgment of legal separation is entered, parties wishing to "reconcile" can request a revocation of the judgment.

An action for legal separation can also be converted to an action for divorce. Prior to entry of a judgment for legal separation, if one or both of the parties in a legal separation action state under oath that the marriage is irretrievably broken, the action will be converted to an action for divorce. If the judgment for legal separation has been entered, the parties must wait at least one year before seeking to convert the judgment to a judgment of divorce.

Impact of Annulment, Divorce, and Legal Separation

Because of the different ways each type of judgment affects marriage, the impact of each judgment on involved parties' other relationships, rights, obligations, and benefits differs as well. The table below summarizes those impacts under Wisconsin law.

Impact	Annulment	Divorce	Legal Separation
Right to inherit from the other party	Terminated	Terminated	Continues
Provisions in a will signed prior to judgment giving gifts or powers to the "former spouse" or to the "former in-laws"	Void	Treated as if the "former spouse" or "former in-laws" pre-deceased	No impact, as the parties are still legally married
Spousal privilege (prevents spouses from being forced to testify against their spouses)	Destroyed	Terminates for actions or circumstances that happened ***after*** the judgment	Continues
Interspousal tort immunity (prevents spouses from suing one another based on certain types of claims)	Terminates for actions or circumstances that happened ***after*** the judgment	Terminates for actions or circumstances that happened ***after*** the judgment	Continues
Government benefits (for example, social security payments)	Individual benefits may be reinstated No qualification for spousal benefits	Individual benefits may be reinstated Qualification for spousal benefits for marriages that lasted at least 10 years	Benefits may be reduced
Health insurance coverage	Coverage for ex-spouse terminated when judgment is entered	Coverage for ex-spouse terminated when judgment is entered	Coverage for spouse ***may*** be terminated when judgment is entered, depending on the policy language
Beneficiary designations under life insurance, retirement benefits, annuities, etc.	Unclear; depends on the insurance policy or plan documentation	Likely terminated; retirement benefits and annuities may be divisible	Unclear; depends on the insurance policy or plan documentation

Children born of annulled marriages are not impacted. The law continues to treat them as "marital children" with rights to support, inheritance, and other benefits from both parents.

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9.7: Considerations in Child Custody Orders

The ultimate goal with respect to orders impacting children is to foster and encourage the child's well-being, health (mental, emotional, physical), security, and emotional development into young adulthood, while at the same time preserving the Constitutional rights of the parents. Fortunately, in most cases, the parents are able to agree regarding legal custody and physical placement of their children. Most states have established procedures that encourage the parties to agree, based on the theory that the parties are more likely to abide by orders based on their agreement. When legal custody is disputed, however, the courts must intervene.

Initial Order for Legal Custody and Physical Placement

Legal custody and physical placement laws are fairly similar across all 50 states, with the overriding factor being the **best interest of the child**. How the best interest of the child is defined varies by state, and courts have a lot of discretion with respect to what is in a specific child's best interest.

In Wisconsin, joint legal custody is presumed to be in the child's best interest. Similarly, courts are directed to "set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households."

In addition to those presumptions, Wisconsin statutes require the court to consider the following factors when determining what is in the child's best interest:

- The wishes of the child's parents as contained in a proposed parenting plan or stipulation
- The wishes of the child, as communicated by the child or through the child's guardian ad litem or other appropriate professional
- The cooperation and communication between the parents, and whether either parent unreasonably refuses to cooperate or communicate with the other parent.
- Whether each parent can support the other parent's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one parent is likely to unreasonably interfere with the child's continuing relationship with the other parent.
- The interaction and interrelationship of the child with his or her siblings, and any other person who may significantly affect the child's best interest.
- The interaction and interrelationship of the child with his or her parent or parents and the amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles, and any reasonable lifestyle changes that a parent proposes to make to maximize placement with the child.
- Whether a parent, someone who resides in the parent's household, or someone in a dating relationship with a parent has or had a significant problem with alcohol or drug abuse.
- The child's adjustment to the home, school, religion, and community.
- The age of the child and the child's developmental and educational needs at different ages.
- Whether the mental or physical health of a parent, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.
- Whether a parent, someone who resides in the parent's household, or someone in a dating relationship with a parent has a criminal record or has engaged in abuse of the child or any other child or neglected the child or any other child.
- Whether there is evidence of interspousal battery or domestic abuse
- The reports of the appropriate professionals, if admitted into evidence.

Some courts also consider the "stability" and "continuity" of the parent's household, as well as the parent's "availability" to respond to the child's day-to-day needs. These courts look at the proportion of time each parent spent performing caretaking functions (for example, taking the child to appointments, helping with homework, changing diapers, etc.) prior to the divorce or paternity action.

Unfit Parents

Unless a person is deemed "unfit," the law cannot interfere with that person's fundamental rights to be a parent. Although there is no specific definition of what makes a parent "unfit," again there is some language in the Wisconsin statutes that provides some insight:

- The "court shall presume that joint legal custody is in the best interest of the child." However, there is "a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party" if the court "finds by the preponderance of the evidence that a party has engaged in a ***pattern or serious incident of interspousal battery or domestic abuse***." Section 767.41(2)(d), Wis. Stats. (emphasis added). Click on the link and read the statute for details about what needs to be proven and how the rebuttable presumption may be overcome.
- "A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would ***endanger the child's physical, mental or emotional health***." Section 767.41(4)(b), Wis. Stats. (emphasis added),
- A party "is not capable of performing parental duties and responsibilities or does not wish to have an active role in raising the child." Section767.41(2)(b)2.a., Wis. Stats.
- A party unreasonably refuses to cooperate with the other party. Section 767.41(2)(b)2.c. and 767.41(2)(c), Wis. Stats.

The following circumstances ***do not*** make a parent "unfit" and thus are not grounds for denying legal custody or, at a minimum, visitation:

- Failure to pay court-ordered child support, family support, or spousal support. 767.41(4)(c), Wis. Stats.
- A party is (or is not) a certain gender or race. 767.41(5)(am), Wis. Stats. Gender or race also cannot be a ground of "preference" regarding granting legal custody and/or physical placement
- With respect to legal custody, military service of a parent, including whether the service member has been or may be called to active duty and consequently is, or in the future will be or may be, absent from the service member's home. 767.41(5)(c), Wis. Stats.
- With respect to legal custody, a parent's incarceration. Also, a court may order the child to visit the parent while the parent is incarcerated.

Generally speaking, a parent (or the parent's circumstances) will not be seen as "unfit" unless there is evidence of harm to the child's best interest that would justify restricting a parent's right to legal custody or physical placement. While domestic violence, child abuse (physical or sexual), or other crimes committed against the child or the other parent, and threats to kidnap the child present fairly clear justifications for restrictions (such as supervised placement and exchange/transfer of the child), they do not always justify outright denial of legal custody or physical placement. Similarly, other issues such as parental substance abuse or the parent's sexual conduct (hetero- or homosexual) may justify restrictions against engaging in specific conduct while the child is placed with that parent, but they do not always justify greater restrictions such as supervised placement.

Grounds for Modifications of Orders for Legal Custody and Physical Placement

Chapter 11 discussed the court's jurisdiction to modify an existing legal custody or physical placement order. Once the court has determined it has jurisdiction, a modification must be determined to be in the best interest of the child and also justified by one of the following factors:

- A substantial change in circumstances has occurred since the original order, OR
- Relevant facts have come to light that were not available to the Court at the time the original order was entered

What constitutes a **substantial change in circumstances** is not specifically defined in the statutes. Some examples may include

- Significant changes in the child's health, education, or other needs
- Relocation by one parent may impact time with the child
- Evidence of substance abuse or other criminal behavior by a parent
- A change in a parent's work hours
- Adjustment to home or school
- Other circumstances that make it impractical to continue the current placement order
- Failure to effectively communicate or co-parent with the other party regarding the child(ren)

- A parent's repeated unreasonable refusal to allow the other parent to exercise court-ordered physical placement

Wisconsin imposes additional requirements on courts determining whether to modify an existing order:

- There is a rebuttable presumption that continuing the current order regarding legal custody and physical placement is in the best interest of the child. Section 767.451(1)(b), Wis. Stats.
- A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification

Moreover, in Wisconsin modification of existing legal custody and physical placement orders ***is not allowed before 2 years*** have passed after the initial order ***unless*** the requesting party shows by ***substantial evidence*** that the ***modification is necessary*** because the ***current*** custodial conditions are ***physically or emotionally harmful*** to the best interest of the child. Section 767.451(1)(a), Wis. Stats. (emphasis added). This restriction imposes higher evidentiary standards with respect to the burden/amount of proof required (substantial evidence rather than a preponderance of the evidence) as well as the justification (a change must be necessary – there is no other alternative available to protect the child). The reason for this restriction is to provide for a transition or "cooling off" period during which the child(ren) and the parents can adjust to life under the existing order without the parents continually going back to court seeking changes.

Failure to exercise ordered physical placement.

There can be numerous reasons why a parent does not exercise their right to physical placement as ordered by the court. In Wisconsin, if a parent "has repeatedly and unreasonably failed to exercise periods of physical placement awarded under an order of physical placement that allocates specific times for the exercise of periods of physical placement" the court is allowed to modify the order. Section 767.451(2m), Wis. Stats. This is sometimes referred to as Wisconsin's "use it or lose it" law. Additionally, an unreasonable failure to exercise court-ordered physical placement can also result in the party being required to reimburse the other parent for financial losses and expenses resulting from that failure. Section 767.471(5)(c), Wis. Stats.

Relocation of the child.

In our mobile society, it's not uncommon for issues concerning relocation to arise in the context of a parent's job change/reassignment or a parent's to move closer to other family members. When one parent's desire to relocate impacts the child's ability to enjoy an ongoing relationship with the other parent through meaningful and regular physical placement, the courts are often asked to intervene.

Like many states, Wisconsin places restrictions on parents desiring to relocate with the child. Section 767.481, Wis. Stats. The procedural requirements are designed to ensure adequate notice and opportunity to object to the child's relocation. Specifically, prior to relocating, a parent intending to relocate with the child 100 miles or more from the other parent is required to file a motion with the court requesting permission to relocate. Once the motion is filed, the court must hold an initial hearing on the motion within 30 days. The parent is not allowed to relocate the child before the initial hearing occurs.

Once the initial hearing is scheduled, the motion must be mailed immediately to the other parent and is required to include all of the following:

1. A relocation plan including date, municipality, and state of relocation, and the reason for the relocation
2. A proposed new physical placement schedule, including allocation between the parents for the cost of transporting the child between the parents
3. A notice to the other parent of the initial hearing date and time, the parent's right to object, the procedure for objecting, and a court-provided Objection to Relocation form.

Once the motion is filed, if the other parent wishes to object to the relocation, that parent must file and serve the Objection to Relocation form on the other parent, at least 5 days prior to the date on which the hearing is scheduled. If the objecting party does not attend the hearing, the court must approve the relocation plan unless it is not in the best interest of the child. If the objecting party appears at the initial hearing, the court must enter an order

- Requiring the objecting party to explain, in writing, the basis for the objection, and to submit an alternative proposal for physical placement with cost allocations
- Referring the parties to mediation (unless it would cause undue hardship or endanger the health or safety of a party)
- Appointing a guardian ad litem for the child to investigate, in the event mediation is not successful

- Setting a final hearing date to be held within 60 days
- Allowing temporary relocation pending the outcome of the final hearing, if the relocation is in the child's "immediate" best interest.

In determining whether to approve the proposed relocation plan, the court is to apply the same factors used to determine the child's best interest for an initial legal custody and physical placement order. Additionally, presumptions in favor of approval are applied if the objecting parent has not significantly exercised existing court-ordered physical placement, or if the objecting parent has engaged in abuse of the child or the other parent.

If the parents already live more than 100 miles apart when one of them desires to relocate with the child, court permission to relocate is not required. However, written notice of the intent to relocate (including the date of the move and new address) must still be served on the other parent at least 60 days before the relocation.

Enforcement of Legal Custody and Physical Placement Orders

As you have already learned in Chapter 11, the Full Faith and Credit Clause, the PKPA, and the UCCJEA require states to enforce legal custody and physical placement orders properly entered in other states. As a practical matter, however, enforcement of these orders – even in the home state – can present challenges. Law enforcement agencies are often reluctant to assist in the enforcement of physical placement orders, and often outright refuse to do so. Thus, the primary method of enforcing these orders is through the civil contempt of court process or, in extreme cases, the criminal contempt of court process. Essentially, an aggrieved parent files an action with the court requesting that the other party be found in contempt of court for disobeying its orders. If a parent is found to be in contempt, sanctions may include unfavorable modification of orders, orders for restitution/payments to the other party, fines, or even jail time.

Denial of or interference with physical placement.

In Wisconsin, the aggrieved party would file a motion to enforce the physical placement order. If, after a hearing, the court determines that the other parent intentionally and unreasonably denied physical placement or intentionally and unreasonably interfered with physical placement, the court is required to order additional periods of physical placement to replace those that were denied or interfered with. Depending on the circumstances, the court can also find the other party to be in contempt of court, punishable by fines or imprisonment. The court can also issue an **injunction** ordering the other parent to strictly comply with the physical placement order, which can also include an order to the sheriff to assist with serving or executing the injunction. Section 767.471, Wis. Stats. Repeated denial or interference can also become grounds for the aggrieved party to seek a modification of the initial physical placement order.

Psychological or emotional interference.

Sadly, hostility between parents can sometimes spill over onto the children. One parent may attempt to manipulate the child's wishes to spend more time with that parent through "bribery" or lax rules or may engage in undermining or badmouthing the other parent. The child suffers the most from this type of conduct, and the courts have had difficulty coming up with ways to rectify these situations. The following case from the Florida Supreme Court is one example of a court's attempt to do so.

✔ Case in Point: *Schutz v. Schutz*, 581 So. 2d 1290 (Fl. 1991).

Synopsis

The parties were divorced in 1978, with custody awarded to the father. In 1979, custody was modified and the mother was granted sole custody, with visitation rights granted to the father. In 1981, the mother moved to Georgia, without notifying the father. The father traveled to Georgia three times to visit the children, only to find an empty house. After seven months, the mother moved back to Florida and did not notify the father. When the father finally discovered the children's whereabouts in 1985, the father visited the children and learned that they "hated, despised, and feared" him due to his failure to support or visit them. After a hearing, the trial court concluded that the mother had "brainwashed" the children into "bigoted belligerence" toward the father. The court then ordered the mother "to do everything in her power to create in the minds of [the children] a loving, caring feeling toward the father . . . [and] to convince the children that it is the mother's desire that they see their father and love their father." The court further ordered that if the mother breached this order "either in words, actions, demeanor,

implication or otherwise" would result in the "severest penalties . . ., including contempt, imprisonment, [or] loss of residential custody…."

Excerpts

Following are excerpts from the opinion approving of the trial court's order: (citations and references to other authorities within the opinion are omitted)

[A] custodial parent has an affirmative obligation to encourage and nurture the relationship between the child and the noncustodial parent. … This duty is owed to both the noncustodial parent and the child. This obligation may be met by encouraging the child to interact with the noncustodial parent, taking good faith measures to ensure that the child visits and otherwise has frequent and continuing contact with the noncustodial parent, and refraining from doing anything likely to undermine the relationship naturally fostered by such interaction.

Consistent with this obligation, we read the challenged portion of the order at issue to require nothing more of the mother than a good faith effort to take those measures necessary to restore and promote the frequent and continuing positive interaction (e.g., visitation, phone calls, letters) between the children and their father and to refrain from doing or saying anything likely to defeat that end. There is no requirement that the petitioner express opinions that she does not hold, a practice disallowed by the First Amendment. … Under this construction of the order, any burden on the mother's First Amendment rights is merely "incidental."

Accordingly, we must balance the mother's right of free expression against the state's … interest in assuring the well-being of the parties' minor children. However, as with all matters involving custody of minor children, the interests of the father and of the children, which here happen to parallel those of the state, must also factor into the equation.

In this case, the court … sought to resolve the dispute between the parties in accordance with the best interests of their children by attempting to restore a meaningful relationship between the children and their father by assuring them unhampered, frequent and continuing contact with him. In resolving the matter, the court also properly considered the father's constitutionally protected "inherent right" to a meaningful relationship with his children, a personal interest which in this case is consistent with the state's interest in promoting meaningful family relationships.

There is no question that the state's interest in restoring a meaningful relationship between the parties' children and their father, thereby promoting the best interests of the children, is at the very least substantial. Likewise, any restriction placed on the mother's freedom of expression is essential to the furtherance of the state's interests because affirmative measures taken by the mother to encourage meaningful interaction between the children and their father would be for naught if she were allowed to contradict those measures by word or deed.

Think About It ...

1. Do you agree with the court's opinion and its outcome? Why or why not?
2. If you disagree with the trial court's order, what would you have ordered instead?
3. Would the mother violate the court order if she simply never mentioned the father in the children's presence and refused to respond in any way to the children's questions or statements about their father?
4. What if the court ordered the mother to tell the children "Your father loves you" or "Your father is a good man" – would this violate her First Amendment rights?

Third-Party Visitation and Other Special Issues

Up to this point, we've been discussing the rights of parents who are divorcing or who were never married in the context of legal issues regarding children born to those parents. Issues can also arise with respect to other adults who have a special relationship with those children, and who want to continue to have regular interactions and relationships with the children. Additionally, there may be as yet unborn children whose future must be determined.

Third Party/Grandparent Visitation.

When parents are unmarried, or about to become unmarried, grandparents and other adults may be concerned about whether they will be able to maintain their relationships with the children. The United States Supreme Court has established that actions for grandparent or third-party visitation cannot be brought when the children are from an **intact marriage**. *Troxel v. Granville*, 530 U.S. 57 (2000).

Definition: Intact Marriage/family

Intact marriage: The parents are married and there is no pending action for divorce or legal separation.

Although state laws vary as to the rights, procedure, and factors involved in a petition for grandparent or third-party visitation, the best interest of the child is still consistently used as the overriding standard. Some states require proof that a person seeking visitation is either a **psychological parent** or **fictive kin.**

Definition: "Parents"

Psychological parent: An adult other than a biological or adoptive parent who, in a substantial and continuing way, has provided for the physical and emotional needs of a child.

Fictive kin: A person who is not related by birth or marriage to a child, but who has an emotionally significant and family-like relationship with the child.

Wisconsin provides for non-parent visitation in limited circumstances.

Visitation by Grandparents and Other Third Parties

Wisconsin statutes permit a court to order visitation with a child by a third party, such as a grandparent, in specific circumstances. These circumstances include visitation during the course of a divorce proceeding, visitation if one or both of the child's parents are deceased, and visitation if the child's parents never marry each other. Who may petition for visitation and the type of relationship that person must have with the child varies under each statute. In addition, the Wisconsin Supreme Court has recognized that courts have equitable powers to protect the best interests of a child by ordering visitation even in specified circumstances that do not meet the criteria of any statute governing third-party visitation.

Background

Parents have a constitutionally protected right to raise their children without government interference. This right is based on the privacy protections of the U.S. Constitution. Privacy rights are derived from the Fourteenth Amendment, which generally prohibits government interference with a person's liberty without due process. Awarding visitation to a third party over a parent's objection interferes with the parent's constitutionally protected right to make decisions regarding the "care, custody, and control" of his or her children. [Troxel v. Granville, 530 U.S. 57, 67 (2000).]

In determining whether to order third-party visitation, a court must analyze the visitation request based on the child's best interest, giving special deference to a fit parent's determinations as to what visitation is appropriate. Current law presumes that a fit parent's decision regarding nonparental visitation is in the child's best interest. A court may read this requirement into a nonparental visitation statute, even when the statute is silent on the topic.

Wisconsin law gives courts the authority to order visitation of children by certain persons who are not a child's parent in several specific situations, but the person seeking visitation must overcome the presumption in favor of a fit parent's visitation decision with clear and convincing evidence that the parent's decision is not in the child's best interest. The Wisconsin Supreme Court has cautioned judges not to substitute their judgment for a fit parent's judgment, even if the judge disagrees with the parent's decision. A court may consider the nature and extent of third-party visitation only if the person seeking visitation has overcome the presumption in favor of a fit parent's visitation decision. [Michels v. Lyons, 2019 WI 57.][1] These case law principles apply in cases involving third-party visitation, in addition to any statutory requirements discussed later in this information memorandum.

Visitation Rights in Actions Affecting the Family

A grandparent, great-grandparent, stepparent, or person who has maintained a relationship similar to a parent-child relationship with a child may petition the court for visitation with the child subsequent to, or during, an action affecting the family (such as divorce, legal separation, and paternity actions). The Wisconsin Supreme Court has held that the statutory requirement to prove a "parent-child relationship" applies only to the "person" category listed in the statute, and not to grandparents, great-grandparents, or stepparents. [S.A.M. v. Meister, 2016 WI 22.]

Under this statute, the court may grant reasonable visitation rights to the grandparent, great-grandparent, stepparent, or other person who has standing to seek visitation if: (1) the parents have notice of the hearing; and (2) the court determines that visitation is in the best interests of the child. Whenever possible, in making its determination, the court must consider the wishes of the child. [Section 767.43 (1), Wis. Stats.]

The Wisconsin Supreme Court has further held that a person has standing to seek visitation under the provision above if an underlying action affecting the family unit has been filed, and the child's family is not intact so that it may be in the child's best interests to order visitation. [Cox v. Williams, 177 Wis. 2d 433 (1993).] Generally, a child's family is considered to be "intact" if the child's parents are married to each other.

Wisconsin law includes a special grandparent visitation provision involving a child whose parents have not married each other and who has not been adopted (non-marital child). The grandparent of such a non-marital child must petition for visitation with the child under the special provision, described next below. [Section 767.43 (2m), Wis. Stats.]

Grandparent Visitation with a Non-marital Child

The court may grant reasonable visitation to the grandparents of a non-marital child whose parents have not subsequently married if the court determines all of the following:

- The paternity of the child has been determined if the grandparent filing the petition is a parent of the child's father.[2]
- The child has not been adopted.
- The grandparent has maintained a relationship with the child or has attempted to maintain a relationship with the child but has been prevented from doing so by a parent with legal custody of the child.
- The grandparent is not likely to act in a manner that is contrary to decisions that are made by a parent with legal custody of the child and that are related to the child's physical, emotional, educational, or spiritual welfare.
- The visitation is in the child's best interest.

[Section 767.43 (3), Wis. Stats.]

Visitation if One or Both Parents of a Child Are Deceased

A court may grant periods of visitation to a grandparent or stepparent if one or both of a child's parents are deceased and the child is in the custody of the surviving parent or any other person. The person seeking visitation may file a petition as an independent action or within an existing minor guardianship or temporary guardianship proceeding. In order for the court to grant visitation, the surviving parent or other person who has custody of the child must have notice of the hearing, and the court must determine that visitation is in the child's best interest. Also, whenever possible, the court must consider the child's wishes. [Sections 48.9795 (12), Wis. Stats., and 54.56, Wis. Stats.]

A court may grant visitation to a grandparent or stepparent in these circumstances, regardless of whether or not the person with custody of the child is married. Moreover, a trial court's authority to grant visitation under this statute continues even after a subsequent adoption of the child. [Sections 48.9795 (12), Wis. Stats., and 54.56, Wis. Stats.; *In re C.G.F.*, 168 Wis. 2d 62 (1992).]

Visitation Rights of Relatives After a Child's Adoption

If a child is adopted, the parent-child relationship between the adopted child and his or her birth parents is extinguished, unless the adoption is by the birth parent's spouse who is a stepparent to the child. However, even if all parental rights have been extinguished by the adoption, the court is still permitted to order reasonable visitation rights in certain circumstances to a birth relative[3] who has maintained a relationship similar to a parent-child relationship with the child.

A relative may be granted visitation with a child following adoption if the child was adopted by either a stepparent or a relative. The visitation action may be filed at any time, regardless of the date of the adoption. Upon a petition for visitation by a relative, the

court must consider the wishes of the adopted child whenever possible and may grant reasonable visitation rights if the court determines all of the following:

- The relative has maintained a parent-child relationship within the two years prior to the filing of the petition for visitation rights.
- The adoptive parent or parents or, if a birth parent is the spouse of an adoptive parent, the adoptive parent and the birth parent have notice of the hearing.
- Visitation is in the child's best interest.
- The relative will not undermine the adoptive parent's or parents' relationship with the child or, if a birth parent is the spouse of an adoptive parent, the adoptive parent and birth parent's relationship with the child.
- The relative will not act in a manner that is contrary to parenting decisions that are related to the child's physical, emotional, educational, or spiritual welfare and that are made by the adoptive parent or parents or, if a birth parent is the spouse of an adoptive parent, by the adoptive parent and birth parent.

[s. 48.925, Stats.]

Other Third-Party Visitation Rights

Wisconsin courts may grant third-party visitation under certain circumstances when the statutory procedures do not apply. However, grandparents are not currently eligible to petition a court for visitation with grandchildren under these circumstances. Grandparents must rely upon the statutory procedures described above.

In 1995, the Wisconsin Supreme Court decided a case involving the visitation rights of a third party when no action affecting the family had taken place or was pending. In Holtzman v Knott, the Court held that the former live-in female partner of the biological mother of a minor child could bring an action for visitation with the child. [193 Wis. 2d 649 (1995).] The Court held that a court's powers to order visitation with a child are not solely governed by statute. The Court stated that courts have equitable powers to protect the best interests of a child by ordering visitation under circumstances not included in the statutes and that those equitable powers come into play when the petitioner has a parent-like relationship with the child and a triggering event occurs that justifies state intervention.

The Court created a four-part test to apply when a third party seeks visitation rights with respect to a minor child, absent an underlying action affecting the family, to establish that the petitioner has a parent-like relationship with the child. The test requires a showing of all of the following:

- The biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child.
- The petitioner and the child lived together in the same household.
- The petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support without expectation of financial compensation.
- The petitioner has been in a parental role for a length of time sufficient to have established a bonded, dependent relationship that is parental in nature.

To establish a significant triggering event justifying state intervention in the child's relationship with the biological or adoptive parent, the petitioner is required to prove that the parent has interfered substantially with the petitioner's parent-like relationship with the child, and the petitioner sought court-ordered visitation within a reasonable time after the interference. The petitioner must prove all of these elements before a court may consider whether visitation is in the child's best interest.

The Holtzman case could have a broad impact on those seeking visitation privileges with a child. However, Wisconsin courts have, so far, declined to apply the principles in the Holtzman case in circumstances to which a current statute applies. [See Rogers v. Rogers, 2007 WI App 50; Wohlers v. Broughton, 2011 WI App 122.]

Enforcement of Visitation Orders

Any person who interferes with visitation rights granted under an action affecting the family, following the adoption of a child, or to the grandparents of a non-marital child may be held in contempt of court under ch. 785, Stats. [ss. 48.925 (4) and 767.43 (5), Stats.]

In a contempt proceeding, the court may impose only the following remedial sanctions:

- Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as a result of the contempt of court.
- A forfeiture not to exceed $2,000 for each day the contempt of court continues.

[s. 785.04 (1) (a) and (c), Stats.]

With respect to visitation rights granted to grandparents and stepparents when one or both of the child's parents are deceased, the court may issue any order to enforce the visitation order and may modify such visitation privileges or enforcement order upon a showing of good cause. [s. 48.9795 (12) (d), Stats.]
This information memorandum was prepared by Amber Otis, Staff Attorney, on February 26, 2021.

(Wisconsin Legislative Council information memorandum)

Embryos

Assistive reproductive technology (ART) has helped many people become parents through pregnancy which previously may have been impossible. As with any innovation, however, scientific advancements bring new challenges.

Definitions relating to pre-born children

Embryo: An egg that has been fertilized by a sperm and is in the early stages of development, up to about the 8th week of pregnancy.

Fetus: An embryo (pre-born child) from the 8th week of pregnancy through birth.

Couples struggling with infertility may utilize in vitro fertilization, which results in embryos that have been frozen with the intent that they be implanted into the woman's uterus at a later time. When couples divorce, there may be a dispute over who has custody of the embryos. Unfortunately, there are few, if any, statutes that provide guidance as to how to answer this question.

Usually, a couple signs a consent agreement through the clinic that assists with in vitro fertilization, which provides a starting point for sorting out a dispute over custody of the embryos. Such agreements usually require mutual consent of the parties regarding the embryos' future. Many of these agreements also include provisions specifically addressing the embryos' future, and most courts enforce those provisions as legally binding. When the agreement is silent and the parties cannot agree, or when one party seeks to avoid enforcement of the agreement, the courts are left to balance each party's constitutional rights to procreate – or not procreate – against one another. In many cases, the court has ruled in favor of the party who does not want to procreate. The law in this area continues to develop.

Notes

[1] Generally, a court may not grant a third-party visitation with a child if the third party has been convicted of intentional homicide of the child's parent, unless the court finds by clear and convincing evidence that visitation is in the child's best interest, after considering the child's wishes. If visitation rights had already been granted, the court must modify the order to prohibit visitation. [ss. 48.925 (1m), 48.9795 (12) (cm) and (dm), and 767.43 (1m) and (6), Stats.]

[2] If a paternity action is pending, that action must first be completed before visitation rights may be determined.

[3] "Relative" means a stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, brother-in-law, sister-in-law, first cousin, second cousin, nephew, niece, uncle, aunt, step-uncle, step-aunt, or any person of a preceding generation as denoted by the prefix of grand, great, or great-great, whether by blood, marriage, or legal adoption, or the spouse of any "relative," even if the marriage is terminated by death or divorce. [s. 48.02 (15), Stats.]

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CHAPTER OVERVIEW

10: Landlord and Tenant Law

Learning Objectives

After reading this chapter, you should understand the following:

1. The various types of leasehold estates
2. How leasehold states are created and extended
3. The rights and duties of landlords
4. The rights and duties of tenants
5. The potential tort liability of landlords

10.1: Types and Creation of Leasehold Estates

10.2: Rights and Duties of Landlords and Tenants

10.3: Transfer of Landlord's or Tenant's Interest

10.4: Landlord's Tort Liability

10.5: Cases

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10.1: Types and Creation of Leasehold Estates

Learning Objectives

1. Distinguish between the different types of leasehold estates.
2. Describe how leasehold states can be created, both orally and in writing, and the requirements for creating leases that last for more than one year.

In Chapter 11 "The Nature and Regulation of Real Estate and the Environment", we noted that real property can be divided into types of interests: freehold estates and leasehold estates. The freehold estate is characterized by indefinite duration, and the owner has title and the right to possess. The leasehold estate, by contrast, lasts for a specific period. The owner of the leasehold estate—the tenant—may take possession but does not have title to the underlying real property. When the period of the leasehold ends, the right to possession reverts to the landlord—hence the landlord's interest during the tenant's possession is known as a **reversionary interest**. Although a leasehold estate is said to be an interest in real property, the leasehold itself is in fact personal property. The law recognizes three types of leasehold estates: the estate for years, the periodic tenancy, and the tenancy at will.

Types of Leasehold Estates

Estate for Years

The estate for years is characterized by a definite beginning and a definite end. When you rent an apartment for two years, beginning September 1 and ending on the second August 31, you are the owner of an estate for years. Virtually any period will do; although it is called an estate "for years," it can last but one day or extend one thousand years or more. Some statutes declare that any estate for years longer than a specified period—one hundred years in Massachusetts, for instance—is a fee simple estate.

Unless the lease—the agreement creating the leasehold interest—provides otherwise, the estate for years terminates automatically at midnight of the last day specified in the lease. The lease need not refer explicitly to calendar dates. It could provide that "the tenant may occupy the premises for six months to commence one week from the date of signing." Suppose the landlord and tenant sign on June 23. Then the lease term begins at 12:00 a.m. on July 1 and ends just before midnight of December 31. Unless a statute provides otherwise, the landlord is not obligated to send the tenant a notice of termination. Should the tenant die before the lease term ends, her property interest can be inherited under her will along with her other personal property or in accordance with the laws of intestate succession.

Periodic Tenancy

As its name implies, a periodic tenancy lasts for a period that is renewed automatically until either landlord or tenant notifies the other that it will end. The periodic tenancy is sometimes called an estate from year to year (or month to month, or week to week). The lease may provide explicitly for the periodic tenancy by specifying that at the expiration of, say, a one-year lease, it will be deemed renewed for another year unless one party notifies the other to the contrary within six months prior to the expiration of the term. Or the periodic tenancy may be created by implication, if the lease fails to state a term or is defective in some other way, but the tenant takes possession and pays rent. The usual method of creating a periodic tenancy occurs when the tenant remains on the premises ("holds over") when an estate for years under a lease has ended. The landlord may either reject or accept the implied offer by the tenant to rent under a periodic tenancy. If he rejects the implied offer, the tenant may be ejected, and the landlord is entitled to rent for the holdover period. If he accepts the offer, the original lease determines the rent and length of the renewable period, except that no periodic tenancy may last longer than from year to year—that is, the renewable period may never be any longer than twelve months.

At common law, a party was required to give notice at least six months prior to the end of a year-to-year tenancy, and notice equal to the term for any other periodic tenancy. In most states today, the time period for giving notice is regulated by statute. In most instances, a year-to-year tenancy requires a month's notice, and shorter tenancies require notice equal to the term. To illustrate the approach typically used, suppose Simone rents from Anita on a month-to-month tenancy beginning September 15. On March 30, Simone passes the orals for her doctorate and decides to leave town. How soon may she cancel her tenancy? If she calls Anita that afternoon, she will be two weeks shy of a full month's notice for the period ending April 15, so the earliest she can finish her obligation to pay rent is May 15. Suppose her term had been from the first of each month. On April 1, she notifies Anita of her

intention to leave at the end of April, but she is stuck until the end of May, because notice on the first of the month is not notice for a full month. She would have had to notify Anita by March 31 to terminate the tenancy by April 30.

Tenancy at Will

If the landlord and tenant agree that the lease will last only as long as both want it to, then they have created a tenancy at will. Statutes in most states require some notice of intention to terminate. Simone comes to the university to study, and Anita gives her a room to stay in for free. The arrangement is a tenancy at will, and it will continue as long as both want it to. One Friday night, after dinner with classmates, Simone decides she would rather move in with Bob. She goes back to her apartment, packs her suitcase, and tells Anita she's leaving. The tenancy at will terminates that day.

Creation of Leasehold Estates

Oral Leases

Leases can be created orally, unless the term of the lease exceeds the period specified by the Statute of Frauds. In most states, that period is one year. Any oral lease for a period longer than the statutory period is invalid. Suppose that Simone, in a state with a one-year Statute of Frauds period, orally agrees with Anita to rent Anita's apartment for two years, at a monthly rent of $250. The lease is invalid, and either could repudiate it.

Written Leases

A lease required to be in writing under the Statute of Frauds must contain the following items or provisions: (1) it must identify the parties, (2) it must identify the premises, (3) it must specify the duration of the lease, (4) it must state the rent to be paid, and (5) it must be signed by the party against whom enforcement is sought (known as "the party to be charged").

The provisions need not be perfectly stated. As long as they satisfy the five requirements, they will be adequate to sustain the lease under the Statute of Frauds. For instance, the parties need not necessarily be named in the lease itself. Suppose that the prospective tenant gives the landlord a month's rent in advance and that the landlord gives the tenant a receipt listing the property and the terms of the lease but omitting the name of the tenant. The landlord subsequently refuses to let the tenant move in. Who would prevail in court? Since the tenant had the receipt in her possession, that would be sufficient to identify her as the tenant to whom the terms of the lease were meant to apply. Likewise, the lease need not specify every aspect of the premises to be enjoyed. Thus the tenant who rents an apartment in a building will be entitled to the use of the common stairway, the roof, and so on, even though the lease is silent on these points. And as long as a specific amount is ascertainable, the rent may be stated in other than absolute dollar terms. For example, it could be expressed in terms of a cost-of-living index or as a percentage of the tenant's dollar business volume.

Key Takeaway

A leasehold estate, unlike a freehold estate, has a definite duration. The landlord's interest during the term of a leasehold estate is a reversionary interest. Leasehold estates can last for short terms or very long terms; in the case of long-term leases, a property right is created that can be passed to heirs. The usual landlord-tenant relationship is a periodic tenancy, which carries with it various common-law and statutory qualifications regarding renewal and termination. In a tenancy at will, either landlord or tenant can end the leasehold estate as soon as notice is provided by either party.

Exercises 10.1.1

1. What is the difference between a periodic tenancy and a tenancy at will?
2. What are the essential terms that must be in a written lease?

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10.2: Rights and Duties of Landlords and Tenants

Learning Objectives

1. Itemize and explain the rights and duties of landlords.
2. List and describe the rights and duties of tenants.
3. Understand the available remedies for tenants when a landlord is in breach of his or her duties.

Rights and Duties of Landlords

The law imposes a number of duties on the landlord and gives the tenant a number of corresponding rights. These include (1) possession, (2) habitable condition, and (3) noninterference with use.

Possession

The landlord must give the tenant the right of possession of the property. This duty is breached if, at the time the tenant is entitled to take possession, a third party has paramount title to the property and the assertion of this title would deprive the tenant of the use contemplated by the parties. Paramount title means any legal interest in the premises that is not terminable at the will of the landlord or at the time the tenant is entitled to take possession.

If the tenant has already taken possession and then discovers the paramount title, or if the paramount title only then comes into existence, the landlord is not automatically in breach. However, if the tenant thereafter is evicted from the premises and thus deprived of the property, then the landlord is in breach. Suppose the landlord rents a house to a doctor for ten years, knowing that the doctor intends to open a medical office in part of the home and knowing also that the lot is restricted to residential uses only. The doctor moves in. The landlord is not yet in default. The landlord will be in default if a neighbor obtains an injunction against maintaining the office. But if the landlord did not know (and could not reasonably have known) that the doctor intended to use his home for an office, then the landlord would not be in default under the lease, since the property could have been put to normal—that is, residential—use without jeopardizing the tenant's right to possession.

Warranty of Habitability

As applied to leases, the old common-law doctrine of caveat emptor said that once the tenant has signed the lease, she must take the premises as she finds them. Since she could inspect them before signing the lease, she should not complain later. Moreover, if hidden defects come to light, they ought to be easy enough for the tenant herself to fix. Today this rule no longer applies, at least to residential rentals. Unless the parties specifically agree otherwise, the landlord is in breach of his lease if the conditions are unsuitable for residential use when the tenant is due to move in. The landlord is held to an implied warranty of habitability.

The change in the rule is due in part to the conditions of the modern urban setting: tenants have little or no power to walk away from an available apartment in areas where housing is scarce. It is also due to modem construction and technology: few tenants are capable of fixing most types of defects. A US court of appeals has said the following:

Today's urban tenants, the vast majority of whom live in multiple dwelling houses, are interested not in the land, but solely in "a house suitable for occupation." Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the "jack-of-all-trades" farmer who was the common law's model of the lessee. Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling, repairs may require access to equipment and areas in control of the landlord. Low and middle income tenants, even if they were interested in making repairs, would be unable to obtain financing for major repairs since they have no long-term interest in the property. (*Javins v. First National Realty Corp.*, 428 F.2d 1071, 1078-79 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970)).

At common law, the landlord was not responsible if the premises became unsuitable once the tenant moved in. This rule was often harshly applied, even for unsuitable conditions caused by a sudden act of God, such as a tornado. Even if the premises collapsed, the tenant would be liable to pay the rent for the duration of the lease. Today, however, many states have statutorily abolished the

tenant's obligation to pay the rent if a non-man-made force renders the premises unsuitable. Moreover, most states today impose on the landlord, after the tenant has moved in, the responsibility for maintaining the premises in a safe, livable condition, consistent with the safety, health, and housing codes of the jurisdiction.

These rules apply only in the absence of an express agreement between the parties. The landlord and tenant may allocate in the lease the responsibility for repairs and maintenance. But it is unlikely that any court would enforce a lease provision waiving the landlord's implied warranty of habitability for residential apartments, especially in areas where housing is relatively scarce.

Noninterference with Use

In addition to maintaining the premises in a physically suitable manner, the landlord has an obligation to the tenant not to interfere with a permissible use of the premises. Suppose Simone moves into a building with several apartments. One of the other tenants consistently plays music late in the evening, causing Simone to lose sleep. She complains to the landlord, who has a provision in the lease permitting him to terminate the lease of any tenant who persists in disturbing other tenants. If the landlord does nothing after Simone has notified him of the disturbance, he will be in breach. This right to be free of interference with permissible uses is sometimes said to arise from the landlord's implied covenant of quiet enjoyment.

Tenant's Remedies

When the landlord breaches one of the foregoing duties, the tenant has a choice of three basic remedies: termination, damages, or rent adjustment.

In virtually all cases where the landlord breaches, the tenant may terminate the lease, thus ending her obligation to continue to pay rent. To terminate, the tenant must (1) actually vacate the premises during the time that she is entitled to terminate and (2) either comply with lease provisions governing the method of terminating or else take reasonable steps to ensure that the landlord knows she has terminated and why.

When the landlord physically deprives the tenant of possession, he has evicted the tenant; wrongful eviction permits the tenant to terminate the lease. Even if the landlord's conduct falls short of actual eviction, it may interfere substantially enough with the tenant's permissible use so that they are tantamount to eviction. This is known as constructive eviction, and it covers a wide variety of actions by both the landlord and those whose conduct is attributable to him, as illustrated by *Fidelity Mutual Life Insurance Co. v Kaminsky*, (see Section 13.5.1 "Constructive Eviction").

Damages

Another traditional remedy is money damages, available whenever termination is an appropriate remedy. Damages may be sought after termination or as an alternative to termination. Suppose that after the landlord had refused Simone's request to repair the electrical system, Simone hired a contractor to do the job. The cost of the repair work would be recoverable from the landlord. Other recoverable costs can include the expense of relocating if the lease is terminated, moving costs, expenses connected with finding new premises, and any increase in rent over the period of the terminated lease for comparable new space. A business may recover the loss of anticipated business profits, but only if the extent of the loss is established with reasonable certainty. In the case of most new businesses, it would be almost impossible to prove loss of profits.

In all cases, the tenant's recovery will be limited to damages that would have been incurred by a tenant who took all reasonable steps to mitigate losses. That is, the tenant must take reasonable steps to prevent losses attributable to the landlord's breach, to find new space if terminating, to move efficiently, and so on.

Rent Remedies

Under an old common-law rule, the landlord's obligation to provide the tenant with habitable space and the tenant's obligation to pay rent were independent covenants. If the landlord breached, the tenant was still legally bound to pay the rent; her only remedies were termination and suit for damages. But these are often difficult remedies for the tenant. Termination means the aggravation of moving, assuming that new quarters can be found, and a suit for damages is time consuming, uncertain, and expensive. The obvious solution is to permit the tenant to withhold rent, or what we here call rent adjustment. The modern rule, adopted in several states (but not yet in most), holds that the mutual obligations of landlord and tenant are dependent. States following this approach have developed three types of remedies: rent withholding, rent application, and rent abatement.

The simplest approach is for the tenant to withhold the rent until the landlord remedies the defect. In some states, the tenant may keep the money. In other states, the rent must be paid each month into an escrow account or to the court, and the money in the escrow account becomes payable to the landlord when the default is cured.

Several state statutes permit the tenant to apply the rent money directly to remedy the defect or otherwise satisfy the landlord's performance. Thus Simone might have deducted from her rent the reasonable cost of hiring an electrician to repair the electrical system.

In some states, the rent may be reduced or even eliminated if the landlord fails to cure specific types of defects, such as violations of the housing code. The abatement will continue until the default is eliminated or the lease is terminated.

Rights and Duties of Tenants

In addition to the duties of the tenant set forth in the lease itself, the common law imposes three other obligations: (1) to pay the rent reserved (stated) in the lease, (2) to refrain from committing waste (damage), and (3) not to use the premises for an illegal purpose.

Duty to Pay Rent

What constitutes rent is not necessarily limited to the stated periodic payment usually denominated "rent." The tenant may also be responsible for such assessments as taxes and utilities, payable to the landlord as rent. Simone's lease calls for her to pay taxes of $500 per year, payable in quarterly installments. She pays the rent on the first of each month and the first tax bill on January 1. On April 1, she pays the rent but defaults on the next tax bill. She has failed to pay the rent reserved in the lease.

The landlord in the majority of states is not obligated to mitigate his losses should the tenant abandon the property and fail thereafter to pay the rent. As a practical matter, this means that the landlord need not try to rent out the property but instead can let it sit vacant and sue the defaulting tenant for the balance of the rent as it becomes due. However, the tenant might notify the landlord that she has abandoned the property or is about to abandon it and offer to surrender it. If the landlord accepts the surrender, the lease then terminates. Unless the lease specifically provides for it, a landlord who accepts the surrender will not be able to recover from the tenant the difference between the amount of her rent obligation and the new tenant's rent obligation.

Many leases require the tenant to make a security deposit—a payment of a specific sum of money to secure the tenant's performance of duties under the lease. If the tenant fails to pay the rent or otherwise defaults, the landlord may use the money to make good the tenant's performance. Whatever portion of the money is not used to satisfy the tenant's obligations must be repaid to the tenant at the end of the lease. In the absence of an agreement to the contrary, the landlord must pay interest on the security deposit when he returns the sum to the tenant at the end of the lease.

Alteration and Restoration of the Premises

In the absence of a specific agreement in the lease, the tenant is entitled to physically change the premises in order to make the best possible permissible use of the property, but she may not make structural alterations or damage (waste) the property. A residential tenant may add telephone lines, put up pictures, and affix bookshelves to the walls, but she may not remove a wall in order to enlarge a room.

The tenant must restore the property to its original condition when the lease ends, but this requirement does not include normal wear and tear. Simone rents an apartment with newly polished wooden floors. Because she likes the look of oak, she decides against covering the floors with rugs. In a few months' time, the floors lose their polish and become scuffed. Simone is not obligated to refinish the floors, because the scuffing came from normal walking, which is ordinary wear and tear.

Use of the Property for an Illegal Purpose

It is a breach of the tenant's obligation to use the property for an illegal purpose. A landlord who found a tenant running a numbers racket, for example, or making and selling moonshine whisky could rightfully evict her.

Landlord's Remedies

In general, when the tenant breaches any of the three duties imposed by the common law, the landlord may terminate the lease and seek damages. One common situation deserves special mention: the holdover tenant. When a tenant improperly overstays her lease, she is said to be a tenant at sufferance, meaning that she is liable to eviction. Some cultures, like the Japanese, exhibit a

considerable bias toward the tenant, making it exceedingly difficult to move out holdover tenants who decide to stay. But in the United States, landlords may remove tenants through summary (speedy) proceedings available in every state or, in some cases, through self-help. Self-help is a statutory remedy for landlords or incoming tenants in some states and involves the peaceful removal of a holdover tenant's belongings. If a state has a statute providing a summary procedure for removing a holdover tenant, neither the landlord nor the incoming tenant may resort to self-help, unless the statute specifically allows it. A provision in the lease permitting self-help in the absence of statutory authority is unenforceable. Self-help must be peaceful, must not cause physical harm or even the expectation of harm to the tenant or anyone on the premises with his permission, and must not result in unreasonable damage to the tenant's property. Any clause in the lease attempting to waive these conditions is void.

Self-help can be risky, because some summary proceeding statutes declare it to be a criminal act and because it can subject the landlord to tort liability. Suppose that Simone improperly holds over in her apartment. With a new tenant scheduled to arrive in two days, the landlord knocks on her door the evening after her lease expires. When Simone opens the door, she sees the landlord standing between two 450-pound Sumo wrestlers with menacing expressions. He demands that she leave immediately. Fearing for her safety, she departs instantly. Since she had a reasonable expectation of harm had she not complied with the landlord's demand, Simone would be entitled to recover damages in a tort suit against her landlord, although she would not be entitled to regain possession of the apartment.

Besides summary judicial proceedings and self-help, the landlord has another possible remedy against the holdover tenant: to impose another rental term. In order to extend the lease in this manner, the landlord need simply notify the holdover tenant that she is being held to another term, usually measured by the periodic nature of the rent payment. For example, if rent was paid each month, then imposition of a new term results in a month-to-month tenancy. One year is the maximum tenancy that the landlord can create by electing to hold the tenant to another term.

Key Takeaway

Both landlords and tenants have rights and duties. The primary duty of a landlord is to meet the implied warranty of habitability: that the premises are in a safe, livable condition. The tenant has various remedies available if the landlord fails to meet that duty, or if the landlord fails to meet the implied covenant of quiet enjoyment. These include termination, damages, and withholding of rent. The tenant has duties as well: to pay the rent, refrain from committing waste, and not use the property for an illegal purpose.

Exercises 10.2.1

1. Consistent with the landlord's implied warranty of habitability, can the landlord and tenant agree in a lease that the tenant bear any and all expenses to repair the refrigerator, the stove, and the microwave?
2. Under what conditions is it proper for a tenant to withhold rent from the landlord?

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10.3: Transfer of Landlord's or Tenant's Interest

Learning Objectives

1. Explain how the landlord’s reversionary interest works and how it may be assigned.
2. Describe the two ways in which a tenant’s leasehold interest may be transferred to another party.

General Rule

At common law, the interests of the landlord and tenant may be transferred freely unless (1) the tenancy is at will; (2) the lease requires either party to perform significant personal services, which would be substantially less likely to be performed if the interest was transferred; or (3) the parties agree that the interest may not be transferred.

Landlord’s Interest

When the landlord sells his interest, the purchaser takes subject to the lease. If there are tenants with leases in an apartment building, the new landlord may not evict them simply because he has taken title. The landlord may divide his interest as he sees fit, transferring all or only part of his entire interest in the property. He may assign his right to the rent or sell his reversionary interest in the premises. For instance, Simone takes a three-year lease on an apartment near the university. Simone’s landlord gives his aged uncle his reversionary interest for life. This means that Simone’s landlord is now the uncle, and she must pay him rent and look to him for repairs and other performances owed under the lease. When Simone’s lease terminates, the uncle will be entitled to rent the premises. He does so, leasing to another student for three years. One year later, the uncle dies. His nephew (Simone’s original landlord) has the reversionary interest and so once again becomes the landlord. He must perform the lease that the uncle agreed to with the new student, but when that lease expires, he will be free to rent the premises as he sees fit.

Tenant’s Interest

Why would a tenant be interested in transferring her leasehold interest? For at least two reasons: she might need to move before her lease expired, or she might be able to make money on the leasehold itself. In recent years, many companies in New York have discovered that their present leases were worth far more to them by moving out than staying in. They had signed long-term leases years ago when the real estate market was glutted and were paying far less than current market prices. By subletting the premises and moving to cheaper quarters, they could pocket the difference between their lease rate and the market rate they charged their subtenants.

The tenant can transfer her interest in the lease by assigning or by subletting. In an assignment, the tenant transfers all interest in the premises and all obligations. Thus the assignee-tenant is duty bound to pay the landlord the periodic rental and to perform all other provisions in the lease. If the assignee defaulted, however, the original tenant would remain liable to the landlord. In short, with an assignment, both assignor and assignee are liable under the lease unless the landlord releases the assignor. By contrast, a sublease is a transfer of something less than the entire leasehold interest (see Figure 13.1 "Assignment vs. Sublease"). For instance, the tenant might have five years remaining on her lease and sublet the premises for two years, or she might sublet the ground floor of a four-story building. Unlike an assignee, the subtenant does not step into the shoes of the tenant and is not liable to the landlord for performance of the tenant’s duties. The subtenant’s only obligations are to the tenant. What distinguishes the assignment from the sublease is not the name but whether or not the entire leasehold interest has been transferred. If not, the transfer is a sublease.

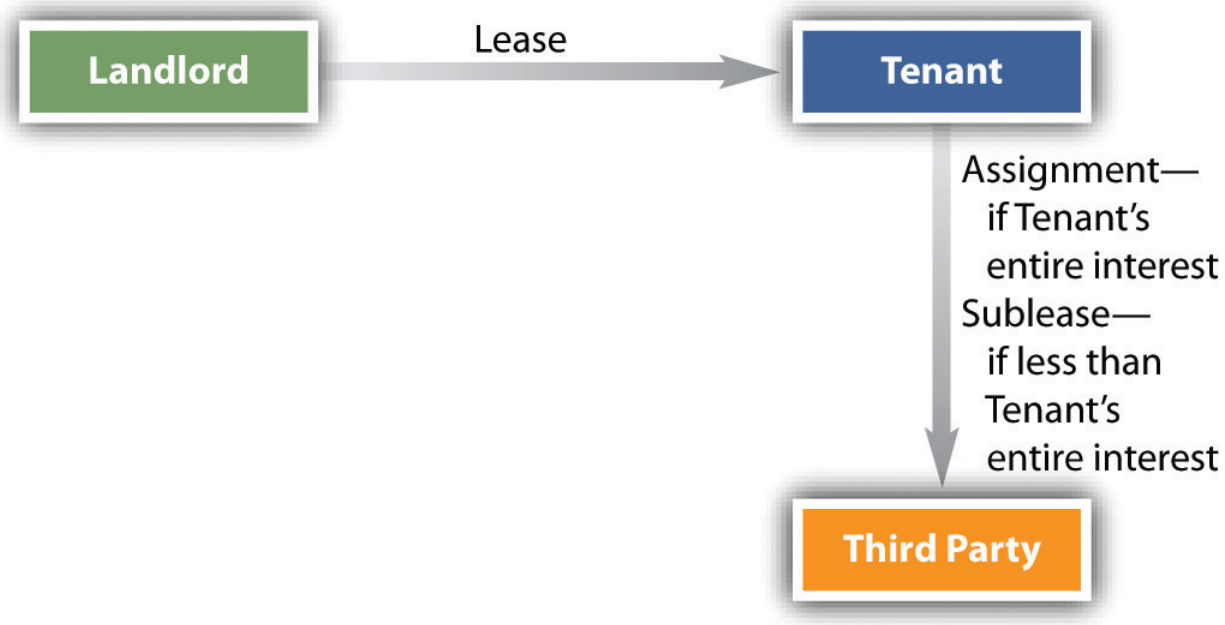


Figure **10.3.1**: Assignment vs Sublease

Many landlords include clauses in their leases prohibiting assignments or subleases, and these clauses are generally upheld. But the courts construe them strictly, so that a provision barring subleases will not be interpreted to bar assignments.

Key Takeaway

The interests of landlords and tenants can be freely transferred unless the parties agree otherwise or unless there is a tenancy at will. If the tenant assigns her leasehold interest, she remains liable under the lease unless the landlord releases her. If less than the entire leasehold interest is transferred, it is a sublease rather than an assignment. But the original lease may prohibit either or both.

Exercises 10.3.1

1. What is the difference between an assignment and a sublease?
2. Are the duties of the tenant any different if the reversionary interest is assigned? Suppose that Simone is in year one of a three-year lease and that Harry is the landlord. If Harry assigns his reversionary interest to Louise, can Louise raise the rent for the next two years beyond what is stated in the original lease?

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10.4: Landlord's Tort Liability

Learning Objectives

1. State the general common-law rule as to the liability of the landlord for injuries occurring on the leased premises.
2. State the exceptions to the general rule, and explain the modern trend toward increased liability of the landlord.

In Chapter 11 "The Nature and Regulation of Real Estate and the Environment", we discussed the tort liability of the owner or occupier of real estate to persons injured on the property. As a general rule, when injury occurs on premises rented to a tenant, it is the tenant—an occupier—who is liable. The reason for this rule seems clear: The landlord has given up all but a reversionary interest in the property; he has no further control over the premises. Indeed, he is not even permitted on the property without the tenant's permission. But over the years, certain exceptions have developed to the rule that the landlord is not liable. The primary reason for this change is the recognition that the landlord is better able to pay for repairs to his property than his relatively poorer tenants and that he has ultimate control over the general conditions surrounding the apartment or apartment complex.

Exceptions to the General Rule

Hidden Dangers Known to Landlord

The landlord is liable to the tenant, her family, or guests who are injured by hidden and dangerous conditions that the landlord knew about or should have known about but failed to disclose to the tenant.

Dangers to People off the Premises

The landlord is liable to people injured outside the property by defects that existed when the lease was signed. Simone rents a dilapidated house and agrees with the landlord to keep the building repaired. She neglects to hire contractors to repair the cracked and sagging wall on the street. The building soon collapses, crushing several automobiles parked alongside. Simone can be held responsible and so can the landlord; the tenant's contractual agreement to maintain the property is not sufficient to shift the liability away from the landlord. In a few cases, the landlord has even been held liable for activities carried on by the tenant, but only because he knew about them when the lease was signed and should have known that the injuries were probable results.

Premises Leased for Admitting the Public

A landlord is responsible for injuries caused by dangerous conditions on property to be used by the public if the danger existed when the lease was made. Thus an uneven floor that might cause people to trip or a defective elevator that stops a few inches below the level of each floor would be sufficiently dangerous to pin liability on the landlord.

Landlord Retaining Control of Premises

Frequently, a landlord will retain control over certain areas of the property—for example, the common hallways and stairs in an apartment building. When injuries occur as a result of faulty and careless maintenance of these areas, the landlord will be responsible. In more than half the states, the landlord is liable for failure to remove ice and snow from a common walkway and stairs at the entrance. In one case, the tenant even recovered damages for a broken hip caused when she fell in fright from seeing a mouse that jumped out of her stove; she successfully charged the landlord with negligence in failing to prevent mice from entering the dwelling in areas under his control.

Faulty Repair of Premises

Landlords often have a duty to repair the premises. The duty may be statutory or may rest on an agreement in the lease. In either case, the landlord will be liable to a tenant or others for injury resulting from defects that should have been repaired. No less important, a landlord will be liable even if he has no duty to repair but negligently makes repairs that themselves turn out to be dangerous.

key takeaway

At common law, injuries taking place on leased premises were the responsibility of the tenant. There were notable exceptions, including situations where hidden dangers were known to the landlord but not the tenant, where the premises' condition caused injury to people off the premises, or where faulty repairs caused the injuries. The modern trend is to adopt general negligence principles to determine landlord liability. Thus where the landlord does not use reasonable care and subjects others to an unreasonable risk of harm, there may be liability for the landlord. This varies from state to state.

Exercises 10.4.1

1. What was the basic logic of the common law in having tenants be responsible for all injuries that took place on leased premises?
2. Does the modern trend of applying general negligence principles to landlords make more sense? Explain your answer.

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10.5: Cases

Constructive Eviction

Fidelity Mutual Life Insurance Co. v. Kaminsky

768 S.W.2d 818 (Tx. Ct. App. 1989)

MURPHY, JUSTICE

The issue in this landlord-tenant case is whether sufficient evidence supports the jury's findings that the landlord and appellant, Fidelity Mutual Life Insurance Company ["Fidelity"], constructively evicted the tenant, Robert P. Kaminsky, M.D., P.A. ["Dr. Kaminsky"] by breaching the express covenant of quiet enjoyment contained in the parties' lease. We affirm.

Dr. Kaminsky is a gynecologist whose practice includes performing elective abortions. In May 1983, he executed a lease contract for the rental of approximately 2,861 square feet in the Red Oak Atrium Building for a two-year term which began on June 1, 1983. The terms of the lease required Dr. Kaminsky to use the rented space solely as "an office for the practice of medicine." Fidelity owns the building and hires local companies to manage it. At some time during the lease term, Shelter Commercial Properties ["Shelter"] replaced the Horne Company as managing agents. Fidelity has not disputed either management company's capacity to act as its agent.

The parties agree that: (1) they executed a valid lease agreement; (2) Paragraph 35 of the lease contains an express covenant of quiet enjoyment conditioned on Dr. Kaminsky's paying rent when due, as he did through November 1984; Dr. Kaminsky abandoned the leased premises on or about December 3, 1984 and refused to pay additional rent; anti-abortion protestors began picketing at the building in June of 1984 and repeated and increased their demonstrations outside and inside the building until Dr. Kaminsky abandoned the premises.

When Fidelity sued for the balance due under the lease contract following Dr. Kaminsky's abandonment of the premises, he claimed that Fidelity constructively evicted him by breaching Paragraph 35 of the lease. Fidelity apparently conceded during trial that sufficient proof of the constructive eviction of Dr. Kaminsky would relieve him of his contractual liability for any remaining rent payments. Accordingly, he assumed the burden of proof and the sole issue submitted to the jury was whether Fidelity breached Paragraph 35 of the lease, which reads as follows:

Quiet Enjoyment

Lessee, on paying the said Rent, and any Additional Rental, shall and may peaceably and quietly have, hold and enjoy the Leased Premises for the said term.

A constructive eviction occurs when the tenant leaves the leased premises due to conduct by the landlord which materially interferes with the tenant's beneficial use of the premises. Texas law relieves the tenant of contractual liability for any remaining rentals due under the lease if he can establish a constructive eviction by the landlord.

The protests took place chiefly on Saturdays, the day Dr. Kaminsky generally scheduled abortions. During the protests, the singing and chanting demonstrators picketed in the building's parking lot and inner lobby and atrium area. They approached patients to speak to them, distributed literature, discouraged patients from entering the building and often accused Dr. Kaminsky of "killing babies." As the protests increased, the demonstrators often occupied the stairs leading to Dr. Kaminsky's office and prevented patients from entering the office by blocking the doorway. Occasionally they succeeded in gaining access to the office waiting room area.

Dr. Kaminsky complained to Fidelity through its managing agents and asked for help in keeping the protestors away, but became increasingly frustrated by a lack of response to his requests. The record shows that no security personnel were present on Saturdays to exclude protestors from the building, although the lease required Fidelity to provide security service on Saturdays. The record also shows that Fidelity's attorneys prepared a written statement to be handed to the protestors soon after Fidelity hired Shelter as its managing agent. The statement tracked TEX. PENAL CODE ANN. §30.05 (Vernon Supp. 1989) and generally served to inform trespassers that they risked criminal prosecution by failing to leave if asked to do so. Fidelity's attorneys instructed Shelter's representative to "have several of these letters printed up and be ready to distribute them and verbally demand that these people move on and off the property." The same representative conceded at trial that she did not distribute these notices. Yet when Dr.

Kaminsky enlisted the aid of the Sheriff's office, officers refused to ask the protestors to leave without a directive from Fidelity or its agent. Indeed, an attorney had instructed the protestors to remain unless the landlord or its representative ordered them to leave. It appears that Fidelity's only response to the demonstrators was to state, through its agents, that it was aware of Dr. Kaminsky's problems.

Both action and lack of action can constitute "conduct" by the landlord which amounts to a constructive eviction.…

This case shows ample instances of Fidelity's failure to act in the fact of repeated requests for assistance despite its having expressly covenanted Dr. Kaminsky's quiet enjoyment of the premises. These instances provided a legally sufficient basis for the jury to conclude that Dr. Kaminsky abandoned the leased premises, not because of the trespassing protestors, but because of Fidelity's lack of response to his complaints about the protestors. Under the circumstances, while it is undisputed that Fidelity did not "encourage" the demonstrators, its conduct essentially allowed them to continue to trespass.

[The trial court judgment is affirmed.]

? case questions 10.5.1

A constructive eviction occurs when the tenant leaves the leased premises because of conduct by the landlord that materially interferes with the tenant's beneficial use of the premises.

1. At the trial, who concluded that Fidelity's "conduct" constituted constructive eviction? Is this a question of fact, an interpretation of the contract, or both?
2. How can failure to act constitute "conduct"? What could explain Fidelity's apparent reluctance to give notice to protestors that they might be arrested for trespass?

Landlord's Tort Liability

Stephens v. Stearns

106 Idaho 249; 678 P.2d 41 (Idaho Sup. Ct. 1984)

Donaldson, Chief Justice

Plaintiff-appellant Stephens filed this suit on October 2, 1978, for personal injuries she sustained on July 15, 1977, from a fall on an interior stairway of her apartment. Plaintiff's apartment, located in a Boise apartment complex, was a "townhouse" consisting of two separate floors connected by an internal stairway.

The apartments were built by defendant Koch and sold to defendant Stearns soon after completion in 1973. Defendant Stearns was plaintiff's landlord from the time she moved into the apartment in 1973 through the time of plaintiff's fall on July 15, 1977. Defendant Albanese was the architect who designed and later inspected the apartment complex.

* * *

When viewed in the light most favorable to appellant, the facts are as follows: On the evening of July 15, 1977, Mrs. Stephens went to visit friends. While there she had two drinks. She returned to her apartment a little past 10:00 p.m. Mrs. Stephens turned on the television in the living room and went upstairs to change clothes. After changing her clothes, she attempted to go downstairs to watch television. As Mrs. Stephens reached the top of the stairway, she either slipped or fell forward. She testified that she "grabbed" in order to catch herself. However, Mrs. Stephens was unable to catch herself and she fell to the bottom of the stairs. As a result of the fall, she suffered serious injury. The evidence further showed that the stairway was approximately thirty-six inches wide and did not have a handrail although required by a Boise ordinance.

* * *

In granting defendant Stearns' motion for directed verdict, the trial judge concluded that there was "an absolute lack of evidence" and that "to find a proximate cause between the absence of the handrail and the fall suffered by the plaintiff would be absolutely conjecture and speculation." (Although the trial judge's conclusion referred to "proximate cause," it is apparent that he was referring to factual or actual cause. (*See Munson v. State, Department of Highways*, 96 Idaho 529, 531 P.2d 1174 (1975)).) We disagree with the conclusion of the trial judge.

We have considered the facts set out above in conjunction with the testimony of Chester Shawver, a Boise architect called as an expert in the field of architecture, that the primary purpose of a handrail is for user safety. We are left with the firm conviction that there is sufficient evidence from which reasonable jurors could have concluded that the absence of a handrail was the actual cause of plaintiff's injuries; i.e., that plaintiff would not have fallen, or at least would have been able to catch herself, had there been a handrail available for her to grab.

In addition, we do not believe that the jury would have had to rely on conjecture and speculation to find that the absence of the handrail was the actual cause. To the contrary, we believe that reasonable jurors could have drawn legitimate inferences from the evidence presented to determine the issue. This comports with the general rule that the factual issue of causation is for the jury to decide. (*McKinley v. Fanning*, 100 Idaho 189, 595 P.2d 1084 (1979); *Munson v. State, Department of Highways, supra*). In addition, courts in several other jurisdictions, when faced with similar factual settings, have held that this issue is a question for the jury.

* * *

Rather than attempt to squeeze the facts of this case into one of the common-law exceptions, plaintiff instead has brought to our attention the modern trend of the law in this area. Under the modern trend, landlords are simply under a duty to exercise reasonable care under the circumstances. The Tennessee Supreme Court had the foresight to grasp this concept many years ago when it stated: "The ground of liability upon the part of a landlord when he demises dangerous property has nothing special to do with the relation of landlord and tenant. It is the ordinary case of liability for personal misfeasance, which runs through all the relations of individuals to each other." (*Wilcox v. Hines*, 100 Tenn. 538, 46 S.W. 297, 299 (1898)). Seventy-five years later, the Supreme Court of New Hampshire followed the lead of *Wilcox*. *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528 (1973). The *Sargent* court abrogated the common-law rule and its exceptions, and adopted the reasonable care standard by stating:

We thus bring up to date the other half of landlord-tenant law. Henceforth, landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm.…A landlord must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.

Id. at 534 [Citations]

Tennessee and New Hampshire are not alone in adopting this rule. As of this date, several other states have also judicially adopted a reasonable care standard for landlords.

* * *

In commenting on the common-law rule, A. James Casner, Reporter of Restatement (Second) of Property—Landlord and Tenant, has stated: "While continuing to pay lip service to the general rule, the courts have expended considerable energy and exercised great ingenuity in attempting to fit various factual settings into the recognized exceptions." Restatement (Second) of Property—Landlord and Tenant ch. 17 Reporter's Note to Introductory Note (1977). We believe that the energies of the courts of Idaho should be used in a more productive manner. Therefore, after examining both the common-law rule and the modern trend, we today decide to leave the common-law rule and its exceptions behind, and we adopt the rule that a landlord is under a duty to exercise reasonable care in light of all the circumstances.

We stress that adoption of this rule is not tantamount to making the landlord an insurer for all injury occurring on the premises, but merely constitutes our removal of the landlord's common-law cloak of immunity. Those questions of hidden danger, public use, control, and duty to repair, which under the common-law were prerequisites to the consideration of the landlord's negligence, will now be relevant only inasmuch as they pertain to the elements of negligence, such as foreseeability and unreasonableness of the risk. We hold that defendant Stearns did owe a duty to plaintiff Stephens to exercise reasonable care in light of all the circumstances, and that it is for a jury to decide whether that duty was breached. Therefore, we reverse the directed verdict in favor of defendant Stearns and remand for a new trial of plaintiff's negligence action against defendant Stearns.

? case question 10.5.2

1. Why should actual cause be a jury question rather than a question that the trial judge decides on her own?
2. Could this case have fit one of the standard exceptions to the common-law rule that injuries on the premises are the responsibility of the tenant?
3. Does it mean anything at all to say, as the court does, that persons (including landlords) must “exercise reasonable care not to subject others to an unreasonable risk of harm?” Is this a rule that gives very much direction to landlords who may wonder what the limit of their liabilities might be?

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SECTION OVERVIEW

11.1: Introduction to Contract Law

Learning Objectives

After reading this chapter, you should understand the following:

1. Why and how contract law has developed
2. What a contract is
3. What topics will be discussed in the contracts chapter of this book
4. What the sources of contract law are
5. How contracts are classified (basic taxonomy)

11.1.1: General Perspectives on Contracts

11.1.2: Sources of Contract Law

11.1.3: Basic Taxonomy of Contracts

11.1.4: Cases

11.1.5: Summary and Exercises

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11.1.1: General Perspectives on Contracts

LEARNING OBJECTIVES

1. Explain contract law's cultural roots: how it has evolved as capitalism has evolved.
2. Understand that contracts serve essential economic purposes.
3. Define contract.
4. Understand the basic issues in contract law.

The Role of Contracts in Modern Society

Contract is probably the most familiar legal concept in our society because it is so central to the essence of our political, economic, and social life. In common parlance, contract is used interchangeably with *agreement*, *bargain*, *undertaking*, or *deal*. Whatever the word, the concept it embodies is our notion of freedom to pursue our own lives together with others. Contract is central because it is the means by which a free society orders what would otherwise be a jostling, frenetic anarchy.

So commonplace is the concept of contract—and our freedom to make contracts with each other—that it is difficult to imagine a time when contracts were rare, when people's everyday associations with one another were not freely determined. Yet in historical terms, it was not so long ago that contracts were rare, entered into if at all by very few: that affairs should be ordered based on mutual assent was mostly unknown. In primitive societies and in feudal Europe, relationships among people were largely fixed; traditions spelled out duties that each person owed to family, tribe, or manor. People were born into an ascribed position—a status (not unlike the caste system still existing in India)—and social mobility was limited. Sir Henry Maine, a nineteenth-century British historian, wrote that "the movement of the progressive societies has…been a movement from status to contract."Sir Henry Maine, *Ancient Law* (1869), 180–82. This movement was not accidental—it developed with the emerging industrial order. From the fifteenth to the nineteenth century, England evolved into a booming mercantile economy, with flourishing trade, growing cities, an expanding monetary system, the commercialization of agriculture, and mushrooming manufacturing. With this evolution, contract law was created of necessity.

Contract law did not develop according to a conscious plan, however. It was a response to changing conditions, and the judges who created it frequently resisted, preferring the imagined quieter pastoral life of their forefathers. Not until the nineteenth century, in both the United States and England, did a full-fledged law of contracts arise together with, and help create, modern capitalism.

Modern capitalism, indeed, would not be possible without contract law. So it is that in planned economies, like those of the former Soviet Union and precapitalistic China, the contract did not determine the nature of an economic transaction. That transaction was first set forth by the state's planning authorities; only thereafter were the predetermined provisions set down in a written contract. Modern capitalism has demanded new contract regimes in Russia and China; the latter adopted its Revised Contract Law in 1999.

Contract law may be viewed economically as well as culturally. In *An Economic Analysis of Law*, Judge Richard A. Posner (a former University of Chicago law professor) suggests that contract law performs three significant economic functions. First, it helps maintain incentives for individuals to exchange goods and services efficiently. Second, it reduces the costs of economic transactions because its very existence means that the parties need not go to the trouble of negotiating a variety of rules and terms already spelled out. Third, the law of contracts alerts the parties to troubles that have arisen in the past, thus making it easier to plan the transactions more intelligently and avoid potential pitfalls.Richard A. Posner, *Economic Analysis of Law* (New York: Aspen, 1973).

The Definition of *Contract*

As usual in the law, the legal definition of **contract** is formalistic. The Restatement (Second) of Contracts (Section 1) says, "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Similarly, the Uniform Commercial Code says, "'Contract' means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law."Uniform Commercial Code, Section 1-201(11). As operational definitions, these two are circular; in effect, a contract is defined as an agreement that the law will hold the parties to.

Most simply, a contract is a legally enforceable promise. This implies that not every promise or agreement creates a binding contract; if every promise did, the simple definition set out in the preceding sentence would read, “A contract is a promise.” But—again—a contract is not simply a promise: it is a legally enforceable promise. The law takes into account the way in which contracts are made, by whom they are made, and for what purposes they are made. For example, in many states, a wager is unenforceable, even though both parties “shake” on the bet. We will explore these issues in the chapters to come.

Overview of the Contracts Chapter

Although contract law has many wrinkles and nuances, it consists of four principal inquiries, each of which will be taken up in subsequent chapters:

1. Did the parties create a valid contract? Four elements are necessary for a valid contract:
    1. Mutual assent (i.e., offer and acceptance), Chapter 9 "The Agreement"
    2. Real assent (no duress, undue influence, misrepresentation, mistake, or incapacity), Chapter 10 "Real Assent"
    3. Consideration, Chapter 11 "Consideration"
    4. Legality, Chapter 12 "Legality"
2. What does the contract mean, and is it in the proper form to carry out this meaning? Sometimes contracts need to be in writing (or evidenced by some writing), or they can’t be enforced. Sometimes it isn’t clear what the contract means, and a court has to figure that out. These problems are taken up in Chapter 13 "Form and Meaning".
3. Do persons other than the contracting parties have rights or duties under the contract? Can the right to receive a benefit from the contract be assigned, and can the duties be delegated so that a new person is responsible? Can persons not a party to the contract sue to enforce its terms? These questions are addressed in Chapter 14 "Third-Party Rights".
4. How do contractual duties terminate, and what remedies are available if a party has breached the contract? These issues are taken up in Chapter 15 "Discharge of Obligations" and Chapter 16 "Remedies".

Together, the answers to these four basic inquiries determine the rights and obligations of contracting parties.

KEY TAKEAWAY

Contract law developed when the strictures of feudalism dissipated, when a person’s position in society came to be determined by personal choice (by mutual agreement) and not by status (by how a person was born). Capitalism and contract law have developed together, because having choices in society means that people decide and agree to do things with and to each other, and those agreements bind the parties; the agreements must be enforceable.

EXERCISES

1. Why is contract law necessary in a society where a person’s status is not predetermined by birth?
2. Contract law serves some economic functions. What are they?

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11.1.2: Sources of Contract Law

LEARNING OBJECTIVES

1. Understand that contract law comes from two sources: judges (cases) and legislation.
2. Know what the Restatement of Contracts is.
3. Recognize the Convention on Contracts for the International Sale of Goods.

The most important sources of contract law are state case law and state statutes (though there are also many federal statutes governing how contracts are made by and with the federal government).

Case Law

Law made by judges is called **case law**. Because contract law was made up in the common-law courtroom by individual judges as they applied rules to resolve disputes before them, it grew over time to formidable proportions. By the early twentieth century, tens of thousands of contract disputes had been submitted to the courts for resolution, and the published opinions, if collected in one place, would have filled dozens of bookshelves. Clearly this mass of material was too unwieldy for efficient use. A similar problem also had developed in the other leading branches of the common law.

Disturbed by the profusion of cases and the resulting uncertainty of the law, a group of prominent American judges, lawyers, and law teachers founded the American Law Institute (ALI) in 1923 to attempt to clarify, simplify, and improve the law. One of the ALI's first projects, and ultimately one of its most successful, was the drafting of the **Restatement of the Law of Contracts**, completed in 1932. A revision—the Restatement (Second) of Contracts—was undertaken in 1964 and completed in 1979. Hereafter, references to "the Restatement" pertain to the Restatement (Second) of Contracts.

The Restatements—others exist in the fields of torts, agency, conflicts of laws, judgments, property, restitution, security, and trusts—are detailed analyses of the decided cases in each field. These analyses are made with an eye to discerning the various principles that have emerged from the courts, and to the maximum extent possible, the Restatements declare the law as the courts have determined it to be. The Restatements, guided by a reporter (the director of the project) and a staff of legal scholars, go through several so-called tentative drafts—sometimes as many as fifteen or twenty—and are screened by various committees within the ALI before they are eventually published as final documents.

The Restatement (Second) of Contracts won prompt respect in the courts and has been cited in innumerable cases. The Restatements are not authoritative, in the sense that they are not actual judicial precedents; but they are nevertheless weighty interpretive texts, and judges frequently look to them for guidance. They are as close to "black letter" rules of law as exist anywhere in the American common-law legal system.

Common law, case law (the terms are synonymous), governs contracts for the sale of real estate and services. "Services" refer to acts or deeds (like plumbing, drafting documents, driving a car) as opposed to the sale of property.

Statutory Law: The Uniform Commercial Code

Common-law contract principles govern contracts for real estate and services. Because of the historical development of the English legal system, contracts for the sale of goods came to be governed by a different body of legal rules. In its modern American manifestation, that body of rules is an important statute: the **Uniform Commercial Code (UCC)**, especially **Article 2**, which deals with the sale of goods.

History of the UCC

A bit of history is in order. Before the UCC was written, commercial law varied, sometimes greatly, from state to state. This first proved a nuisance and then a serious impediment to business as the American economy became nationwide during the twentieth century. Although there had been some uniform laws concerned with commercial deals—including the Uniform Sales Act, first published in 1906—few were widely adopted and none nationally. As a result, the law governing sales of goods, negotiable instruments, warehouse receipts, securities, and other matters crucial to doing business in an industrial market economy was a crazy quilt of untidy provisions that did not mesh well from state to state.

The UCC is a model law developed by the ALI and the National Conference of Commissioners on Uniform State Laws; it has been adopted in one form or another by the legislatures in all fifty states, the District of Columbia, and the American territories. It is a "national" law not enacted by Congress—it is not federal law but uniform state law.

Initial drafting of the UCC began in 1942 and was ten years in the making, involving the efforts of hundreds of practicing lawyers, law teachers, and judges. A final draft, promulgated by the ALI, was endorsed by the American Bar Association and published in 1951. Various revisions followed in different states, threatening the uniformity of the UCC. The ALI responded by creating a permanent editorial board to oversee future revisions. In one or another of its various revisions, the UCC has been adopted in whole or in part in all American jurisdictions. The UCC is now a basic law of relevance to every business and business lawyer in the United States, even though it is not entirely uniform because different states have adopted it at various stages of its evolution—an evolution that continues still.

Organization of the UCC

The UCC consists of nine major substantive articles; each deals with separate though related subjects. The articles are as follows:

- Article 1: General Provisions
- Article 2: Sales
- Article 2A: Leases
- Article 3: Commercial Paper
- Article 4: Bank Deposits and Collections
- Article 4A: Funds Transfers
- Article 5: Letters of Credit
- Article 6: Bulk Transfers
- Article 7: Warehouse Receipts, Bills of Lading, and Other Documents of Title
- Article 8: Investment Securities
- Article 9: Secured Transactions

Article 2 deals only with the sale of goods, which the UCC defines as "all things…which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid."Uniform Commercial Code, Section 2-105. The only contracts and agreements covered by Article 2 are those relating to the present or future sale of goods.

Article 2 is divided in turn into six major parts: (1) Form, Formation, and Readjustment of Contract; (2) General Obligation and Construction of Contract; (3) Title, Creditors, and Good Faith Purchasers; (4) Performance; (5) Breach, Repudiation, and Excuse; and (6) Remedies. These topics will be discussed in Chapter 17 "Introduction to Sales and Leases", Chapter 18 "Title and Risk of Loss", Chapter 19 "Performance and Remedies", Chapter 20 "Products Liability", and Chapter 21 "Bailments and the Storage, Shipment, and Leasing of Goods".

Figure 8.1 Sources of Law

	Source of Law	
Type of Contract	Common Law	UCC
Real Estate	✓	
Services	✓	
Sale of Goods		✓

International Sales Law

The Convention on Contracts for the International Sale of Goods

A **Convention on Contracts for the International Sale of Goods (CISG)** was approved in 1980 at a diplomatic conference in Vienna. (A convention is a preliminary agreement that serves as the basis for a formal treaty.) The CISG has been adopted by more

than forty countries, including the United States.

The CISG is significant for three reasons. First, it is a uniform law governing the sale of goods—in effect, an international Uniform Commercial Code. The major goal of the drafters was to produce a uniform law acceptable to countries with different legal, social, and economic systems. Second, although provisions in the CISG are generally consistent with the UCC, there are significant differences. For instance, under the CISG, consideration (discussed in Chapter 11 "Consideration") is not required to form a contract, and there is no Statute of Frauds (a requirement that certain contracts be evidenced by a writing). Third, the CISG represents the first attempt by the US Senate to reform the private law of business through its treaty powers, for the CISG preempts the UCC. The CISG is not mandatory: parties to an international contract for the sale of goods may choose to have their agreement governed by different law, perhaps the UCC, or perhaps, say, Japanese contract law. The CISG does not apply to contracts for the sale of (1) ships or aircraft, (2) electricity, or (3) goods bought for personal, family, or household use, nor does it apply (4) where the party furnishing the goods does so only incidentally to the labor or services part of the contract.

KEY TAKEAWAY

Judges have made contract law over several centuries by deciding cases that create, extend, or change the developing rules affecting contract formation, performance, and enforcement. The rules from the cases have been abstracted and organized in the Restatements of Contracts. To facilitate interstate commerce, contract law for many commercial transactions—especially the sale of goods—not traditionally within the purview of judges has been developed by legal scholars and presented for the states to adopt as the Uniform Commercial Code. There is an analogous Convention on Contracts for the International Sale of Goods, to which the United States is a party.

EXERCISES

1. How do judges make contract law?
2. What is the Restatement of the Law of Contracts, and why was it necessary?
3. Why was the Uniform Commercial Code developed, and by whom?
4. Who adopts the UCC as governing law?
5. What is the Convention on Contracts for the International Sale of Goods?

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11.1.3: Basic Taxonomy of Contracts

LEARNING OBJECTIVES

1. Understand that contracts are classified according to the criteria of explicitness, mutuality, enforceability, and degree of completion and that some noncontract promises are nevertheless enforceable under the doctrine of promissory estoppel.
2. Keep your eyes (and ears) alert to the use of suffixes (word endings) in legal terminology that express relationships between parties.

Some contracts are written, some oral; some are explicit, some not. Because contracts can be formed, expressed, and enforced in a variety of ways, a taxonomy of contracts has developed that is useful in grouping together like legal consequences. In general, contracts are classified along four different dimensions: explicitness, mutuality, enforceability, and degree of completion. Explicitness is the degree to which the agreement is manifest to those not party to it. Mutuality takes into account whether promises are given by two parties or only one. Enforceability is the degree to which a given contract is binding. Completion considers whether the contract is yet to be performed or whether the obligations have been fully discharged by one or both parties. We will examine each of these concepts in turn.

Explicitness

Express Contract

An **express contract** is one in which the terms are spelled out directly. The parties to an express contract, whether it is written or oral, are conscious that they are making an enforceable agreement. For example, an agreement to purchase your neighbor's car for $5,500 and to take title next Monday is an express contract.

Implied Contract (Implied in Fact)

An **implied contract** is one that is inferred from the actions of the parties. When parties have not discussed terms, an implied contract exists if it is clear from the conduct of both parties that they intended there be one. A delicatessen patron who asks for a turkey sandwich to go has made a contract and is obligated to pay when the sandwich is made. By ordering the food, the patron is implicitly agreeing to the price, whether posted or not.

The distinction between express and implied contracts has received a degree of notoriety in the so-called palimony cases, in which one member of an unmarried couple seeks a division of property after a long-standing live-together relationship has broken up. When a married couple divorces, their legal marriage contract is dissolved, and financial rights and obligations are spelled out in a huge body of domestic relations statutes and judicial decisions. No such laws exist for unmarried couples. However, about one-third of the states recognize common-law marriage, under which two people are deemed to be married if they live together with the intent to be married, regardless of their failure to have obtained a license or gone through a ceremony. Although there is no actual contract of marriage (no license), their behavior implies that the parties intended to be treated as if they were married.

Quasi-Contract

A **quasi-contract (implied in law)** is—unlike both express and implied contracts, which embody an actual agreement of the parties—an obligation said to be "imposed by law" in order to avoid unjust enrichment of one person at the expense of another. A quasi-contract is not a contract at all; it is a fiction that the courts created to prevent injustice. Suppose, for example, that the local lumberyard mistakenly delivers a load of lumber to your house, where you are repairing your deck. It was a neighbor on the next block who ordered the lumber, but you are happy to accept the load for free; since you never talked to the lumberyard, you figure you need not pay the bill. Although it is true there is no contract, the law implies a contract for the value of the material: of course you will have to pay for what you got and took. The existence of this implied contract does not depend on the intention of the parties.

Mutuality

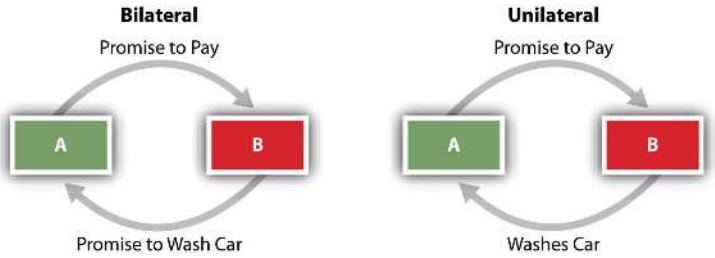
Bilateral Contract

The typical contract is one in which the parties make mutual promises. Each is both promisor and promisee; that is, each pledges to do something, and each is the recipient of such a pledge. This type of contract is called a **bilateral contract**.

Unilateral Contract

Mutual promises are not necessary to constitute a contract. **Unilateral contracts**, in which one party performs an act in exchange for the other party's promise, are equally valid. An offer of a reward—for catching a criminal or for returning a lost cat—is an example of a unilateral contract: there is an offer on one side, and the other side accepts by taking the action requested.

Figure 8.2 Bilateral and Unilateral Contracts



Enforceability

Void

Not every agreement between two people is a binding contract. An agreement that is lacking one of the legal elements of a contract is said to be a **void contract**—that is, not a contract at all. An agreement that is illegal—for example, a promise to commit a crime in return for a money payment—is void. Neither party to a void "contract" may enforce it.

Voidable

By contrast, a **voidable contract** is one that may become unenforceable by one party but can be enforced by the other. For example, a minor (any person under eighteen, in most states) may "avoid" a contract with an adult; the adult may not enforce the contract against the minor if the minor refuses to carry out the bargain. But the adult has no choice if the minor wishes the contract to be performed. (A contract may be voidable by both parties if both are minors.)

Ordinarily, the parties to a voidable contract are entitled to be restored to their original condition. Suppose you agree to buy your seventeen-year-old neighbor's car. He delivers it to you in exchange for your agreement to pay him next week. He has the legal right to terminate the deal and recover the car, in which case you will of course have no obligation to pay him. If you have already paid him, he still may legally demand a return to the status quo ante (previous state of affairs). You must return the car to him; he must return the cash to you.

A voidable contract remains a valid contract until it is voided. Thus a contract with a minor remains in force unless the minor decides he or she does not wish to be bound by it. When the minor reaches majority, he or she may "ratify" the contract—that is, agree to be bound by it—in which case the contract will no longer be voidable and will thereafter be fully enforceable.

Unenforceable

An **unenforceable contract** is one that some rule of law bars a court from enforcing. For example, Tom owes Pete money, but Pete has waited too long to collect it and the statute of limitations has run out. The contract for repayment is unenforceable and Pete is out of luck, unless Tom makes a new promise to pay or actually pays part of the debt. (However, if Pete is holding collateral as security for the debt, he is entitled to keep it; not all rights are extinguished because a contract is unenforceable.) A debt becomes unenforceable, too, when the debtor declares bankruptcy.

A bit more on enforceability is in order. A promise or what seems to be a promise is usually enforceable only if it is otherwise embedded in the elements necessary to make that promise a contract. Those elements are mutual assent, real assent, consideration, capacity, and legality. Sometimes, though, people say things that seem like promises, and on which another person relies. In the

early twentieth century, courts began, in some circumstances, to recognize that insisting on the existence of the traditional elements of contract to determine whether a promise is enforceable could work an injustice where there has been reliance. Thus developed the equitable doctrine of **promissory estoppel**, which has become an important adjunct to contract law. The Restatement (Section 90) puts it this way: "A promise which the promisor should reasonably expect to induce action or forbearance on the party of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."

To be "estopped" means to be prohibited from denying now the validity of a promise you made before.

The doctrine has an interesting background. In 1937, High Trees House Ltd. (a British corporation) leased a block of London apartments from Central London Properties. As World War II approached, vacancy rates soared because people left the city. In 1940 the parties agreed to reduce the rent rates by half, but no term was set for how long the reduction would last. By mid-1945, as the war was ending, occupancy was again full, and Central London sued for the full rental rates from June on. The English court, under Judge Alfred Thompson Denning (1899–1999), had no difficulty finding that High Trees owed the full amount once full occupancy was again achieved, but Judge Denning went on. In an aside (called a dicta—a statement "by the way"—that is, not necessary as part of the decision), he mused about what would have happened if in 1945 Central London had sued for the full-occupancy rate back to 1940. Technically, the 1940 amendment to the 1937 contract was not binding on Central London—it lacked consideration—and Central London could have reached back to demand full-rate payment. But Judge Denning said that High Trees would certainly have relied on Central London's promise that a reduced-rate rent would be acceptable, and that would have been enough to bind it, to prevent it from acting inconsistently with the promise. He wrote, "The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it."*Central London Property Trust Ltd. v. High Trees House Ltd.* (1947) KB 130.

In the years since, though, courts *have* gone so far as to give a cause of action in damages for various noncontract promises. Contract protects agreements; promissory estoppel protects reliance, and that's a significant difference. The law of contracts continues to evolve.

Degree of Completion

An agreement consisting of a set of promises is called an **executory contract** before any promises are carried out. Most executory contracts are enforceable. If John makes an agreement to deliver wheat to Humphrey and does so, the contract is called a **partially executed contract**: one side has performed, the other has not. When John pays for the wheat, the contract is fully performed. A contract that has been carried out fully by both parties is called an **executed contract**.

Terminology: Suffixes Expressing Relationships

Although not really part of the taxonomy of contracts (i.e., the orderly classification of the subject), an aspect of contractual—indeed, legal—terminology should be highlighted here. *Suffixes* (the end syllables of words) in the English language are used to express relationships between parties in legal terminology. Here are examples:

- **Offeror.** One who makes an offer.
- **Offeree.** One to whom an offer is made.
- **Promisor.** One who makes a promise.
- **Promisee.** One to whom a promise is made.
- **Obligor.** One who makes and has an obligation.
- **Obligee.** One to whom an obligation is made.
- **Transferor.** One who makes a transfer.
- **Transferee.** One to whom a transfer is made.

KEY TAKEAWAY

Contracts are described and thus defined on the basis of four criteria: explicitness (express, implied, or quasi-contracts), mutuality (bilateral or unilateral), enforceability (void, voidable, unenforceable), and degree of completion (executory, partially executed, executed). Legal terminology in English often describes relationships between parties by the use of suffixes, to which the eye and ear must pay attention.

EXERCISES

1. Able *writes* to Baker: “I will mow your lawn for $20.” If Baker accepts, is this an express or implied contract?
2. Able *telephones* Baker: “I will mow your lawn for $20.” Is this an express or implied contract?
3. What is the difference between a void contract and a voidable one?
4. Carr staples this poster to a utility pole: “$50 reward for the return of my dog, Argon.” Describe this in contractual terms regarding explicitness, mutuality, enforceability, and degree of completion.
5. Is a voidable contract always unenforceable?
6. Contractor bids on a highway construction job, incorporating Guardrail Company’s bid into its overall bid to the state. Contractor cannot accept Guardrail’s offer until it gets the nod from the state. Contractor gets the nod from the state, but before it can accept Guardrail’s offer, the latter revokes it. Usually a person can revoke an offer any time before it is accepted. Can Guardrail revoke its offer in this case?

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11.1.4: Cases

Explicitness: Implied Contract

Roger's Backhoe Service, Inc. v. Nichols

681 N.W.2d 647 (Iowa 2004)

Carter, J.

Defendant, Jeffrey S. Nichols, is a funeral director in Muscatine.…In early 1998 Nichols decided to build a crematorium on the tract of land on which his funeral home was located. In working with the Small Business Administration, he was required to provide drawings and specifications and obtain estimates for the project. Nichols hired an architect who prepared plans and submitted them to the City of Muscatine for approval. These plans provided that the surface water from the parking lot would drain onto the adjacent street and alley and ultimately enter city storm sewers. These plans were approved by the city.

Nichols contracted with Roger's [Backhoe Service, Inc.] for the demolition of the foundation of a building that had been razed to provide room for the crematorium and removal of the concrete driveway and sidewalk adjacent to that foundation. Roger's completed that work and was paid in full.

After construction began, city officials came to the jobsite and informed Roger's that the proposed drainage of surface water onto the street and alley was unsatisfactory. The city required that an effort be made to drain the surface water into a subterranean creek, which served as part of the city's storm sewer system. City officials indicated that this subterranean sewer system was about fourteen feet below the surface of the ground.…Roger's conveyed the city's mandate to Nichols when he visited the jobsite that same day.

It was Nichols' testimony at trial that, upon receiving this information, he advised…Roger's that he was refusing permission to engage in the exploratory excavation that the city required. Nevertheless, it appears without dispute that for the next three days Roger's did engage in digging down to the subterranean sewer system, which was located approximately twenty feet below the surface. When the underground creek was located, city officials examined the brick walls in which it was encased and determined that it was not feasible to penetrate those walls in order to connect the surface water drainage with the underground creek. As a result of that conclusion, the city reversed its position and once again gave permission to drain the surface water onto the adjacent street and alley.

[T]he invoices at issue in this litigation relate to charges that Roger's submitted to Nichols for the three days of excavation necessary to locate the underground sewer system and the cost for labor and materials necessary to refill the excavation with compactable materials and attain compaction by means of a tamping process.…The district court found that the charges submitted on the…invoices were fair and reasonable and that they had been performed for Nichols' benefit and with his tacit approval.…

The court of appeals…concluded that a necessary element in establishing an implied-in-fact contract is that the services performed be beneficial to the alleged obligor. It concluded that Roger's had failed to show that its services benefited Nichols.…

In describing the elements of an action on an implied contract, the court of appeals stated in [Citation], that the party seeking recovery must show:

(1) the services were carried out under such circumstances as to give the recipient reason to understand:

(a) they were performed for him and not some other person, and

(b) they were not rendered gratuitously, but with the expectation of compensation from the recipient; and

(2) *the services were beneficial to the recipient.*

In applying the italicized language in [Citation] to the present controversy, it was the conclusion of the court of appeals that Roger's' services conferred no benefit on Nichols. We disagree. There was substantial evidence in the record to support a finding that, unless and until an effort was made to locate the subterranean sewer system, the city refused to allow the project to proceed. Consequently, it was necessary to the successful completion of the project that the effort be made. The fact that examination of the brick wall surrounding the underground creek indicated that it was unfeasible to use that source of drainage does not alter the fact

that the project was stalemated until drainage into the underground creek was fully explored and rejected. The district court properly concluded that Roger's' services conferred a benefit on Nichols.…

Decision of court of appeals vacated; district court judgment affirmed.

CASE QUESTIONS

1. What facts must be established by a plaintiff to show the existence of an implied contract?
2. What argument did Nichols make as to why there was no implied contract here?
3. How would the facts have to be changed to make an express contract?

Mutuality of Contract: Unilateral Contract

SouthTrust Bank v. Williams

775 So.2d 184 (Ala. 2000)

Cook, J.

SouthTrust Bank ("SouthTrust") appeals from an order denying its motion to compel arbitration of an action against it by checking-account customers Mark Williams and Bessie Daniels. We reverse and remand.

Daniels and Williams began their relationship with SouthTrust in 1981 and 1995, respectively, by executing checking-account "signature cards." The signature card each customer signed contained a "change-in-terms" clause. Specifically, when Daniels signed her signature card, she "agree[d] to be subject to the Rules and Regulations as may now or *hereafter* be adopted by the Bank." (Emphasis added.)…[Later,] SouthTrust added paragraph 33 to the regulations:…

ARBITRATION OF DISPUTES. You and we agree that the transactions in your account involve 'commerce' under the Federal Arbitration Act ('FAA'). ANY CONTROVERSY OR CLAIM BETWEEN YOU AND US…WILL BE SETTLED BY BINDING ARBITRATION UNDER THE FAA.…

This action…challenges SouthTrust's procedures for paying overdrafts, and alleges that SouthTrust engages in a "uniform practice of paying the largest check(s) before paying multiple smaller checks…[in order] to generate increased service charges for [SouthTrust] at the expense of [its customers]."

SouthTrust filed a "motion to stay [the] lawsuit and to compel arbitration." It based its motion on paragraph 33 of the regulations. [T]he trial court…entered an order denying SouthTrust's motion to compel arbitration. SouthTrust appeals.…

Williams and Daniels contend that SouthTrust's amendment to the regulations, adding paragraph 33, was ineffective because, they say, they did not *expressly assent* to the amendment. In other words, they object to submitting their claims to arbitration because, they say, when they opened their accounts, neither the regulations nor any other relevant document contained an arbitration provision. They argue that "mere failure to object to the addition of a material term cannot be construed as an acceptance of it."… They contend that SouthTrust could not unilaterally insert an arbitration clause in the regulations and make it binding on depositors like them.

SouthTrust, however, referring to its change-of-terms clause insists that it "notified" Daniels and Williams of the amendment in January 1997 by enclosing in each customer's "account statement" a complete copy of the regulations, as amended. Although it is undisputed that Daniels and Williams never affirmatively assented to these amended regulations, SouthTrust contends that their assent was evidenced by their failure to close their accounts after they received notice of the amendments.…Thus, the disposition of this case turns on the legal effect of Williams and Daniels's continued use of the accounts after the regulations were amended.

Williams and Daniels argue that "[i]n the context of contracts between merchants [under the UCC], a written confirmation of an acceptance may modify the contract *unless* it adds a *material* term, and arbitration clauses are material terms."…

Williams and Daniels concede—as they must—…that Article 2 governs "transactions in goods," and, consequently, that it is not applicable to the transactions in this case. Nevertheless, they argue:

It would be astonishing if a Court were to consider the addition of an arbitration clause a material alteration to a contract between merchants, who by definition are sophisticated in the trade to which the contract applies, but *not* hold that the addition of an

arbitration clause is a material alteration pursuant to a change-of-terms clause in a contract between one sophisticated party, a bank, and an entire class of less sophisticated parties, its depositors.…

In response, SouthTrust states that "because of the 'at-will' nature of the relationship, banks by necessity must contractually reserve the right to amend their deposit agreements from time to time." In so stating, SouthTrust has precisely identified the fundamental difference between the transactions here and those transactions governed by [Article 2].

Contracts for the purchase and sale of goods are essentially *bilateral* and executory in nature. See [Citation] "An agreement whereby one party promises to sell and the other promises to buy a thing at a later time…is a bilateral promise of sale or contract to sell"…."[A] unilateral contract results from an exchange of a promise for an act; a bilateral contract results from an exchange of promises."…Thus, "in a unilateral contract, there is no bargaining process or exchange of promises by parties as in a bilateral contract." [Citation] "[O]nly one party makes an offer (or promise) which invites performance by another, and performance constitutes both acceptance of that offer and consideration." Because "a 'unilateral contract' is one in which no promisor receives promise as consideration for his promise," only one party is bound.…The difference is not one of semantics but of substance; it determines the rights and responsibilities of the parties, including the time and the conditions under which a cause of action accrues for a breach of the contract.

This case involves at-will, commercial relationships, based upon a series of unilateral transactions. Thus, it is more analogous to cases involving insurance policies, such as [Citations]. The common thread running through those cases was the *amendment* by one of the parties to a business relationship of a document underlying that relationship—without the express assent of the other party—to require the arbitration of disputes arising after the amendment.…

The parties in [the cited cases], like Williams and Daniels in this case, took no action that could be considered inconsistent with an assent to the arbitration provision. In each case, they continued the business relationship after the interposition of the arbitration provision. In doing so, they implicitly assented to the addition of the arbitration provision.…

Reversed and remanded.

CASE QUESTIONS

1. Why did the plaintiffs think they should not be bound by the arbitration clause?
2. The court said this case involved a unilateral contract. What makes it that, as opposed to a bilateral contract?
3. What should the plaintiffs have done if they didn't like the arbitration requirement?

Unilateral Contract and At-Will Employment

Woolley v. Hoffmann-La Roche, Inc.

491 A.2d 1257 (N.J. 1985)

Wilntz, C. J.

Plaintiff, Richard Woolley, was hired by defendant, Hoffmann-La Roche, Inc., in October 1969, as an Engineering Section Head in defendant's Central Engineering Department at Nutley. There was no written employment contract between plaintiff and defendant. Plaintiff began work in mid-November 1969. Sometime in December, plaintiff received and read the personnel manual on which his claims are based.

[The company's personnel manual had eight pages;] five of the eight pages are devoted to "termination." In addition to setting forth the purpose and policy of the termination section, it defines "the types of termination" as "layoff," "discharge due to performance," "discharge, disciplinary," "retirement" and "resignation." As one might expect, layoff is a termination caused by lack of work, retirement a termination caused by age, resignation a termination on the initiative of the employee, and discharge due to performance and discharge, disciplinary, are both terminations for cause. There is no category set forth for discharge without cause. The termination section includes "Guidelines for discharge due to performance," consisting of a fairly detailed procedure to be used before an employee may be fired for cause. Preceding these definitions of the five categories of termination is a section on "Policy," the first sentence of which provides: "It is the policy of Hoffmann-La Roche to retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively."

In 1976, plaintiff was promoted, and in January 1977 he was promoted again, this latter time to Group Leader for the Civil Engineering, the Piping Design, the Plant Layout, and the Standards and Systems Sections. In March 1978, plaintiff was directed to write a report to his supervisors about piping problems in one of defendant's buildings in Nutley. This report was written and submitted to plaintiff's immediate supervisor on April 5, 1978. On May 3, 1978, stating that the General Manager of defendant's Corporate Engineering Department had lost confidence in him, plaintiff's supervisors requested his resignation. Following this, by letter dated May 22, 1978, plaintiff was formally asked for his resignation, to be effective July 15, 1978.

Plaintiff refused to resign. Two weeks later defendant again requested plaintiff's resignation, and told him he would be fired if he did not resign. Plaintiff again declined, and he was fired in July.

Plaintiff filed a complaint alleging breach of contract.…The gist of plaintiff's breach of contract claim is that the express and implied promises in defendant's employment manual created a contract under which he could not be fired at will, but rather only for cause, and then only after the procedures outlined in the manual were followed. Plaintiff contends that he was not dismissed for good cause, and that his firing was a breach of contract.

Defendant's motion for summary judgment was granted by the trial court, which held that the employment manual was not contractually binding on defendant, thus allowing defendant to terminate plaintiff's employment at will. The Appellate Division affirmed. We granted certification.

The employer's contention here is that the distribution of the manual was simply an expression of the company's "philosophy" and therefore free of any possible contractual consequences. The former employee claims it could reasonably be read as an explicit statement of company policies intended to be followed by the company in the same manner as if they were expressed in an agreement signed by both employer and employees.…

This Court has long recognized the capacity of the common law to develop and adapt to current needs.…The interests of employees, employers, and the public lead to the conclusion that the common law of New Jersey should limit the right of an employer to fire an employee at will.

In order for an offer in the form of a promise to become enforceable, it must be accepted. Acceptance will depend on what the promisor bargained for: he may have bargained for a return promise that, if given, would result in a bilateral contract, both promises becoming enforceable. Or he may have bargained for some action or nonaction that, if given or withheld, would render his promise enforceable as a unilateral contract. In most of the cases involving an employer's personnel policy manual, the document is prepared without any negotiations and is voluntarily distributed to the workforce by the employer. It seeks no return promise from the employees. It is reasonable to interpret it as seeking continued work from the employees, who, in most cases, are free to quit since they are almost always employees at will, not simply in the sense that the employer can fire them without cause, but in the sense that they can quit without breaching any obligation. Thus analyzed, the manual is an offer that seeks the formation of a unilateral contract—the employees' bargained-for action needed to make the offer binding being their continued work when they have no obligation to continue.

The unilateral contract analysis is perfectly adequate for that employee who was aware of the manual and who continued to work intending that continuation to be the action in exchange for the employer's promise; it is even more helpful in support of that conclusion if, but for the employer's policy manual, the employee would have quit. See generally M. Petit, "Modern Unilateral Contracts," 63 Boston Univ. Law Rev. 551 (1983) (judicial use of unilateral contract analysis in employment cases is widespread).

…All that this opinion requires of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises. What is sought here is basic honesty: if the employer, for whatever reason, does not want the manual to be capable of being construed by the court as a binding contract, there are simple ways to attain that goal. All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.

Reversed and remanded for trial.

CASE QUESTIONS

1. What did Woolley do to show his acceptance of the terms of employment offered to him?
2. In part of the case not included here, the court notes that Mr. Woolley died “before oral arguments on this case.” How can there be any damages if the plaintiff has died? Who now has any case to pursue?
3. The court here is changing the law of employment in New Jersey. It is making case law, and the rule here articulated governs similar future cases in New Jersey. Why did the court make this change? Why is it relevant that the court says it would be easy for an employer to avoid this problem?

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11.1.5: Summary and Exercises

Summary

Contract law developed as the status-centered organization of feudal society faded and people began to make choices about how they might order their lives. In the capitalistic system, people make choices about how to interact with others, and—necessarily—those choices expressed as promises must be binding and enforceable.

The two fundamental sources of contract law are (1) the common law as developed in the state courts and as summarized in the Restatement (Second) of Contracts and (2) the Uniform Commercial Code for the sale of goods. In general, the UCC is more liberal than the common law in upholding the existence of a contract.

Types of contracts can be distinguished by four criteria: (1) express and implied, including quasi-contracts implied by law; (2) bilateral and unilateral; (3) enforceable and unenforceable; and (4) completed (executed) and uncompleted (executory). To understand contract law, it is necessary to master these distinctions and their nuances.

EXERCISES

1. 1. Mr. and Mrs. Smith, an elderly couple, had no relatives. When Mrs. Smith became ill, the Smiths asked a friend, Henrietta, to help with various housekeeping chores, including cleaning and cooking. Although the Smiths never promised to pay her, Henrietta performed the chores for eighteen months. Henrietta now claims that she is entitled to the reasonable value of the services performed. Is she correct? Explain.
   2. Assume instead that the Smiths asked Mrs. Smith's sister, Caroline, who lived nearby, to help with the housekeeping. After eighteen months, Caroline claims she is entitled to the reasonable value of the services performed. Is she correct? Explain.
2. A letter from Bridge Builders Inc. to the Allied Steel Company stated, "We offer to purchase 10,000 tons of No. 4 steel pipe at today's quoted price for delivery two months from today. Your acceptance must be received in five days." Does Bridge Builders intend to create a bilateral or a unilateral contract? Why?
3. Roscoe's barber persuaded him to try a new hair cream called Sansfree, which the barber applied to Roscoe's hair and scalp. The next morning Roscoe had a very unpleasant rash along his hairline. Upon investigation he discovered that the rash was due to an improper chemical compound in Sansfree. If Roscoe filed a breach of contract action against the barber, would the case be governed by the Uniform Commercial Code or common law? Explain.
4. Rachel entered into a contract to purchase a 2004 Dodge from Hanna, who lived in the neighboring apartment. When a dispute arose over the terms of the contract, Hanna argued that, because neither she nor Rachel was a merchant, the dispute should be decided under general principles of common law. Rachel, on the other hand, argued that Hanna was legally considered to be a merchant because she sold the car for profit and that, consequently, the sale was governed by the Uniform Commercial Code. Who is correct? Explain.
5. Lee and Michelle decided to cohabit. When they set up house, Michelle gave up her career, and Lee promised to share his earnings with her on a fifty-fifty basis. Several years later they ended their relationship, and when Lee failed to turn over half of his earnings, Michelle filed suit on the basis of Lee's promise. What kind of contract would Michelle allege that Lee had breached? Explain.
6. Harry and Wilma were divorced in 2008, and Harry was ordered in the divorce decree to pay his ex-wife $10,000. In 2009 and 2010 Harry was hospitalized, incurring $3,000 in bills. He and Wilma discussed the matter, and Wilma agreed to pay the bill with her own money, even though Harry still owed her $5,000 from the divorce decree. When Harry died in late 2010, Wilma made a claim against his estate for $8,000 (the $3,000 in medical bills and the $5,000 from the decree), but the estate was only willing to pay the $5,000 from the decree, claiming she had paid the hospital bill voluntarily and had no contract for repayment. Is the estate correct? Explain.
7. Louie, an adult, entered into a contract to sell a case of scotch whiskey to Leroy, a minor. Is the contract void or voidable? Explain.
8. James Mann owned a manufacturing plant that assembled cell phones. A CPA audit determined that several phones were missing. Theft by one or more of the workers was suspected. Accordingly, under Mann's instructions, the following sign was placed in the employees' cafeteria:

Reward. We are missing phones. I want all employees to watch for thievery. A reward of $500 will be paid for information given by any employee that leads to the apprehension of employee thieves.

—James Mann

Waldo, a plant employee, read the notice and immediately called Mann, stating, “I accept your offer. I promise to watch other employees and provide you with the requested information.” Has a contract been formed? Explain.

9. Almost every day Sally took a break at lunch and went to the International News Stand—a magazine store—to browse the newspapers and magazines and chat with the owner, Conrad. Often she bought a magazine. One day she went there, browsed a bit, and took a magazine off the rack. Conrad was busy with three customers. Sally waved the magazine at Conrad and left the store with it. What kind of a contract, if any, was created?
10. Joan called Devon Sand & Gravel and ordered two “boxes” (dump-truck loads) of gravel to be spread on her rural driveway by the “shoot and run” method: the tailgate is partially opened, the dump-truck bed is lifted, and the truck moves down the driveway spreading gravel as it goes. The driver mistakenly graveled the driveway of Joan’s neighbor, Watson, instead of Joan’s. Is Devon entitled to payment by Watson? Explain.

SELF-TEST QUESTIONS

1. An implied contract
    1. must be in writing
    2. is one in which the terms are spelled out
    3. is one inferred from the actions of the parties
    4. is imposed by law to avoid an unjust result
    5. may be avoided by one party
2. The Convention on Contracts for the International Sale of Goods is
    1. an annual meeting of international commercial purchasing agents.
    2. contract law used in overseas US federal territories
    3. a customary format or template for drafting contracts
    4. a kind of treaty setting out international contract law, to which the United States is a party
    5. the organization that develops uniform international law
3. An unenforceable contract is
    1. void, not a contract at all
    2. one that a court will not enforce for either side because of a rule of law
    3. unenforceable by one party but enforceable by the other
    4. one that has been performed by one party but not the other
    5. too indefinite to be valid
4. Betty Baker found a bicycle apparently abandoned near her house. She took it home and spent $150 repairing and painting it, after which Carl appeared and proved his ownership of it. Under what theory is Betty able to get reimbursed for her expenditures?
    1. express contract
    2. implied contract
    3. apparent or quasi-contract
    4. executory contract
    5. none: she will not get reimbursed
5. Alice discusses with her neighbor Bob her plan to hire Woodsman to cut three trees on her side of their property line, mentioning that she can get a good deal because Woodsman is now between jobs. Bob says, “Oh, don’t do that. My brother is going to cut some trees on my side, and he can do yours too for free.” Alice agrees. But Bob’s brother is preoccupied and never does the job. Three weeks later Alice discovers Woodsman’s rates have risen prohibitively. Under what theory does Alice have a cause of action against Bob?
    1. express contract

2. promissory estoppel
3. quasi-contract
4. implied contract
5. none: she has no cause of action against Bob

SELF-TEST AnswerS

1. c
2. d
3. c
4. c
5. b

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SECTION OVERVIEW

11.2: The Agreement

Learning Objectives

After reading this chapter, you should understand the following:

- What a contract offer is, and what proposals are not offers
- How an offer is communicated
- How definite the offer needs to be
- How long an offer is good for
- How an offer is accepted, who can accept it, and when acceptance is effective

In this chapter, we begin the first of the four broad inquiries of contract law mentioned in Chapter 8: Did the parties create a valid contract? The answer is not always obvious; the range of factors that must be taken into account can be large, and their relationships subtle. Since businesspeople frequently conduct contract negotiations without the assistance of a lawyer, it is important to attend to the nuances in order to avoid legal trouble at the outset. Whether a contract has been formed depends in turn on whether

1. the parties reached an agreement (the focus of this chapter);
2. consideration was present;
3. the agreement was legal; and
4. the parties entered into the contract of their own free will, with knowledge of the facts, and with the capacity to make a contract.

Factors 2, 3, and 4 are the subjects of subsequent chapters.

11.2.1: The Agreement in General

11.2.2: The Offer

11.2.3: The Acceptance

11.2.4: Cases

11.2.5: Summary and Exercises

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11.2.1: The Agreement in General

LEARNING OBJECTIVES

1. Recognize that not all agreements or promises are contracts.
2. Understand that whether a contract exists is based on an objective analysis of the parties' interaction, not on a subjective one.

The Significance of Agreement

The core of a legal contract is the agreement between the parties. This is not a necessary ingredient; in Communist nations, contracts were (or are, in the few remaining Communist countries) routinely negotiated between parties who had the terms imposed on them. But in the West, and especially in the United States, agreement is of the essence. That is not merely a matter of convenience; it is at the heart of our philosophical and psychological beliefs. As the great student of contract law Samuel Williston put it, "It was a consequence of the emphasis laid on the ego and the individual will that the formation of a contract should seem impossible unless the wills of the parties concurred. Accordingly we find at the end of the eighteenth century, and the beginning of the nineteenth century, the prevalent idea that there must be a "meeting of the minds" (a new phrase) in order to form a contract."Samuel Williston, "Freedom of Contract," *Cornell Law Quarterly* 6 (1921), 365.

Although agreements may take any form, including unspoken conduct between the parties, they are usually structured in terms of an offer and an acceptance.Uniform Commercial Code, Section 2-204(1). These two components will be the focus of our discussion. Note, however, that not every agreement, in the broadest sense of the word, need consist of an offer and an acceptance, and that it is entirely possible, therefore, for two persons to reach agreement without forming a contract. For example, people may agree that the weather is pleasant or that it would be preferable to go out for Chinese food rather than to see a foreign film; in neither case has a contract been formed. One of the major functions of the law of contracts is to sort out those agreements that are legally binding—those that are contracts—from those that are not.

The Objective Test

In interpreting agreements, courts generally apply an **objective standard** (outwardly, as an observer would interpret; not subjectively). The Restatement (Second) of Contracts defines *agreement* as a "manifestation of mutual assent by two or more persons to one another."Uniform Commercial Code, Section 3. The Uniform Commercial Code defines *agreement* as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance."Uniform Commercial Code, Section 1-201(3). The critical question is what the parties said or did, not what they thought they said or did, or not what impression they thought they were making.

The distinction between objective and subjective standards crops up occasionally when one person claims he spoke in jest. The vice president of a company that manufactured punchboards, used in gambling, testified to the Washington State Game Commission that he would pay $100,000 to anyone who found a "crooked board." Barnes, a bartender, who had purchased two boards that were crooked some time before, brought one to the company office and demanded payment. The company refused, claiming that the statement was made in jest (the audience at the commission hearing had laughed when the offer was made). The court disagreed, holding that it was reasonable to interpret the pledge of $100,000 as a means of promoting punchboards:

[I]f the jest is not apparent and a reasonable hearer would believe that an offer was being made, then the speaker risks the formation of a contract which was not intended. It is the objective manifestations of the offeror that count and not secret, unexpressed intentions. If a party's words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of the party's mind on the subject.*Barnes v. Treece*, 549 P.2d 1152 (Wash. App. 1976).

Lucy v. Zehmer (Section 9.4.1 "Objective Intention" at the end of the chapter) illustrates that a party's real state of mind must be expressed to the other party, rather than in an aside to one's spouse.

KEY TAKEAWAY

Fundamentally, a contract is a legally binding "meeting of the minds" between the parties. It is not the unexpressed intention in the minds of the parties that determines whether there was "a meeting." The test is objective: how would a reasonable person interpret the interaction?

EXERCISES

1. For the purposes of determining whether a party had a contractual intention, why do courts employ an objective rather than a subjective test?
2. What is the relationship between “the emphasis laid on the ego and the individual will” in modern times (Williston) and the concept of the contractual agreement?

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11.2.2: The Offer

LEARNING OBJECTIVES

1. Know the definition of *offer*.
2. Recognize that some proposals are not offers.
3. Understand the three essentials of an offer: intent, communication, and definiteness.
4. Know when an offer expires and can no longer be accepted.

Offer and acceptance may seem to be straightforward concepts, as they are when two people meet face-to-face. But in a commercial society, the ways of making offers and accepting them are nearly infinite. A retail store advertises its merchandise in the newspaper. A seller makes his offer by mail or over the Internet. A telephone caller states that his offer will stand for ten days. An offer leaves open a crucial term. An auctioneer seeks bids. An offeror gives the offeree a choice. All these situations can raise tricky questions, as can corresponding situations involving acceptances.

The Definition of *Offer*

The Restatement defines **offer** as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."Restatement (Second) of Contracts, Section 24. Two key elements are implicit in that definition: the offer must be communicated, and it must be definite. Before considering these requirements, we examine the threshold question of whether an offer was intended. Let us look at proposals that may look like, but are not, offers.

Proposals That Are Not Offers

Advertisements

Most advertisements, price quotations, and invitations to bid are not construed as offers. A notice in the newspaper that a bicycle is on sale for $800 is normally intended only as an invitation to the public to come to the store to make a purchase. Similarly, a statement that a seller can "quote" a unit price to a prospective purchaser is not, by itself, of sufficient definiteness to constitute an offer; quantity, time of delivery, and other important factors are missing from such a statement. Frequently, in order to avoid construction of a statement about price and quantity as an offer, a seller or buyer may say, "Make me an offer." Such a statement obviously suggests that no offer has yet been made. This principle usually applies to invitations for bids (e.g., from contractors on a building project). Many forms used by sales representatives as contracts indicate that by signing, the customer is making an offer to be accepted by the home office and is not accepting an offer made by the sales representative.

Although advertisements, price quotations, and the like are generally not offers, the facts in each case are important. Under the proper circumstances, an advertised statement can be construed as an offer, as shown in the well-known *Lefkowitz* case (Section 9.4.2 "Advertisements as Offers" at the end of the chapter), in which the offended customer acted as his own lawyer and pursued an appeal to the Minnesota Supreme Court against a Minneapolis department store that took back its advertised offer.

Despite the common-law rule that advertisements are normally to be considered invitations rather than offers, legislation and government regulations may offer redress. For many years, retail food stores have been subject to a rule, promulgated by the Federal Trade Commission (FTC), that goods advertised as "specials" must be available and must be sold at the price advertised. It is unlawful for a retail chain not to have an advertised item in each of its stores and in sufficient quantity, unless the advertisement specifically states how much is stocked and which branch stores do not carry it. Many states have enacted consumer protection statutes that parallel the FTC rule.

Invitations to Bid

Invitations to bid are also not generally construed as offers. An auctioneer does not make offers but solicits offers from the crowd: "May I have an offer?—$500? $450? $450! I have an offer for $450. Do I hear $475? May I have an offer?"

Communication

A contract is an agreement in which each party assents to the terms of the other party. Without mutual assent there cannot be a contract, and this implies that the assent each person gives must be with reference to that of the other. If Toni places several alternative offers on the table, only one of which can be accepted, and invites Sandy to choose, no contract is formed if Sandy says merely, "I accept your terms." Sandy must specify which offer she is assenting to.

From this general proposition, it follows that no contract can be legally binding unless an offer is in fact communicated to the offeree. If you write an e-mail to a friend with an offer to sell your car for a certain sum and then get distracted and forget to send it, no offer has been made. If your friend coincidentally e-mails you the following day and says that she wants to buy your car and names the same sum, no contract has been made. Her e-mail to you is not an acceptance, since she did not know of your offer; it is, instead, an offer or an invitation to make an offer. Nor would there have been a contract if you had sent your communication and the two e-mails crossed in cyberspace. Both e-mails would be offers, and for a valid contract to be formed, it would still be necessary for one of you to accept the other's offer. An offer is not effective until it is received by the offeree (and that's also true of a revocation of the offer, and a rejection of the offer by the offeree).

The requirement that an offer be communicated does not mean that every term must be communicated. You call up your friend and offer to sell him your car. You tell him the price and start to tell him that you will throw in the snow tires but will not pay for a new inspection, and that you expect to keep the car another three weeks. Impatiently, he cuts you off and says, "Never mind about all that; I'll accept your offer on whatever terms you want." You and he have a contract.

These principles apply to unknown offers of reward. An offer of a reward constitutes a unilateral contract that can be made binding only by performing the task for which the reward is offered. Suppose that Bonnie posts on a tree a sign offering a reward for returning her missing dog. If you saw the sign, found the dog, and returned it, you would have fulfilled the essentials of the offer. But if you chanced upon the dog, read the tag around its neck, and returned it without ever having been aware that a reward was offered, then you have not responded to the offer, even if you acted in the hope that the owner would reward you. There is no contractual obligation.

In many states, a different result follows from an offer of a reward by a governmental entity. Commonly, local ordinances provide that a standing reward of, say, $1,000 will be paid to anyone providing information that leads to the arrest and conviction of arsonists. To collect the reward, it is not necessary for a person who does furnish local authorities with such information to know that a reward ordinance exists. In contract terms, the standing reward is viewed as a means of setting a climate in which people will be encouraged to act in certain ways in the expectation that they will earn unknown rewards. It is also possible to view the claim to a reward as noncontractual; the right to receive it is guaranteed, instead, by the local ordinance.

Although a completed act called for by an unknown private offer does not give rise to a contract, partial performance usually does. Suppose Apex Bakery posts a notice offering a one-week bonus to all bakers who work at least six months in the kitchen. Charlene works two months before discovering the notice on the bulletin board. Her original ignorance of the offer will not defeat her claim to the bonus if she continues working, for the offer serves as an inducement to complete the performance called for.

Definiteness

The common law reasonably requires that an offer spell out the essential proposed terms with sufficient **definiteness**—certainty of terms that enables a court to order enforcement or measure damages in the event of a breach. As it has often been put, "The law does not make contracts for the parties; it merely enforces the duties which they have undertaken" (Simpson, 1965, p. 19). Thus a supposed promise to sell "such coal as the promisor may wish to sell" is not an enforceable term because the seller, the coal company, undertakes no duty to sell anything unless it wishes to do so. Essential terms certainly include price and the work to be done. But not every omission is fatal; for example, as long as a missing term can be fixed by referring to some external standard—such as "no later than the first frost"—the offer is sufficiently definite.

In major business transactions involving extensive negotiations, the parties often sign a preliminary "agreement in principle" before a detailed contract is drafted. These preliminary agreements may be definite enough to create contract liability even though they lack many of the terms found in a typical contract. For example, in a famous 1985 case, a Texas jury concluded that an agreement made "in principle" between the Pennzoil Company and the Getty Oil Company and not entirely finished was binding and that

Texaco had unlawfully interfered with their contract. As a result, Texaco was held liable for over $10 billion, which was settled for $3 billion after Texaco went into bankruptcy.

Offers that state alternatives are definitive if each alternative is definite. David offers Sheila the opportunity to buy one of two automobiles at a fixed price, with delivery in two months and the choice of vehicle left to David. Sheila accepts. The contract is valid. If one of the cars is destroyed in the interval before delivery, David is obligated to deliver the other car. Sometimes, however, what appears to be an offer in the alternative may be something else. Charles makes a deal to sell his business to Bernie. As part of the bargain, Charles agrees not to compete with Bernie for the next two years, and if he does, to pay $25,000. Whether this is an alternative contract depends on the circumstances and intentions of the parties. If it is, then Charles is free to compete as long as he pays Bernie $25,000. On the other hand, the intention might have been to prevent Charles from competing in any event; hence a court could order payment of the $25,000 as damages for a breach and still order Charles to refrain from competition until the expiration of the two-year period.

The UCC Approach

The Uniform Commercial Code (UCC) is generally more liberal in its approach to definiteness than is the common law—at least as the common law was interpreted in the heyday of classical contract doctrine. Section 2-204(3) states the rule: “Even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”

The drafters of the UCC sought to give validity to as many contracts as possible and grounded that validity on the intention of the parties rather than on formalistic requirements. As the official comment to Section 2-204(3) notes, “If the parties intend to enter into a binding agreement, this subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy.…Commercial standards on the point of ‘indefiniteness’ are intended to be applied.” Other sections of the UCC spell out rules for filling in such open provisions as price, performance, and remedies.Chiefly, Uniform Commercial Code, Sections 2-305 through 2-310.

One of these sections, Section 2-306(1), provides that a contract term under which a buyer agrees to purchase the seller’s entire output of goods (an “outputs contract”) or a seller agrees to meet all the buyer’s requirements (a “requirements” or “needs” contract) means output or requirements that occur in good faith. A party to such a contract cannot offer or demand a quantity that is “unreasonably disproportionate” to a stated estimate or past quantities.

Duration of Offer

An offer need not be accepted on the spot. Because there are numerous ways of conveying an offer and numerous contingencies that may be part of the offer’s subject matter, the offeror might find it necessary to give the offeree considerable time to accept or reject the offer. By the same token, an offer cannot remain open forever, so that once given, it never lapses and cannot be terminated. The law recognizes seven ways by which the offer can expire (besides acceptance, of course): revocation, rejection by the offeree, counteroffer, acceptance with counteroffer, lapse of time, death or insanity of a person or destruction of an essential term, and illegality. We will examine each of these in turn.

Revocation

People are free to make contracts and, in general, to revoke them.

Revocability

The general rule, both in common law and under the UCC, is that the offeror may revoke his or her offer at any time before acceptance, even if the offer states that it will remain open for a specified period of time. Neil offers Arlene his car for $5,000 and promises to keep the offer open for ten days. Two days later, Neil calls Arlene to revoke the offer. The offer is terminated, and Arlene’s acceptance thereafter, though within the ten days, is ineffective. But if Neil had sent his **revocation** (the taking back of an offer before it is accepted) by mail, and if Arlene, before she received it, had telephoned her acceptance, there would be a contract, since revocation is effective only when the offeree actually receives it. There is an exception to this rule for offers made to the public through newspaper or like advertisements. The offeror may revoke a public offering by notifying the public by the same

means used to communicate the offer. If no better means of notification is reasonably available, the offer is terminated even if a particular offeree had no actual notice.

Revocation may be communicated indirectly. If Arlene had learned from a friend that Neil had sold his car to someone else during the ten-day period, she would have had sufficient notice. Any attempt to accept Neil's offer would have been futile.

Irrevocable Offers

Not every type of offer is revocable. One type of offer that cannot be revoked is the **option contract** (the promisor explicitly agrees for consideration to limit his right to revoke). Arlene tells Neil that she cannot make up her mind in ten days but that she will pay him $25 to hold the offer open for thirty days. Neil agrees. Arlene has an option to buy the car for $5,000; if Neil should sell it to someone else during the thirty days, he will have breached the contract with Arlene. Note that the transactions involving Neil and Arlene consist of two different contracts. One is the promise of a thirty-day option for the promise of $25. It is this contract that makes the option binding and is independent of the original offer to sell the car for $5,000. The offer can be accepted and made part of an independent contract during the option period.

Partial performance of a unilateral contract creates an option. Although the option is not stated explicitly, it is recognized by law in the interests of justice. Otherwise, an offeror could induce the offeree to go to expense and trouble without ever being liable to fulfill his or her part of the bargain. Before the offeree begins to carry out the contract, the offeror is free to revoke the offer. But once performance begins, the law implies an option, allowing the offeree to complete performance according to the terms of the offer. If, after a reasonable time, the offeree does not fulfill the terms of the offer, then it may be revoked.

Revocability under the UCC

The UCC changes the common-law rule for offers by merchants. Under Section 2-205, a **firm offer** (a written and signed promise by a merchant to hold an offer to buy or sell goods for some period of time) is irrevocable. That is, an option is created, but no consideration is required. The offer must remain open for the time period stated or, if no time period is given, for a reasonable period of time, which may not exceed three months.

Irrevocability by Law

By law, certain types of offers may not be revoked (statutory irrevocability), despite the absence of language to that effect in the offer itself. One major category of such offers is that of the contractor submitting a bid to a public agency. The general rule is that once the period of bidding opens, a bidder on a public contract may not withdraw his or her bid unless the contracting authority consents. The contractor who purports to withdraw is awarded the contract based on the original bid and may be sued for damages for nonperformance.

Rejection by the Offeree

Rejection (a manifestation of refusal to agree to the terms of an offer) of the offer is effective when the offeror receives it. A subsequent change of mind by the offeree cannot revive the offer. Donna calls Chuck to reject Chuck's offer to sell his lawn mower. Chuck is then free to sell it to someone else. If Donna changes her mind and calls Chuck back to accept after all, there still is no contract, even if Chuck has made no further effort to sell the lawn mower. Having rejected the original offer, Donna, by her second call, is not accepting but making an offer to buy. Suppose Donna had written Chuck to reject, but on changing her mind, decided to call to accept before the rejection letter arrived. In that case, the offer would have been accepted.

Counteroffer

A **counteroffer**, a response that varies the terms of an offer, is a rejection. Jones offers Smith a small parcel of land for $10,000 and says the offer will remain open for one month. Smith responds ten days later, saying he will pay $5,000. Jones's original offer has thereby been rejected. If Jones now declines Smith's counteroffer, may Smith bind Jones to his original offer by agreeing to pay the full $10,000? He may not, because once an original offer is rejected, all the terms lapse. However, an inquiry by Smith as to whether Jones would consider taking less is not a counteroffer and would not terminate the offer.

Acceptance with Counteroffer

This is not really an acceptance at all but is a counteroffer: an acceptance that changes the terms of the offer is a counteroffer and terminates the offer. The common law imposes a **mirror image rule**: the acceptance must match the offer in all its particulars or the offer is rejected. However, if an acceptance that requests a change or an addition to the offer does not require the offeror's assent, then the acceptance is valid. The broker at Friendly Real Estate offers you a house for $320,000. You accept but include in your acceptance "the vacant lot next door." Your acceptance is a counteroffer, which serves to terminate the original offer. If, instead, you had said, "It's a deal, but I'd prefer it with the vacant lot next door," then there is a contract because you are not demanding that the broker abide by your request. If you had said, "It's a deal, and I'd also like the vacant lot next door," you have a contract, because the request for the lot is a separate offer, not a counteroffer rejecting the original proposal.

The UCC and Counteroffers

The UCC is more liberal than the common law in allowing contracts to be formed despite counteroffers and in incorporating the counteroffers into the contracts. This UCC provision is necessary because the use of routine forms for contracts is very common, and if the rule were otherwise, much valuable time would be wasted by drafting clauses tailored to the precise wording of the routine printed forms. A buyer and a seller send out documents accompanying or incorporating their offers and acceptances, and the provisions in each document rarely correspond precisely. Indeed, it is often the case that one side's form contains terms favorable to it but inconsistent with terms on the other side's form. Section 2-207 of the UCC attempts to resolve this "battle of the forms" by providing that additional terms or conditions in an acceptance operate as such unless the acceptance is conditioned on the offeror's consent to the new or different terms. The new terms are construed as offers but are automatically incorporated in any contract between merchants for the sale of goods unless "(a) the offer expressly limits acceptance to the terms of the offer; (b) [the terms] materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received."

An example of terms that become part of the contract without being expressly agreed to are clauses providing for interest payments on overdue bills. Examples of terms that would materially alter the contract and hence need express approval are clauses that negate the standard warranties that sellers give buyers on their merchandise.

Frequently, parties use contract provisions to prevent the automatic introduction of new terms. A typical seller's provision is as follows:

Amendments

Any modification of this document by the Buyer, and all additional or different terms included in Buyer's purchase order or any other document responding to this offer, are hereby objected to. BY ORDERING THE GOODS HERE FOR SHIPMENT, BUYER AGREES TO ALL THE TERMS AND CONDITIONS CONTAINED ON BOTH SIDES OF THIS DOCUMENT.

Section 2-207 of the UCC, liberalizing the mirror image rule, is pervasive, covering all sorts of contracts, from those between industrial manufacturers to those between friends.

Lapse of Time

Offers are not open-ended; they lapse after some period of time. An offer may contain its own specific time limitation—for example, "until close of business today."

In the absence of an expressly stated time limit, the common-law rule is that the offer expires at the end of a "reasonable" time. Such a period is a factual question in each case and depends on the particular circumstances, including the nature of the service or property being contracted for, the manner in which the offer is made, and the means by which the acceptance is expected to be made. Whenever the contract involves a speculative transaction—the sale of securities or land, for instance—the time period will depend on the nature of the security and the risk involved. In general, the greater the risk to the seller, the shorter the period of time. Karen offers to sell Gary a block of oil stocks that are fluctuating rapidly hour by hour. Gary receives the offer an hour before the market closes; he accepts by fax two hours after the market has opened the next morning and after learning that the stock has jumped up significantly. The time period has lapsed if Gary was accepting a fixed price that Karen set, but it may still be open if the price is market price at time of delivery. (Under Section 41 of the Restatement, an offer made by mail is "seasonably accepted if an acceptance is mailed at any time before midnight on the day on which the offer is received.")

For unilateral contracts, both the common law and the UCC require the offeree to notify the offeror that he has begun to perform the terms of the contract. Without notification, the offeror may, after a reasonable time, treat the offer as having lapsed.

Death or Insanity of the Offeror

The death or insanity of the offeror prior to acceptance terminates the offer; the offer is said to die with the offeror. (Notice, however, that the death of a party to a *contract* does not necessarily terminate the contract: the estate of a deceased person may be liable on a contract made by the person before death.)

Destruction of Subject Matter Essential to the Offer

Destruction of something essential to the contract also terminates the offer. You offer to sell your car, but the car is destroyed in an accident before your offer is accepted; the offer is terminated.

Postoffer Illegality

A statute making unlawful the object of the contract will terminate the offer if the statute takes effect after the offer was made. Thus an offer to sell a quantity of herbal weight-loss supplements will terminate if the Food and Drug Administration outlaws the sale of such supplements.

KEY TAKEAWAY

An offer is a manifestation of willingness to enter into a contract, effective when received. It must be communicated to the offeree, be made intentionally (according to an objective standard), and be definite enough to determine a remedy in case of breach. An offer terminates in one of seven ways: revocation before acceptance (except for option contracts, firm offers under the UCC, statutory irrevocability, and unilateral offers where an offeree has commenced performance); rejection; counteroffer; acceptance with counteroffer; lapse of time (as stipulated or after a reasonable time); death or insanity of the offeror before acceptance or destruction of subject matter essential to the offer; and postoffer illegality.

EXERCISES

1. Why is it said an offer is a “manifestation” of willingness to enter into a contract? How could willingness be “manifested”?
2. Which kind of standard is used to determine whether a person has made an offer—subjective or objective?
3. If Sandra posts a written notice offering “to the kitchen staff at Coldwater Bay (Alaska) transportation to Seattle at the end of the fishing season,” and if David, one of the maintenance workers, says to her, “I accept your offer of transportation to Seattle,” is there a contract?
4. What are the seven ways an offer can terminate?

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11.2.3: The Acceptance

LEARNING OBJECTIVES

1. Define *acceptance*.
2. Understand who may accept an offer.
3. Know when the acceptance is effective.
4. Recognize when silence is acceptance.

General Definition of *Acceptance*

To result in a legally binding contract, an offer must be accepted by the offeree. Just as the law helps define and shape an offer and its duration, so the law governs the nature and manner of **acceptance**. The Restatement defines acceptance of an offer as "a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer."Restatement (Second) of Contracts, Section 24.The assent may be either by the making of a mutual promise or by performance or partial performance. If there is doubt about whether the offer requests a return promise or a return act, the Restatement, Section 32, provides that the offeree may accept with either a promise or performance. The Uniform Commercial Code (UCC) also adopts this view; under Section 2-206(1)(a), "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances" unless the offer unambiguously requires a certain mode of acceptance.

Who May Accept?

The identity of the offeree is usually clear, even if the name is unknown. The person to whom a promise is made is ordinarily the person whom the offeror contemplates will make a return promise or perform the act requested. But this is not invariably so. A promise can be made to one person who is not expected to do anything in return. The consideration necessary to weld the offer and acceptance into a legal contract can be given by a third party. Under the common law, whoever is invited to furnish consideration to the offeror is the offeree, and only an offeree may accept an offer. A common example is sale to a minor. George promises to sell his automobile to Bartley, age seventeen, if Bartley's father will promise to pay $3,500 to George. Bartley is the promisee (the person to whom the promise is made) but not the offeree; Bartley cannot legally accept George's offer. Only Bartley's father, who is called on to pay for the car, can accept, by making the promise requested. And notice what might seem obvious: a *promise* to perform as requested in the offer is itself a binding acceptance.

When Is Acceptance Effective?

As noted previously, an offer, a revocation of the offer, and a rejection of the offer are not effective until received. The same rule does not always apply to the acceptance.

Instantaneous Communication

Of course, in many instances the moment of acceptance is not in question: in face-to-face deals or transactions negotiated by telephone, the parties extend an offer and accept it instantaneously during the course of the conversation. But problems can arise in contracts negotiated through correspondence.

Stipulations as to Acceptance

One common situation arises when the offeror stipulates the mode of acceptance (e.g., return mail, fax, or carrier pigeon). If the offeree uses the stipulated mode, then the acceptance is deemed effective when sent. Even though the offeror has no knowledge of the acceptance at that moment, the contract has been formed. Moreover, according to the Restatement, Section 60, if the offeror says that the offer can be accepted only by the specified mode, that mode must be used. (It is said that "the offeror is the master of the offer.")

If the offeror specifies no particular mode, then acceptance is effective when transmitted, as long as the offeree uses a reasonable method of acceptance. It is implied that the offeree can use the same means used by the offeror or a means of communication customary to the industry.

The “Mailbox Rule”

The use of the postal service is customary, so acceptances are considered effective when mailed, regardless of the method used to transmit the offer. Indeed, the so-called **mailbox rule** has a lineage tracing back more than one hundred years to the English courts.*Adams v. Lindsell*, 1 Barnewall & Alderson 681 (K.B. 1818).

The mailbox rule may seem to create particular difficulties for people in business, since the acceptance is effective even though the offeror is unaware of the acceptance, and even if the letter is lost and never arrives. But the solution is the same as the rationale for the rule. In contracts negotiated through correspondence, there will always be a burden on one of the parties. If the rule were that the acceptance is not effective until received by the offeror, then the offeree would be on tenterhooks, rather than the other way around, as is the case with the present rule. As between the two, it seems fairer to place the burden on the offeror, since he or she alone has the power to fix the moment of effectiveness. All the offeror need do is specify in the offer that acceptance is not effective until received.

In all other cases—that is, when the offeror fails to specify the mode of acceptance and the offeree uses a mode that is not reasonable—acceptance is deemed effective only when received.

Acceptance “Outruns” Rejection

When the offeree sends a rejection first and then later transmits a superseding acceptance, the “effective when received” rule also applies. Suppose a seller offers a buyer two cords of firewood and says the offer will remain open for a week. On the third day, the buyer writes the seller, rejecting the offer. The following evening, the buyer rethinks his firewood needs, and on the morning of the fifth day, he sends an e-mail accepting the seller’s terms. The previously mailed letter arrives the following day. Since the letter had not yet been received, the offer had not been rejected. For there to be a valid contract, the e-mailed acceptance must arrive before the mailed rejection. If the e-mail were hung up in cyberspace, although through no fault of the buyer, so that the letter arrived first, the seller would be correct in assuming the offer was terminated—even if the e-mail arrived a minute later. In short, where “the acceptance outruns the rejection” the acceptance is effective. See Figure 9.1.

Figure 9.1

	When Sent	When Recieved
1. Offer		✓
2. Revocation of Offer		✓
3. Rejection		✓
4. Acceptance	If reasonable or by specified mode	If unreasonable or mode not specified or after rejection sent

When Is Communication Effective?

Electronic Communications

Electronic communications have, of course, become increasingly common. Many contracts are negotiated by e-mail, accepted and “signed” electronically. Generally speaking, this does not change the rules. The **Uniform Electronic Transactions Act (UETA)** was promulgated (i.e., disseminated for states to adopt) in 1999. It is one of a number of uniform acts, like the Uniform Commercial Code. As of June 2010, forty-seven states and the US Virgin Islands had adopted the statute. The introduction to the act provides that “the purpose of the UETA is to remove barriers to electronic commerce by validating and effectuating electronic records and signatures.”The National Conference of Commissioners on Uniform State Laws, *Uniform Electronic Transactions Act (1999)* (Denver: National Conference of Commissioners on Uniform State Laws, 1999), accessed March 29, 2011, www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.pdf. In general, the UETA provides the following:

1. A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
2. A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
3. If a law requires a record to be in writing, an electronic record satisfies the law.
4. If a law requires a signature, an electronic signature satisfies the law.

The UETA, though, doesn't address all the problems with electronic contracting. Clicking on a computer screen may constitute a valid acceptance of a contractual offer, but only if the offer is clearly communicated. In *Specht v. Netscape Communications Corp*., customers who had downloaded a free online computer program complained that it effectively invaded their privacy by inserting into their machines "cookies"; they wanted to sue, but the defendant said they were bound to arbitration.*Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002). They had clicked on the Download button, but hidden below it were the licensing terms, including the arbitration clause. The federal court of appeals held that there was no valid acceptance. The court said, "We agree with the district court that a reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms before responding to defendants' invitation to download the free software, and that defendants therefore did not provide reasonable notice of the license terms. In consequence, the plaintiffs' bare act of downloading the software did not unambiguously manifest assent to the arbitration provision contained in the license terms."

If a faxed document is sent but for some reason not received or not noticed, the emerging law is that the mailbox rule does not apply. A court would examine the circumstances with care to determine the reason for the nonreceipt or for the offeror's failure to notice its receipt. A person has to have fair notice that his or her offer has been accepted, and modern communication makes the old-fashioned mailbox rule—that acceptance is effective upon dispatch—problematic.See, for example, *Clow Water Systems Co. v. National Labor Relations Board*, 92 F.3d 441 (6th Cir. 1996).

Silence as Acceptance

General Rule: Silence Is Not Acceptance

Ordinarily, for there to be a contract, the offeree must make some positive manifestation of assent to the offeror's terms. The offeror cannot usually word his offer in such a way that the offeree's failure to respond can be construed as an acceptance.

Exceptions

The Restatement, Section 69, gives three situations, however, in which silence can operate as an acceptance. The first occurs when the offeree avails himself of services proffered by the offeror, even though he could have rejected them and had reason to know that the offeror offered them expecting compensation. The second situation occurs when the offer states that the offeree may accept without responding and the offeree, remaining silent, intends to accept. The third situation is that of previous dealings, in which only if the offeree intends not to accept is it reasonable to expect him to say so.

As an example of the first type of acceptance by silence, assume that a carpenter happens by your house and sees a collapsing porch. He spots you in the front yard and points out the deterioration. "I'm a professional carpenter," he says, "and between jobs. I can fix that porch for you. Somebody ought to." You say nothing. He goes to work. There is an implied contract, with the work to be done for the carpenter's usual fee.

To illustrate the second situation, suppose that a friend has left her car in your garage. The friend sends you a letter in which she offers you the car for $4,000 and adds, "If I don't hear from you, I will assume that you have accepted my offer." If you make no reply, with the intention of accepting the offer, a contract has been formed.

The third situation is illustrated by Section 9.4.3 "Silence as Acceptance", a well-known decision made by Justice Oliver Wendell Holmes Jr. when he was sitting on the Supreme Court of Massachusetts.

KEY TAKEAWAY

Without an acceptance of an offer, no contract exists, and once an acceptance is made, a contract is formed. If the offeror stipulates how the offer should be accepted, so be it. If there is no stipulation, any reasonable means of communication is good. Offers and revocations are usually effective upon receipt, while an acceptance is effective on dispatch. The advent of electronic contracting has caused some modification of the rules: courts are likely to investigate the facts surrounding the exchange of offer and acceptance more carefully than previously. But the nuances arising because of the mailbox rule and acceptance by silence still require close attention to the facts.

EXERCISES

1. Rudy puts this poster, with a photo of his dog, on utility poles around his neighborhood: "$50 reward for the return of my lost dog." Carlene doesn't see the poster, but she finds the dog and, after looking at the tag on its collar, returns the dog to Rudy. As

she leaves his house, her eye falls on one of the posters, but Rudy declines to pay her anything. Why is Rudy correct that Carlene has no legal right to the reward?

2. How has the UCC changed the common law's mirror image rule, and why?
3. When is an offer generally said to be effective? A rejection of an offer? A counteroffer?
4. How have modern electronic communications affected the law of offer and acceptance?
5. When is silence considered an acceptance?

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11.2.4: Cases

Objective Intention

Lucy v. Zehmer

84 S.E.2d 516 (Va. 1954)

Buchanan, J.

This suit was instituted by W. O. Lucy and J. C. Lucy, complainants, against A. H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W. O. Lucy a tract of land owned by A. H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for $50,000. J. C. Lucy, the other complainant, is a brother of W. O. Lucy, to whom W. O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A. H. Zehmer on December 20, 1952, in these words: "We hereby agree to sell to W. O. Lucy the Ferguson farm complete for $50,000.00, title satisfactory to buyer," and signed by the defendants, A. H. Zehmer and Ida S. Zehmer.

The answer of A. H. Zehmer admitted that at the time mentioned W. O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out "the memorandum" quoted above and induced his wife to sign it; that he did not deliver the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.…

In his testimony Zehmer claimed that he "was high as a Georgia pine," and that the transaction "was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most." That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done.…

If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, "You know you sold that place fair and square." After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

In the field of contracts, as generally elsewhere, "We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts."

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for a long time. Lucy testified that if there was any jesting it was about paying $50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer $5 to seal the bargain. Not until then, even under the defendants' evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn't hear and that it was not intended that he should hear.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his

manifestations is known to the other party.

"* * * The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them. * * *." [Citation]

An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind.

So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement.

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties.…

Reversed and remanded.

CASE QUESTIONS

1. What objective evidence was there to support the defendants' contention that they were just kidding when they agreed to sell the farm?
2. Suppose the defendants really did think the whole thing was a kind of joke. Would that make any difference?
3. As a matter of public policy, why does the law use an objective standard to determine the seriousness of intention, instead of a subjective standard?
4. It's 85 degrees in July and 5:00 p.m., quitting time. The battery in Mary's car is out of juice, again. Mary says, "Arrgh! I will sell this stupid car for $50!" Jason, walking to his car nearby, whips out his checkbook and says, "It's a deal. Leave your car here. I'll give you a ride home and pick up your car after you give me the title." Do the parties have a contract?

Advertisements as Offers

Lefkowitz v. Great Minneapolis Surplus Store

86 N.W.2d 689 (Minn. 1957)

Murphy, Justice.

This is an appeal from an order of the Municipal Court of Minneapolis denying the motion of the defendant for amended findings of fact, or, in the alternative, for a new trial. The order for judgment awarded the plaintiff the sum of $138.50 as damages for breach of contract.

This case grows out of the alleged refusal of the defendant to sell to the plaintiff a certain fur piece which it had offered for sale in a newspaper advertisement. It appears from the record that on April 6, 1956, the defendant published the following advertisement in a Minneapolis newspaper:

Saturday 9 A.M. Sharp

3 Brand New Fur Coats Worth to $100.00

First Come

First Served

$1 Each

[The $100 coat would be worth about $800 in 2010 dollars.] On April 13, the defendant again published an advertisement in the same newspaper as follows:

Saturday 9 A.M.

2 Brand New Pastel Mink 3-Skin Scarfs

Selling for. $89.50

Out they go Saturday. Each…$1.00

1 Black Lapin Stole Beautiful, worth $139.50…$1.00

First Come First Served

The record supports the findings of the court that on each of the Saturdays following the publication of the above-described ads the plaintiff was the first to present himself at the appropriate counter in the defendant's store and on each occasion demanded the coat and the stole so advertised and indicated his readiness to pay the sale price of $1. On both occasions, the defendant refused to sell the merchandise to the plaintiff, stating on the first occasion that by a "house rule" the offer was intended for women only and sales would not be made to men, and on the second visit that plaintiff knew defendant's house rules.

The trial court properly disallowed plaintiff's claim for the value of the fur coats since the value of these articles was speculative and uncertain. The only evidence of value was the advertisement itself to the effect that the coats were "Worth to $100.00," how much less being speculative especially in view of the price for which they were offered for sale. With reference to the offer of the defendant on April 13, 1956, to sell the "1 Black Lapin Stole * * * worth $139.50 * * *" the trial court held that the value of this article was established and granted judgment in favor of the plaintiff for that amount less the $1 quoted purchase price.

1. The defendant contends that a newspaper advertisement offering items of merchandise for sale at a named price is a "unilateral offer" which may be withdrawn without notice. He relies upon authorities which hold that, where an advertiser publishes in a newspaper that he has a certain quantity or quality of goods which he wants to dispose of at certain prices and on certain terms, such advertisements are not offers which become contracts as soon as any person to whose notice they may come signifies his acceptance by notifying the other that he will take a certain quantity of them. Such advertisements have been construed as an invitation for an offer of sale on the terms stated, which offer, when received, may be accepted or rejected and which therefore does not become a contract of sale until accepted by the seller; and until a contract has been so made, the seller may modify or revoke such prices or terms. [Citations]

   …On the facts before us we are concerned with whether the advertisement constituted an offer, and, if so, whether the plaintiff's conduct constituted an acceptance.

   There are numerous authorities which hold that a particular advertisement in a newspaper or circular letter relating to a sale of articles may be construed by the court as constituting an offer, acceptance of which would complete a contract. [Citations]

   The test of whether a binding obligation may originate in advertisements addressed to the general public is "whether the facts show that some performance was promised in positive terms in return for something requested." 1 Williston, Contracts (Rev. ed.) s 27.

   The authorities above cited emphasize that, where the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract.…

   Whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances. [Citations] We are of the view on the facts before us that the offer by the defendant of the sale of the Lapin fur was clear, definite, and explicit, and left nothing open for negotiation. The plaintiff having successfully managed to be the first one to appear at the seller's place of business to be served, as requested by the advertisement, and having offered the stated purchase price of the article, he was entitled to performance on the part of the defendant. We think the trial court was correct in holding that there was in the conduct of the parties a sufficient mutuality of obligation to constitute a contract of sale.

2. The defendant contends that the offer was modified by a "house rule" to the effect that only women were qualified to receive the bargains advertised. The advertisement contained no such restriction. This objection may be disposed of briefly by stating that, while an advertiser has the right at any time before acceptance to modify his offer, he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer. [Citations]

Affirmed.

CASE QUESTIONS

1. If the normal rule is that display advertisements in newspapers and the like are not offers, but rather invitations to make an offer, why was this different? Why did the court hold that this was an offer?

2. What is the rationale for the rule that a display ad is usually not an offer?
3. If a newspaper display advertisement reads, “This offer is good for two weeks,” is it still only an invitation to make an offer, or is it an offer?
4. Is a listing by a private seller for the sale of a trailer on Craigslist or in the weekly classified advertisements an offer or an invitation to make an offer?

Silence as Acceptance

Hobbs v.Massasoit Whip Co.

33 N.E. 495 (Mass. 1893)

Holmes, J.

This is an action for the price of eel skins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendant declined to accept the skins. The case comes before us on exceptions to an instruction to the jury that, whether there was any prior contract or not, if skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and bear the expense, of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eel skins in the same way four or five times before, and they had been accepted and paid for. On the defendant’s testimony, it was fair to assume that if it had admitted the eel skins to be over 22 inches in length, and fit for its business, as the plaintiff testified and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins.

In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. [Citations] The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party—a principle sometimes lost sight of in the cases. [Citations]

Exceptions overruled.

CASE QUESTIONS

1. What is an eel, and why would anybody make a whip out of its skin?
2. Why did the court here deny the defendant’s assertion that it never accepted the plaintiff’s offer?
3. If it reasonably seems that silence is acceptance, does it make any difference what the offeree really intended?

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11.2.5: Summary and Exercises

Summary

Whether a legally valid contract was formed depends on a number of factors, including whether the parties reached agreement, whether consideration was present, and whether the agreement was legal. Agreement may seem like an intuitive concept, but intuition is not a sufficient guide to the existence of agreement in legal terms. The most common way of examining an agreement for legal sufficiency is by determining whether a valid offer and acceptance were made.

An offer is a manifestation of willingness to enter into a bargain such that it would be reasonable for another individual to conclude that assent to the offer would complete the bargain. Offers must be communicated and must be definite; that is, they must spell out terms to which the offeree can assent.

An important aspect of the offer is its duration. An offer can expire in any one of several ways: (1) rejection, (2) counteroffer, (3) acceptance with counteroffer, (4) lapse of time, (5) death or insanity of the offeror or destruction of an essential term, (6) illegality, and (7) revocation. No understanding of agreement is complete without a mastery of these conditions.

To constitute an agreement, an offer must be accepted.

The offeree must manifest his assent to the terms of the offer in a manner invited or required by the offer. Complications arise when an offer is accepted indirectly through correspondence. Although offers and revocations of offers are not effective until received, an acceptance is deemed accepted when sent if the offeree accepts in the manner specified by the offeror. But the nuances that arise because of the mailbox rule and acceptance by silence require close attention to the circumstances of each agreement.

EXERCISES

1. Sarah's student apartment was unfurnished. She perused Doug's List, an online classified ad service (for nonmerchants), and saw this advertisement: "Moving. For sale: a very nice brown leather couch, almost new, $600." There was an accompanying photo and contact information. Sarah e-mailed the contact, saying she wanted to buy the couch. Does Sarah have a contract with the seller? Explain.
2. Seller called Buyer on the telephone and offered to sell his used stereo. Buyer agreed to buy it without asking the price. The next day Buyer changed her mind and attempted to back out of the agreement. Do the parties have a contract? Explain.
3. On August 1, Ernie wrote to Elsie offering to sell Elsie his car for $7,600, and he promised to hold the offer open for ten days. On August 4 Ernie changed his mind; he sent Elsie a letter revoking the offer. On August 5 Elsie e-mailed Ernie, accepting the offer. Ernie's letter of revocation arrived on August 6. Is there a contract? Explain.
4. On August 1 Grover visited a local electronics shop to purchase a new television. He saw one he liked but wasn't sure if he could afford the $750. The store owner agreed to write up and sign an offer stating that it would be held open for ten days, which he did. On August 2 the owner changed his mind and sent Grover an e-mail revoking the offer, which Grover received immediately. On August 3 Grover sent a reply e-mail accepting the original offer. Is there a contract? Explain.
5. Acme Corporation sent the following letter, here set out in its entirety:

   January 2, 2012

   Acme Corporation

   We hereby offer you 100 Acme golden widgets, size 6. This offer will be good for 10 days.

   [Signed] Roberta Acme

   Owner, Acme Corporation

   Is this offer irrevocable for the time stated? Explain.

6. On November 26, Joe wrote to Kate offering to purchase a farm that she owned. Upon receiving the letter on November 28, Kate immediately sent Joe a letter of acceptance. However, shortly after mailing the letter, Kate had second thoughts and called Joe to advise him that she was rejecting his offer. The call was made before Joe received the letter of acceptance. Has a contract been formed? Why?

7. On a busy day just before April 15, Albert Accountant received a call from a local car dealer. The dealer said, “Hi, Mr. Accountant. Now, while you have income from doing clients’ taxes, I have an excellent offer for you. You can buy a new Buick Century automobile completely loaded for $36,000. Al, I know you’re busy. If I don’t hear from you by the end of the day, I’ll assume you want the car.” Albert, distracted, did not respond immediately, and the dealer hung up. Then followed an exhausting day of working with anxiety-ridden tax clients. Albert forgot about the conversation. Two days later a statement arrived from the dealer, with instructions on how Albert should pick up the car at the dealership. Is there a contract? Explain.
8. Mr. and Mrs. Mitchell, the owners of a small secondhand store, attended an auction where they bought a used safe for $50. The safe, part of the Sumstad estate, had a locked compartment inside, a fact the auctioneer mentioned. After they bought the safe, the Mitchells had a locksmith open the interior compartment; it contained $32,000 in cash. The locksmith called the police, who impounded the safe, and a lawsuit ensued between the Mitchells and the Sumstad estate to determine the ownership of the cash. Who should get it, and why?
9. Ivan Mestrovic, an internationally renowned artist, and his wife lived for years in a house in Indiana. Ivan died in 1982. His widow remained in the house for some years; upon her death the contents of the house were willed to her children. When the Wilkens bought the house from the estate, it was very cluttered. A bank representative (the executor of the estate) said, “You can clean it yourself and keep whatever items you want, or we—as executor of Mrs. Mestrovic’s estate—will hire a rubbish removal service to dispose of it.” The Wilkens opted to clean it up themselves, and amid the mess, behind sofas and in odd closets, were six apparently valuable paintings by Mestrovic. The estate claimed them; the Wilkens claimed them. Who gets the paintings, and why?
10. David Kidd’s dog bit Mikaila Sherrod. On June 14, 2010, the Kidds offered to settle for $32,000. On July 12 the Sherrods sued the Kidds. On July 20 the Kidds bumped their offer up to $34,000. The suit was subject to mandatory arbitration, which proceeded on April 28, 2011. On May 5 the arbitrator awarded the Sherrods $25,000. On May 9 the Sherrods wrote to the Kidds and purported to accept their last offer of $34,000, made the year before. The Sherrods’ attorney moved to enforce that purported $34,000 “settlement agreement.” The court concluded that the offer was properly accepted because it had not been withdrawn and entered judgment against the Kidds for $34,000. The Kidds appealed. What result should obtain on appeal, and why?*Sherrod ex rel. Cantone v. Kidd*, 155 P.3d 976 (Wash. Ct. App., 2007).

SELF-TEST QUESTIONS

1. In interpreting agreements for the purpose of establishing whether a valid contract exists, courts generally apply
    1. subjective standards
    2. objective standards
    3. either a subjective or an objective standard
    4. none of the above
2. A valid offer must be
    1. written
    2. written and intended
    3. communicated by letter
    4. communicated and definite
3. An offer
    1. must specify time, place, and manner of acceptance
    2. must be accepted immediately to be valid
    3. need not be accepted immediately
    4. can only be accepted by the same means it was made
4. An offer generally
    1. is rejected by a counteroffer
    2. can be revoked if the offeror changes his or her mind
    3. can lapse after a reasonable period of time
    4. involves all of the above
5. An acceptance is generally considered effective

1. when a letter is received by the offeror
2. when a letter is mailed
3. when the offeree is silent
4. only when the acceptance is transmitted in writing

SELF-TEST AnswerS

1. b
2. d
3. c
4. d
5. b

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SECTION OVERVIEW

11.3: Real Assent

Learning Objectives

After reading this chapter, you should understand the following:

- Contracts require “a meeting of the minds” between competent parties, and if there is no such “meeting,” the agreement is usually voidable.
- Parties must enter the contract voluntarily, without duress or undue influence.
- Misrepresentation or fraud, when proven, vitiates a contract.
- A mistake may make a contract voidable.
- Parties to a contract must have capacity—that is, not labor under infancy, intoxication, or insanity.

We turn to the second of the four requirements for a valid contract. In addition to manifestation of assent, a party’s assent must be real; he or she must consent to the contract freely, with adequate knowledge, and must have capacity. The requirement of real assent raises the following major questions:

1. Did the parties enter into the contract of their own free will, or was one forced to agree under duress or undue influence?
2. Did the parties enter into the contract with full knowledge of the facts, or was one or both led to the agreement through fraud or mistake?
3. Did both parties have the capacity to make a contract?

11.3.1: Duress and Undue Influence

11.3.2: Misrepresentation

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11.3.1: Duress and Undue Influence

LEARNING OBJECTIVES

1. Recognize that if a person makes an agreement under duress (being forced to enter a contract against his or her will), the agreement is void.
2. Understand what undue influence is and what the typical circumstances are when it arises to make a contract voidable.

Duress

When a person is forced to do something against his or her will, that person is said to have been the victim of **duress**—compulsion. There are two types of duress: physical duress and duress by improper threat. A contract induced by physical violence is void.

Physical Duress

If a person is forced into entering a contract on threat of physical bodily harm, he or she is the victim of **physical duress**. It is defined by the Restatement (Second) of Contracts in Section 174: "If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent."

Comment (a) to Section 174 provides in part, "This Section involves an application of that principle to those *relatively rare situations in which actual physical force* has been used to compel a party to appear to assent to a contract.…The essence of this type of duress is that a party is compelled by physical force to do an act that he has no intention of doing. He is, it is sometimes said, 'a mere mechanical instrument.' The result is that there is no contract at all, or a 'void contract' as distinguished from a voidable one" (emphasis added).

The Restatement is undoubtedly correct that there are "relatively rare situations in which actual physical force" is used to compel assent to a contract. Extortion is a crime.

Duress by Threat

The second kind of duress is *duress by threat*; it is more common than physical duress. Here the perpetrator threatens the victim, who feels there is no reasonable alternative but to assent to the contract. It renders the contract voidable. This rule contains a number of elements.

First, the threat must be improper. Second, there must be no reasonable alternative. If, for example, a supplier threatens to hold up shipment of necessary goods unless the buyer agrees to pay more than the contract price, this would not be duress if the buyer could purchase identical supplies from someone else. Third, the test for inducement is subjective. It does not matter that the person threatened is unusually timid or that a reasonable person would not have felt threatened. The question is whether the threat in fact induced assent by the victim. Such facts as the victim's belief that the threatener had the ability to carry out the threat and the length of time between the threat and assent are relevant in determining whether the threat did prompt the assent.

There are many types of improper threats that might induce a party to enter into a contract: threats to commit a crime or a tort (e.g., bodily harm or taking of property), to instigate criminal prosecution, to instigate civil proceedings when a threat is made in bad faith, to breach a "duty of good faith and fair dealing under a contract with the recipient," or to disclose embarrassing details about a person's private life.

Jack buys a car from a local used-car salesman, Mr. Olson, and the next day realizes he bought a lemon. He threatens to break windows in Olson's showroom if Olson does not buy the car back for $2,150, the purchase price. Mr. Olson agrees. The agreement is voidable, even though the underlying deal is fair, if Olson feels he has no reasonable alternative and is frightened into agreeing. Suppose Jack knows that Olson has been tampering with his cars' odometers, a federal offense, and threatens to have Olson prosecuted if he will not repurchase the car. Even though Olson may be guilty, this threat makes the repurchase contract voidable, because it is a misuse for personal ends of a power (to go to the police) given each of us for other purposes. If these threats failed, suppose Jack then tells Olson, "I'm going to haul you into court and sue your pants off." If Jack means he will sue for his purchase price, this is not an improper threat, because everyone has the right to use the courts to gain what they think is rightfully theirs. But if Jack meant that he would fabricate damages done him by a (falsely) claimed odometer manipulation, that would be an improper

threat. Although Olson could defend against the suit, his reputation would suffer in the meantime from his being accused of odometer tampering.

A threat to breach a contract that induces the victim to sign a new contract could be improper. Suppose that as part of the original purchase price, Olson agrees to make all necessary repairs and replace all failed parts for the first ninety days. At the end of one month, the transmission dies, and Jack demands a replacement. Olson refuses to repair the car unless Jack signs a contract agreeing to buy his next car from Olson. Whether this threat is improper depends on whether Jack has a reasonable alternative; if a replacement transmission is readily available and Jack has the funds to pay for it, he might have an alternative in suing Olson in small claims court for the cost. But if Jack needs the car immediately and he is impecunious, then the threat would be improper and the contract voidable. A threat to breach a contract is not necessarily improper, however. It depends on whether the new contract is fair and equitable because of unanticipated circumstances. If, for example, Olson discovers that he must purchase a replacement transmission at three times the anticipated cost, his threat to hold up work unless Jack agrees to pay for it might be reasonable.

Undue Influence

The Restatement of Contracts (Second) characterizes **undue influence** as “unfair persuasion.”Restatement (Second) of Contracts, Section 177. It is a milder form of duress than physical harm or threats. The unfairness does not lie in any misrepresentation; rather, it occurs when the victim is under the domination of the persuader or is one who, in view of the relationship between them, is warranted in believing that the persuader will act in a manner detrimental to the victim’s welfare if the victim fails to assent. It is the improper use of trust or power to deprive a person of free will and substitute instead another’s objective. Usually the fact pattern involves the victim being isolated from receiving advice except from the persuader. Falling within this rule are situations where, for example, a child takes advantage of an infirm parent, a doctor takes advantage of an ill patient, or a lawyer takes advantage of an unknowledgeable client. If there has been undue influence, the contract is voidable by the party who has been unfairly persuaded. Whether the relationship is one of domination and the persuasion is unfair is a factual question. The answer hinges on a host of variables, including “the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded.”Restatement (Second) of Contracts, Section 177(b). See Section 10.5.1 "Undue Influence", *Hodge v. Shea*.

KEY TAKEAWAY

A contract induced by physical duress—threat of bodily harm—is void; a contract induced by improper threats—another type of duress—is voidable. Voidable also are contracts induced by undue influence, where a weak will is overborne by a stronger one.

EXERCISES

1. What are the two types of duress?
2. What are the elements necessary to support a claim of undue influence?

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11.3.2: Misrepresentation

LEARNING OBJECTIVES

1. Understand the two types of misrepresentation: fraudulent and nonfraudulent.
2. Distinguish between fraudulent misrepresentation in the execution and fraudulent misrepresentation in the inducement.
3. Know the elements necessary to prove fraudulent and nonfraudulent misrepresentation.
4. Recognize the remedies for misrepresentation.

General Description

The two types of misrepresentation are fraudulent and nonfraudulent. Within the former are fraud in the execution and fraud in the inducement. Within the latter are negligent misrepresentation and innocent misrepresentation.

Misrepresentation is a statement of fact that is not consistent with the truth. If misrepresentation is intentional, it is fraudulent misrepresentation; if it is not intentional, it is nonfraudulent misrepresentation, which can be either negligent or innocent.

In further taxonomy, courts distinguish between fraud in the execution and fraud in the inducement. **Fraud in the execution** is defined by the Restatement as follows: "If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent."Restatement (Second) of Contracts, Section 163. For example, Alphonse and Gaston decide to sign a written contract incorporating terms to which they have agreed. It is properly drawn up, and Gaston reads it and approves it. Before he can sign it, however, Alphonse shrewdly substitutes a different version to which Gaston has not agreed. Gaston signs the substitute version. There is no contract. There has been fraud in the execution.

Fraud in the inducement is more common. It involves some misrepresentation about the subject of the contract that induces assent. Alphonse tells Gaston that the car Gaston is buying from Alphonse has just been overhauled—which pleases Gaston—but it has not been. This renders the contract voidable.

Fraudulent Misrepresentation

Necessary to proving **fraudulent misrepresentation** (usually just "fraud," though technically "fraud" is the crime and "fraudulent misrepresentation" is the civil wrong) is a misstatement of fact that is intentionally made and justifiably relied upon.

Misstatement of Fact

Again, generally, any statement not in accord with the facts (a fact is something amenable to testing as true) is a misrepresentation. Falsity does not depend on intent. A typist's unnoticed error in a letter (inadvertently omitting the word "not," for example, or transposing numbers) can amount to a misrepresentation on which the recipient may rely (it is not fraudulent misrepresentation). A half-truth can amount to a misrepresentation, as, for example, when the seller of a hotel says that the income is from both permanent and transient guests but fails to disclose that the bulk of the income is from single-night stopovers by seamen using the hotel as a brothel.*Ikeda v. Curtis*, 261 P.2d 684 (Wash. 1951).

Concealment

Another type of misrepresentation is concealment. It is an act that is equivalent to a statement that the facts are to the contrary and that serves to prevent the other party from learning the true statement of affairs; it is hiding the truth. A common example is painting over defects in a building—by concealing the defects, the owner is misrepresenting the condition of the property. The act of concealment need not be direct; it may consist of sidetracking the other party from gaining necessary knowledge by, for example, convincing a third person who has knowledge of the defect not to speak. Concealment is always a misrepresentation.

Nondisclosure

A more passive type of concealment is nondisclosure. Although generally the law imposes no obligation on anyone to speak out, nondisclosure of a fact can operate as a misrepresentation under certain circumstances. This occurs, for example, whenever the other party has erroneous information, or, as *Reed v. King* (Section 10.5.2 "Misrepresentation by Concealment") shows, where the

nondisclosure amounts to a failure to act in good faith, or where the party who conceals knows or should know that the other side cannot, with reasonable diligence, discover the truth.

In a remarkable 1991 case out of New York, a New York City stockbroker bought an old house upstate (basically anyplace north of New York City) in the village of Nyack, north of New York City, and then wanted out of the deal when he discovered—the defendant seller had not told him—that it was "haunted." The court summarized the facts: "Plaintiff, to his horror, discovered that the house he had recently contracted to purchase was widely reputed to be possessed by poltergeists [ghosts], reportedly seen by defendant seller and members of her family on numerous occasions over the last nine years. Plaintiff promptly commenced this action seeking rescission of the contract of sale. Supreme Court reluctantly dismissed the complaint, holding that plaintiff has no remedy at law in this jurisdiction."

The high court of New York ruled he could rescind the contract because the house was "haunted as a matter of law": the defendant had promoted it as such on village tours and in *Reader's Digest*. She had concealed it, and no reasonable buyer's inspection would have revealed the "fact." The dissent basically hooted, saying, "The existence of a poltergeist is no more binding upon the defendants than it is upon this court."*Stambovsky v. Ackley*, 169 A.D.2d 254 (N.Y. 1991).

Statement Made False by Subsequent Events

If a statement of fact is made false by later events, it must be disclosed as false. For example, in idle chatter one day, Alphonse tells Gaston that he owns thirty acres of land. In fact, Alphonse owns only twenty-seven, but he decided to exaggerate a little. He meant no harm by it, since the conversation had no import. A year later, Gaston offers to buy the "thirty acres" from Alphonse, who does not correct the impression that Gaston has. The failure to speak is a nondisclosure—presumably intentional, in this situation—that would allow Gaston to rescind a contract induced by his belief that he was purchasing thirty acres.

Statements of Opinion

An opinion, of course, is not a fact; neither is sales puffery. For example, the statements "In my opinion this apple is very tasty" and "These apples are the best in the county" are not facts; they are not expected to be taken as true. Reliance on opinion is hazardous and generally not considered justifiable.

If Jack asks what condition the car is in that he wishes to buy, Mr. Olson's response of "Great!" is not ordinarily a misrepresentation. As the Restatement puts it: "The propensity of sellers and buyers to exaggerate the advantages to the other party of the bargains they promise is well recognized, and to some extent their assertions must be discounted."Restatement (Second) of Contracts, Section 168(d). Vague statements of quality, such as that a product is "good," ought to suggest nothing other than that such is the personal judgment of the opinion holder.

Despite this general rule, there are certain exceptions that justify reliance on opinions and effectively make them into facts. Merely because someone is less astute than the one with whom she is bargaining does not give rise to a claim of justifiable reliance on an unwarranted opinion. But if the person is inexperienced and susceptible or gullible to blandishments, the contract can be voided, as illustrated in *Vokes v. Arthur Murray, Inc.* in Section 10.5.3 "Misrepresentation by Assertions of Opinion".

Misstatement of Law

Incorrect assertions of law usually do not give rise to any relief, but sometimes they do. An assertion that "the city has repealed the sales tax" or that a court has cleared title to a parcel of land is a statement of fact; if such assertions are false, they are governed by the same rules that govern misrepresentations of fact generally. An assertion of the legal consequences of a given set of facts is generally an opinion on which the recipient relies at his or her peril, especially if both parties know or assume the same facts. Thus, if there is a lien on a house, the seller's statement that "the courts will throw it out, you won't be bothered by it" is an opinion. A statement that "you can build a five-unit apartment on this property" is not actionable because, at common law, people are supposed to know what the local and state laws are, and nobody should rely on a layperson's statement about the law. However, if the statement of law is made by a lawyer or real estate broker, or some other person on whom a layperson may justifiably rely, then it may be taken as a fact and, if untrue, as the basis for a claim of misrepresentation. (Assertions about foreign laws are generally held to be statements of fact, not opinion.)

Assertions of Intention

Usually, assertions of intention are not considered facts. The law allows considerable leeway in the honesty of assertions of intention. The Restatement talks in terms of "a misrepresentation of intention…consistent with reasonable standards of fair dealing."Restatement (Second) of Contracts, Section 171(1). The right to misstate intentions is useful chiefly in the acquisition of land; the cases permit buyers to misrepresent the purpose of the acquisition so as not to arouse the suspicion of the seller that the land is worth considerably more than his asking price. To be a misrepresentation that will permit rescission, an assertion of intention must be false at the time made; that is, the person asserting an intention must not then have intended it. That later he or she does not carry out the stated intention is not proof that there was no intention at the time asserted. Moreover, to render a contract voidable, the false assertion of intention must be harmful in some way to other interests of the recipient. Thus, in the common example, the buyer of land tells the seller that he intends to build a residence on the lot, but he actually intends to put up a factory and has lied because he knows that otherwise the seller will not part with it because her own home is on an adjacent lot. The contract is voidable by the seller. So a developer says, as regards the picturesque old barn on the property, "I'll sure try to save it," but after he buys the land he realizes it would be very expensive (and in the way), so he does not try to save it. No misrepresentation.

Intentionally Made Misrepresentation

The second element necessary to prove fraud is that the misrepresentation was intentionally made. A misrepresentation is intentionally made "if the maker intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion."Restatement (Second) of Contracts, Section 162(1).

The question of intent often has practical consequences in terms of the remedy available to the plaintiff. If the misrepresentation is fraudulent, the plaintiff may, as an alternative to avoiding the contract, recover damages. Some of this is discussed in Section 10.2.4 "Remedies" and more fully in Chapter 16 "Remedies", where we see that some states would force the plaintiff to elect one of these two remedies, whereas other states would allow the plaintiff to pursue both remedies (although only one type of recovery would eventually be allowed). If the misrepresentation is not intentional, then the common law allowed the plaintiff only the remedy of rescission. But the Uniform Commercial Code (UCC), Section 2-721, allows both remedies in contracts for the sale of goods, whether the misrepresentation is fraudulent or not, and does not require election of remedies.

Reliance

The final element necessary to prove fraud is reliance by the victim. He or she must show that the misrepresentation induced assent —that is, he or she relied on it. The reliance need not be solely on the false assertion; the defendant cannot win the case by demonstrating that the plaintiff would have assented to the contract even without the misrepresentation. It is sufficient to avoid the contract if the plaintiff weighed the assertion as one of the important factors leading him to make the contract, and he believed it to be true. The person who asserts reliance to avoid a contract must have acted in good faith and reasonably in relying on the false assertion. Thus if the victim failed to read documents given him that truly stated the facts, he cannot later complain that he relied on a contrary statement, as, for example, when the purchaser of a car dealership was told the inventory consisted of new cars, but the supporting papers, receipt of which he acknowledged, clearly stated how many miles each car had been driven. If Mr. Olson tells Jack that the car Jack is interested in is "a recognized classic," and if Jack doesn't care a whit about that but buys the car because he likes its tail fins, he will have no case against Mr. Olson when he finds out the car is not a classic: it didn't matter to him, and he didn't rely on it.

Ordinarily, the person relying on a statement need not verify it independently. However, if verification is relatively easy, or if the statement is one that concerns matters peculiarly within the person's purview, he or she may not be held to have justifiably relied on the other party's false assertion. Moreover, usually the rule of reliance applies to statements about past events or existing facts, not about the occurrence of events in the future.

Nonfraudulent Misrepresentation

Nonfraudulent misrepresentation may also be grounds for some relief. There are two types: negligent misrepresentation and innocent misrepresentation.

Negligent Misrepresentation

Where representation is caused by carelessness, it is **negligent misrepresentation**. To prove it, a plaintiff must show a negligent misstatement of fact that is material and justifiably relied upon.

Negligent

As an element of misrepresentation, “negligent” here means the party who makes the representation was careless. A potential buyer of rural real estate asks the broker if the neighborhood is quiet. The broker assures her it is. In fact, the neighbors down the road have a whole kennel of hunting hounds that bark a lot. The broker didn’t know that; she just assumed the neighborhood was quiet. That is negligence: failure to use appropriate care.

Misstatement of Fact

Whether a thing is a fact may be subject to the same general analysis used in discussing fraudulent misrepresentation. (A person could negligently conceal a fact, or negligently give an opinion, as in legal malpractice.)

Materiality

A material misrepresentation is one that “would be likely to induce a reasonable person to manifest his assent” or that “the maker knows…would be likely to induce the recipient to do so.”Restatement (Second) of Contracts, Section 162(2). An honestly mistaken statement that the house for sale was built in 1922 rather than 1923 would not be the basis for avoiding the contract because it is not material unless the seller knew that the buyer had sentimental or other reasons for purchasing a house built in 1922.

We did not mention materiality as an element of fraud; if the misrepresentation is fraudulent, the victim can avoid the contract, no matter the significance of the misrepresentation. So although materiality is not technically required for fraudulent misrepresentation, it is usually a crucial factor in determining whether the plaintiff did rely. Obviously, the more immaterial the false assertion, the less likely it is that the victim relied on it to his detriment. This is especially the case when the defendant knows that he does not have the basis that he states for an assertion but believes that the particular point is unimportant and therefore immaterial. And of course it is usually not worth the plaintiff’s while to sue over an immaterial fraudulent misrepresentation. Consequently, for practical purposes, materiality is an important consideration in most cases. *Reed v. King* (Section 10.5.2 "Misrepresentation by Concealment") discusses materiality (as well as nondisclosure).

Justifiable Reliance

The issues here for negligent misrepresentation are the same as those set out for fraudulent misrepresentation.

Negligent misrepresentation implies culpability and is usually treated the same as fraudulent misrepresentation; if the representation is not fraudulent, however, it cannot be the basis for rescission unless it is also material.

Innocent Misrepresentation

The elements necessary to prove **innocent misrepresentation** are, reasonably enough, based on what we’ve looked at so far, as follows: an innocent misstatement of fact that is material and justifiably relied upon.

It is not necessary here to go over the elements in detail. The issues are the same as previously discussed, except now the misrepresentation is innocent. The plaintiffs purchased the defendants’ eighteen-acre parcel on the defendants’ representation that the land came with certain water rights for irrigation, which they believed was true. It was not true. The plaintiffs were entitled to rescission on the basis of innocent misrepresentation.*Lesher v. Strid*, 996 P.2d 988 (Or. Ct. App. 2000).

Remedies

Remedies will be taken up in Chapter 16 "Remedies", but it is worth noting the difference between remedies for fraudulent misrepresentation and remedies for nonfraudulent misrepresentation.

Fraudulent misrepresentation has traditionally given the victim the right to rescind the contract promptly (return the parties to the before-contract status) *or* affirm it and bring an action for damages caused by the fraud, but not both.*Merritt v. Craig*, 753 A.2d 2 (Md. Ct. App. 2000). The UCC (Section 2-721) has rejected the "election of remedies" doctrine; it allows cumulative damages, such that the victim can both return the goods and sue for damages. And this is the modern trend for fraudulent misrepresentation: victims may first seek damages, and if that does not make them whole, they may seek rescission.*Ehrman v. Mann*, 979 So.2d 1011 (Fla. Ct. App. 2008). In egregious cases of fraud where the defendant has undertaken a pattern of such deceit, the rare civil remedy of punitive damages may be awarded against the defendant.

One further note: the burden of proof for fraudulent misrepresentation is that it must be proved not just "by a preponderance of the evidence," as in the typical civil case, but rather "by clear, cogent, and convincing evidence"; the fact finder must believe the claim of fraud is very probably true.*Kirkham v. Smith*, 23 P.3d 10 (Wash. Ct. App. 2001).

KEY TAKEAWAY

Misrepresentation may be of two types: fraudulent (in the execution or in the inducement) and nonfraudulent (negligent or innocent). Each type has different elements that must be proved, but in general there must be a misstatement of fact by some means that is intentionally made (for fraud), material (for nonfraudulent), and justifiably relied upon.

EXERCISES

1. Distinguish between fraudulent misrepresentation and nonfraudulent misrepresentation, between fraud in the execution and fraud in the inducement, and between negligent and innocent misrepresentation.
2. List the elements that must be shown to prove the four different types of misrepresentation noted in Exercise 1.
3. What is the difference between the traditional common-law approach to remedies for fraud and the UCC's approach?

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11.3.3: Mistake

LEARNING OBJECTIVES

1. Recognize under what circumstances a person may be relieved of a unilateral mistake.
2. Recognize when a mutual mistake will be grounds for relief, and the types of mutual mistakes.

In discussing fraud, we have considered the ways in which trickery by the other party makes a contract void or voidable. We now examine the ways in which the parties might "trick" themselves by making assumptions that lead them mistakenly to believe that they have agreed to something they have not. A mistake is "a belief about a fact that is not in accord with the truth."Restatement (Second) of Contracts, Section 151.

Mistake by One Party

Unilateral Mistake

Where one party makes a mistake, it is a **unilateral mistake**. The rule: ordinarily, a contract is not voidable because one party has made a mistake about the subject matter (e.g., the truck is not powerful enough to haul the trailer; the dress doesn't fit).

Exceptions

If one side *knows or should know* that the other has made a mistake, he or she may not take advantage of it. A person who makes the mistake of not reading a written document will usually get no relief, nor will relief be afforded to one whose mistake is caused by negligence (a contractor forgets to add in the cost of insulation) unless the negligent party would suffer unconscionable hardship if the mistake were not corrected. Courts will allow the correction of drafting errors in a contract ("reformation") in order to make the contract reflect the parties' intention.*Sikora v. Vanderploeg*, 212 S.W.3d 277 (Tenn. Ct. App. 2006).

Mutual Mistake

In the case of **mutual mistake**—both parties are wrong about the subject of the contract—relief may be granted.

The Restatement sets out three requirements for successfully arguing mutual mistake.Restatement (Second) of Contracts, Section 152. The party seeking to avoid the contract must prove that

1. the mistake relates to a "basic assumption on which the contract was made,"
2. the mistake has a material effect on the agreed exchange of performances,
3. the party seeking relief does not bear the risk of the mistake.

Basic assumption is probably clear enough. In the famous "cow case," the defendant sold the plaintiff a cow—Rose of Abalone—believed by both to be barren and thus of less value than a fertile cow (a promising young dairy cow in 2010 might sell for $1,800).*Sherwood v. Walker*, 33 N.W. 919 (1887). Just before the plaintiff was to take Rose from the defendant's barn, the defendant discovered she was "large with calf"; he refused to go on with the contract. The court held this was a mutual mistake of fact—"a barren cow is substantially a different creature than a breeding one"—and ruled for the defendant. That she was infertile was "a basic assumption," but—for example—that hay would be readily available to feed her inexpensively was not, and had hay been expensive, that would not have vitiated the contract.

Material Effect on the Agreed-to Exchange of Performance

"Material effect on the agreed-to exchange of performance" means that because of the mutual mistake, there is a significant difference between the value the parties thought they were exchanging compared with what they would exchange if the contract were performed, given the standing facts. Again, in the cow case, had the seller been required to go through with the deal, he would have given up a great deal more than he anticipated, and the buyer would have received an unagreed-to windfall.

Party Seeking Relief Does Not Bear the Risk of the Mistake

Assume a weekend browser sees a painting sitting on the floor of an antique shop. The owner says, "That old thing? You can have it for $100." The browser takes it home, dusts it off, and hangs it on the wall. A year later a visitor, an expert in art history, recognizes the hanging as a famous lost El Greco worth $1 million. The story is headlined; the antique dealer is chagrined and

claims the contract for sale should be voided because both parties mistakenly thought they were dickering over an “old, worthless” painting. The contract is valid. The owner is said to bear the risk of mistake because he contracted with conscious awareness of his ignorance: he knew he didn’t know what the painting’s possible value might be, but he didn’t feel it worthwhile to have it appraised. He gambled it wasn’t worth much, and lost.

KEY TAKEAWAY

A mistake may be unilateral, in which case no relief will be granted unless the other side knows of the mistake and takes advantage of it. A mistake may be mutual, in which case relief may be granted if it is about a basic assumption on which the contract was made, if the mistake has a material effect on the agreed-to exchange, and if the person adversely affected did not bear the risk of the mistake.

EXERCISES

1. Why is relief usually not granted for unilateral mistakes? When is relief granted for them?
2. If there is a mutual mistake, what does the party seeking relief have to show to avoid the contract?

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11.3.4: Capacity

LEARNING OBJECTIVES

1. Understand that infants may avoid their contracts, with limitations.
2. Understand that insane or intoxicated people may avoid their contracts, with limitations.
3. Understand the extent to which contracts made by mentally ill persons are voidable, void, or effectively enforceable.
4. Recognize that contracts made by intoxicated persons may be voidable.

A contract is a meeting of minds. If someone lacks mental capacity to understand what he is assenting to—or that he is assenting to anything—it is unreasonable to hold him to the consequences of his act. At common law there are various classes of people who are presumed to lack the requisite capacity. These include infants (minors), the mentally ill, and the intoxicated.

Minors (or "Infants")

The General Rule

The general rule is this: **minors** (or more legalistically "**infants**") are in most states persons younger than seventeen years old; they can avoid their contracts, up to and within a reasonable time after reaching majority, subject to some exceptions and limitations. The rationale here is that infants do not stand on an equal footing with adults, and it is unfair to require them to abide by contracts made when they have immature judgment.

The words *minor* and *infant* are mostly synonymous, but not exactly, necessarily. In a state where the legal age to drink alcohol is twenty-one, a twenty-year-old would be a minor, but not an infant, because infancy is under eighteen. A seventeen-year-old may avoid contracts (usually), but an eighteen-year-old, while legally bound to his contracts, cannot legally drink alcohol. Strictly speaking, the better term for one who may avoid his contracts is *infant*, even though, of course, in normal speaking we think of an infant as a baby.

The **age of majority** (when a person is no longer an infant or a minor) was lowered in all states except Mississippi during the 1970s (to correspond to the Twenty-Sixth Amendment, ratified in 1971, guaranteeing the right to vote at eighteen) from twenty-one to either eighteen or nineteen. Legal rights for those under twenty-one remain ambiguous, however. Although eighteen-year-olds may assent to binding contracts, not all creditors and landlords believe it, and they may require parents to cosign. For those under twenty-one, there are also legal impediments to holding certain kinds of jobs, signing certain kinds of contracts, marrying, leaving home, and drinking alcohol. There is as yet no uniform set of rules.

The exact day on which the disability of minority vanishes also varies. The old common-law rule put it on the day before the twenty-first birthday. Many states have changed this rule so that majority commences on the day of the eighteenth birthday.

An infant's contract is voidable, not void. An infant wishing to avoid the contract need do nothing positive to disaffirm. The defense of infancy to a lawsuit is sufficient; although the adult cannot enforce the contract, the infant can (which is why it is said to be voidable, not void).

Exceptions and Complications

There are exceptions and complications here. We call out six of them.

Necessities

First, as an exception to the general rule, infants are generally liable for the reasonable cost of necessities (for the reason that denying them the right to contract for necessities would harm them, not protect them). At common law, a necessity was defined as food, medicine, clothing, or shelter. In recent years, however, the courts have expanded the concept, so that in many states today, necessities include property and services that will enable the infant to earn a living and to provide for those dependent on him. If the contract is executory, the infant can simply disaffirm. If the contract has been executed, however, the infant must face more onerous consequences. Although he will not be required to perform under the contract, he will be liable under a theory of "quasi-contract" for the reasonable value of the necessity. In *Gastonia Personnel Corp. v. Rogers*, an emancipated infant, nineteen years old (before the age of minority was reduced), needed employment; he contracted with a personnel company to find him a job, for which it would charge him a fee.*Gastonia Personnel Corp. v. Rogers*, 172 S.E.2d 19 (N.C. 1970). The company did find him a job,

and when he attempted to disaffirm his liability for payment on the grounds of infancy, the North Carolina court ruled against him, holding that the concepts of necessities "should be enlarged to include such…services as are reasonable and necessary to enable the infant to earn the money required to provide the necessities of life for himself" and his dependents.

Nonvoidable Contracts

Second, state statutes variously prohibit disaffirmation for such contracts as insurance, education or medical care, bonding agreements, stocks, or bank accounts. In addition, an infant will lose her power to avoid the contract if the rights of third parties intervene. Roberta, an infant, sells a car to Oswald; Oswald, in turn, shortly thereafter sells it to Byers, who knows nothing of Roberta. May Roberta—still an infant—recover it from Byers? No: the rights of the third party have intervened. To allow the infant seller recovery in this situation would undermine faith in commercial transactions.

Misrepresentation of Age

A third exception involves misrepresentation of age. Certainly, that the adult reasonably believed the infant was an adult is of no consequence in a contract suit. In many states, an infant may misrepresent his age and disaffirm in accordance with the general rule. But it depends. If an infant affirmatively lies about his age, the trend is to deny disaffirmation. A Michigan statute, for instance, prohibits an infant from disaffirming if he has signed a "separate instrument containing only the statement of age, date of signing and the signature." And some states estop him from claiming to be an infant even if he less expressly falsely represented himself as an adult. Estoppel is a refusal by the courts on equitable grounds to allow a person to escape liability on an otherwise valid defense; unless the infant can return the consideration, the contract will be enforced. It is a question of fact how far a nonexpress (an implied) misrepresentation will be allowed to go before it is considered so clearly misleading as to range into the prohibited area. Some states hold the infant liable for damages for the tort of misrepresentation, but others do not. As William Prosser, the noted torts scholar, said of cases paying no attention to an infant's lying about his age, "The effect of the decisions refusing to recognize tort liability for misrepresentation is to create a privileged class of liars who are a great trouble to the business world."William L. Prosser, *Handbook of the Law of Torts*, 4th ed. (St. Paul, MN: West, 1971), 999.

Ratification

Fourth, when the infant becomes an adult, she has two choices: she may ratify the contract or disaffirm it. She may ratify explicitly; no further consideration is necessary. She may also do so by implication—for instance, by continuing to make payments or retaining goods for an unreasonable period of time. If the child has not disaffirmed the contract while still an infant, she may do so within a reasonable time after reaching majority; what is a "reasonable time" depends on the circumstances.

Duty to Return Consideration Received

Fifth, in most cases of disavowal, the infant's only obligation is to return the goods (if he still has them) or repay the consideration (unless it has been dissipated); he does not have to account for what he wasted, consumed, or damaged during the contract. But since the age of majority has been lowered to eighteen or nineteen, when most young people have graduated from high school, some courts require, if appropriate to avoid injustice to the adult, that the infant account for what he got. (In *Dodson v. Shrader*, the supreme court of Tennessee held that an infant would—if the contract was fair—have to pay for the pickup truck he bought and wrecked.)*Dodson v. Shrader*, 824 S.W.2d 545 (Tenn. 1992).

Tort Connected with a Contract

Sixth, the general rule is that infants are liable for their torts (e.g., assault, trespass, nuisance, negligence) unless the tort suit is only an indirect method of enforcing a contract. Henry, age seventeen, holds himself out to be a competent mechanic. He is paid $500 to overhaul Baker's engine, but he does a careless job and the engine is seriously damaged. He offers to return the $500 but disaffirms any further contractual liability. Can Baker sue him for his negligence, a tort? No, because such a suit would be to enforce the contract.

Persons Who Are Mentally Ill or Intoxicated

Mentally Ill Persons

The general rule is that a contract made by person who is mentally ill is voidable by the person when she regains her sanity, or, as appropriate, by a guardian. If, though, a guardian has been legally appointed for a person who is mentally ill, any contract made by the mentally ill person is void, but may nevertheless be ratified by the ward (the incompetent person who is under a guardianship) upon regaining sanity or by the guardian.Restatement (Second) of Contracts, Section 13.

However, if the contract was for a necessity, the other party may have a valid claim against the estate of the one who is mentally ill in order to prevent unjust enrichment. In other cases, whether a court will enforce a contract made with a person who is mentally ill depends on the circumstances. Only if the mental illness impairs the competence of the person in the particular transaction can the contract be avoided; the test is whether the person understood the nature of the business at hand. Upon avoidance, the mentally ill person must return any property in her possession. And if the contract was fair and the other party had no knowledge of the mental illness, the court has the power to order other relief.

Intoxicated Persons

If a person is so drunk that he has no awareness of his acts, and if the other person knows this, there is no contract. The intoxicated person is obligated to refund the consideration to the other party unless he dissipated it during his drunkenness. If the other person is unaware of his intoxicated state, however, an offer or acceptance of fair terms manifesting assent is binding.

If a person is only partially inebriated and has some understanding of his actions, “avoidance depends on a showing that the other party induced the drunkenness or that the consideration was inadequate or that the transaction departed from the normal pattern of similar transactions; if the particular transaction is one which a reasonably competent person might have made, it cannot be avoided even though entirely executory.”Restatement (Second) of Contracts, Section 16(b). A person who was intoxicated at the time he made the contract may nevertheless subsequently ratify it. Thus where Mervin Hyland, several times involuntarily committed for alcoholism, executed a promissory note in an alcoholic stupor but later, while sober, paid the interest on the past-due note, he was denied the defense of intoxication; the court said he had ratified his contract.*First State Bank of Sinai v. Hyland*, 399 N.W.2d 894 (S.D. 1987). In any event, intoxicated is a disfavored defense on public policy grounds.

KEY TAKEAWAY

Infants may generally disaffirm their contracts up to majority and within a reasonable time afterward, but the rule is subject to some exceptions and complications: necessities, contracts made nonvoidable by statute, misrepresentation of age, extent of duty to return consideration, ratification, and a tort connected with the contract are among these exceptions.

Contracts made by insane or intoxicated people are voidable when the person regains competency. A contract made by a person under guardianship is void, but the estate will be liable for necessities. A contract made while insane or intoxicated may be ratified.

EXERCISES

1. Ivar, an infant, bought a used car—not a necessity—for $9,500. Seller took advantage of Ivar’s infancy: the car was really worth only $5,500. Can Ivar keep the car but disclaim liability for the $4,000 difference?
2. If Ivar bought the car and it was a necessity, could he disclaim liability for the $4,000?
3. Alice Ace found her adult son’s Christmas stocking; Mrs. Ace herself had made it fifty years before. It was considerably deteriorated. Isabel, sixteen, handy with knitting, agreed to reknit it for $100, which Mrs. Ace paid in advance. Isabel, regrettably, lost the stocking. She returned the $100 to Mrs. Ace, who was very upset. May Mrs. Ace now sue Isabel for the loss of the stocking (conversion) and emotional distress?
4. Why is voluntary intoxication a disfavored defense?

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11.3.5: Cases

Undue Influence

Hodge v. Shea

168 S.E.2d 82 (S.C. 1969)

Brailsford, J.

In this equitable action the circuit court decreed specific performance of a contract for the sale of land, and the defendant has appealed. The plaintiff is a physician, and the contract was prepared and executed in his medical office on August 19, 1965. The defendant had been plaintiff's patient for a number of years. On the contract date, he was seventy-five years of age, was an inebriate of long standing, and was afflicted by grievous chronic illnesses, including arteriosclerosis, cirrhosis of the liver, neuritises, arthritis of the spine and hip and varicose veins of the legs. These afflictions and others required constant medication and frequent medical attention, and rendered him infirm of body and mind, although not to the point of incompetency to contract.

During the period immediately before and after August 19, 1965, George A. Shea, the defendant, was suffering a great deal of pain in his back and hip and was having difficulty in voiding. He was attended professionally by the plaintiff, Dr. Joseph Hodge, either at the Shea home, at the doctor's office or in the hospital at least once each day from August 9 through August 26, 1965, except for August 17. The contract was signed during the morning of August 19. One of Dr. Hodge's frequent house calls was made on the afternoon of that day, and Mr. Shea was admitted to the hospital on August 21, where he remained until August 25.

Mr. Shea was separated from his wife and lived alone. He was dependent upon Dr. Hodge for house calls, which were needed from time to time. His relationship with his physician, who sometimes visited him as a friend and occasionally performed non-professional services for him, was closer than ordinarily arises from that of patient and physician.…

"Where a physician regularly treats a chronically ill person over a period of two years, a confidential relationship is established, raising a presumption that financial dealings between them are fraudulent." [Citation]

A 125 acre tract of land near Mr. Shea's home, adjacent to land which was being developed as residential property, was one of his most valuable and readily salable assets. In 1962, the developer of this contiguous land had expressed to Mr. Shea an interest in it at $1000.00 per acre. A firm offer of this amount was made in November, 1964, and was refused by Mr. Shea on the advice of his son-in-law that the property was worth at least $1500.00 per acre. Negotiations between the developer and Mr. Ransdell commenced at that time and were in progress when Mr. Shea, at the instance of Dr. Hodge and without consulting Mr. Ransdell or anyone else, signed the contract of August 19, 1965. Under this contract Dr. Hodge claims the right to purchase twenty choice acres of the 125 acre tract for a consideration calculated by the circuit court to be the equivalent of $361.72 per acre. The market value of the land on the contract date has been fixed by an unappealed finding of the master at $1200.00 per acre.…

The consideration was expressed in the contract between Dr. Hodge and Mr. Shea as follows:

The purchase price being (Cadillac Coupe DeVille 6600) & $4000.00 Dollars, on the following terms: Dr. Joseph Hodge to give to Mr. George Shea a new $6600 coupe DeVille Cadillac which is to be registered in name of Mr. George A. Shea at absolutely no cost to him. In return, Mr. Shea will give to Dr. Joe Hodge his 1964 Cadillac coupe DeVille and shall transfer title of this vehicle to Dr. Hodge. Further, Dr. Joseph Hodge will pay to Mr. George A. Shea the balance of $4000.00 for the 20 acres of land described above subject to survey, title check, less taxes on purchase of vehicle.

Dr. Hodge was fully aware of Mr. Shea's financial troubles, the liens on his property and his son-in-law's efforts in his behalf. He was also aware of his patient's predilection for new Cadillacs. Although he was not obligated to do so until the property was cleared of liens, which was not accomplished until the following June, Dr. Hodge hastened to purchase a 1965 Cadillac Coupe DeVille and delivered it to Mr. Shea on the day after his discharge from the hospital on August 25, 1965. If he acted in haste in an effort to fortify what he must have realized was a dubious contract, he has so far succeeded.…

The case at hand is attended by gross inadequacy of consideration, serious impairment of the grantor's mentality from age, intemperance and disease, and a confidential relationship between the grantee and grantor. Has the strong presumption of vitiating unfairness arising from this combination of circumstances been overcome by the evidence? We must conclude that it has not. The record is devoid of any evidence suggesting a reason, compatible with fairness, for Mr. Shea's assent to so disadvantageous a

bargain. Disadvantageous not only because of the gross disparity between consideration and value, but because of the possibility that the sale would impede the important negotiations in which Mr. Ransdell was engaged. Unless his memory failed him, Mr. Shea knew that his son-in-law expected to sell the 125 acre tract for about $1500.00 per acre as an important step toward raising sufficient funds to satisfy the tax and judgment liens against the Shea property. These circumstances furnish strong evidence that Mr. Shea's assent to the contract, without so much as notice to Mr. Ransdell, was not the product of a deliberate Exercise of an informed judgment.…

Finally, on this phase of the case, it would be naive not to recognize that the 1965 Cadillac was used to entice a highly susceptible old man into a hard trade. Mr. Shea was fatuously fond of new Cadillacs, but was apparently incapable of taking care of one. His own 1964 model (he had also had a 1963 model) had been badly abused. According to Dr. Hodge, it 'smelled like a toilet. * * * had several fenders bumped, bullet holes in the top and the car was just filthy * * *. It was a rather foul car.'…Knowing the condition of Mr. Shea's car, his financial predicament and the activities of his son-in-law in his behalf, Dr. Hodge used the new automobile as a means of influencing Mr. Shea to agree to sell. The means was calculated to becloud Mr. Shea's judgment, and, under the circumstances, its use was unfair.…

Reversed and remanded.

CASE QUESTIONS

1. Why is it relevant that Mr. Shea was separated from his wife and lived alone?
2. Why is it relevant that it was his doctor who convinced him to sell the real estate?
3. Why did the doctor offer the old man a Cadillac as part of the deal?
4. Generally speaking, if you agree to sell your real estate for less than its real value, that's just a unilateral mistake and the courts will grant no relief. What's different here?

Misrepresentation by Concealment

Reed v. King

193 Cal. Rptr. 130 (Calif. Ct. App. 1983)

Blease, J.

In the sale of a house, must the seller disclose it was the site of a multiple murder? Dorris Reed purchased a house from Robert King. Neither King nor his real estate agents (the other named defendants) told Reed that a woman and her four children were murdered there ten years earlier. However, it seems "truth will come to light; murder cannot be hid long." (Shakespeare, Merchant of Venice, Act II, Scene II.) Reed learned of the gruesome episode from a neighbor after the sale. She sues seeking rescission and damages. King and the real estate agent defendants successfully demurred to her first amended complaint for failure to state a cause of action. Reed appeals the ensuing judgment of dismissal. We will reverse the judgment.

Facts

We take all issuable facts pled in Reed's complaint as true. King and his real estate agent knew about the murders and knew the event materially affected the market value of the house when they listed it for sale. They represented to Reed the premises were in good condition and fit for an "elderly lady" living alone. They did not disclose the fact of the murders. At some point King asked a neighbor not to inform Reed of that event. Nonetheless, after Reed moved in neighbors informed her no one was interested in purchasing the house because of the stigma. Reed paid $76,000, but the house is only worth $65,000 because of its past.…

Discussion

Does Reed's pleading state a cause of action? Concealed within this question is the nettlesome problem of the duty of disclosure of blemishes on real property which are not physical defects or legal impairments to use.

Numerous cases have found non-disclosure of physical defects and legal impediments to use of real property are material. [Citation] However, to our knowledge, no prior real estate sale case has faced an issue of non-disclosure of the kind presented here. Should this variety of ill-repute be required to be disclosed? Is this a circumstance where "non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing [?]" (Rest.2d Contracts, § 161, subd. (b).)

The paramount argument against an affirmative conclusion is it permits the camel's nose of unrestrained irrationality admission to the tent. If such an "irrational" consideration is permitted as a basis of rescission the stability of all conveyances will be seriously undermined. Any fact that might disquiet the enjoyment of some segment of the buying public may be seized upon by a disgruntled purchaser to void a bargain. In our view, keeping this genie in the bottle is not as difficult a task as these arguments assume. We do not view a decision allowing Reed to survive a demurrer in these unusual circumstances as endorsing the materiality of facts predicating peripheral, insubstantial, or fancied harms.

The murder of innocents is highly unusual in its potential for so disturbing buyers they may be unable to reside in a home where it has occurred. This fact may foreseeably deprive a buyer of the intended use of the purchase. Murder is not such a common occurrence that *buyers* should be charged with anticipating and discovering this disquieting possibility. Accordingly, the fact is not one for which a duty of inquiry and discovery can sensibly be imposed upon the buyer.

Reed alleges the fact of the murders has a quantifiable effect on the market value of the premises. We cannot say this allegation is inherently wrong and, in the pleading posture of the case, we assume it to be true. If information known or accessible only to the seller has a significant and measureable effect on market value and, as is alleged here, the seller is aware of this effect, we see no principled basis for making the duty to disclose turn upon the character of the information. Physical usefulness is not and never has been the sole criterion of valuation. Stamp collections and gold speculation would be insane activities if utilitarian considerations were the sole measure of value.

Reputation and history can have a significant effect on the value of realty. "George Washington slept here" is worth something, however physically inconsequential that consideration may be. Ill-repute or "bad will" conversely may depress the value of property. Failure to disclose such a negative fact where it will have a forseeably depressing effect on income expected to be generated by a business is tortuous. [Citation] Some cases have held that *unreasonable* fears of the potential buying public that a gas or oil pipeline may rupture may depress the market value of land and entitle the owner to incremental compensation in eminent domain.

Whether Reed will be able to prove her allegation the decade-old multiple murder has a significant effect on market value we cannot determine. If she is able to do so by competent evidence she is entitled to a favorable ruling on the issues of materiality and duty to disclose. Her demonstration of objective tangible harm would still the concern that permitting her to go forward will open the floodgates to rescission on subjective and idiosyncratic grounds.…

The judgment is reversed.

CASE QUESTIONS

1. Why is it relevant that the plaintiff was "an elderly lady living alone"?
2. How did Mrs. Reed find out about the gruesome fact here?
3. Why did the defendants conceal the facts?
4. What is the concern about opening "floodgates to rescission on subjective and idiosyncratic grounds"?
5. Why *did* George Washington sleep in so many places during the Revolutionary War?
6. Did Mrs. Reed get to rescind her contract and get out of the house as a result of this case?

Misrepresentation by Assertions of Opinion

Vokes v. Arthur Murray, Inc.

212 S.2d. 906 (Fla. 1968)

Pierce, J.

This is an appeal by Audrey E. Vokes, plaintiff below, from a final order dismissing with prejudice, for failure to state a cause of action, her fourth amended complaint, hereinafter referred to as plaintiff's complaint.

Defendant Arthur Murray, Inc., a corporation, authorizes the operation throughout the nation of dancing schools under the name of "Arthur Murray School of Dancing" through local franchised operators, one of whom was defendant J. P. Davenport whose dancing establishment was in Clearwater.

Plaintiff Mrs. Audrey E. Vokes, a widow of 51 years and without family, had a yen to be “an accomplished dancer” with the hopes of finding “new interest in life.” So, on February 10, 1961, a dubious fate, with the assist of a motivated acquaintance, procured her to attend a “dance party” at Davenport’s “School of Dancing” where she whiled away the pleasant hours, sometimes in a private room, absorbing his accomplished sales technique, during which her grace and poise were elaborated upon and her rosy future as “an excellent dancer” was painted for her in vivid and glowing colors. As an incident to this interlude, he sold her eight 1/2-hour dance lessons to be utilized within one calendar month therefrom, for the sum of $14.50 cash in hand paid, obviously a baited “come-on.”

Thus she embarked upon an almost endless pursuit of the terpsichorean art during which, over a period of less than sixteen months, she was sold fourteen “dance courses” totaling in the aggregate 2302 hours of dancing lessons for a total cash outlay of $31,090.45 [about $220,000 in 2010 dollars] all at Davenport’s dance emporium. All of these fourteen courses were evidenced by execution of a written “Enrollment Agreement-Arthur Murray’s School of Dancing” with the addendum in heavy black print, “No one will be informed that you are taking dancing lessons. Your relations with us are held in strict confidence”, setting forth the number of “dancing lessons” and the “lessons in rhythm sessions” currently sold to her from time to time, and always of course accompanied by payment of cash of the realm.

These dance lesson contracts and the monetary consideration therefore of over $31,000 were procured from her by means and methods of Davenport and his associates which went beyond the unsavory, yet legally permissible, perimeter of “sales puffing” and intruded well into the forbidden area of undue influence, the suggestion of falsehood, the suppression of truth, and the free Exercise of rational judgment, if what plaintiff alleged in her complaint was true. From the time of her first contact with the dancing school in February, 1961, she was influenced unwittingly by a constant and continuous barrage of flattery, false praise, excessive compliments, and panegyric encomiums, to such extent that it would be not only inequitable, but unconscionable, for a Court exercising inherent chancery power to allow such contracts to stand.

She was incessantly subjected to overreaching blandishment and cajolery. She was assured she had “grace and poise”; that she was “rapidly improving and developing in her dancing skill”; that the additional lessons would “make her a beautiful dancer, capable of dancing with the most accomplished dancers”; that she was “rapidly progressing in the development of her dancing skill and gracefulness”, etc., etc. She was given “dance aptitude tests” for the ostensible purpose of “determining” the number of remaining hours of instructions needed by her from time to time.

At one point she was sold 545 additional hours of dancing lessons to be entitled to an award of the “Bronze Medal” signifying that she had reached “the Bronze Standard”, a supposed designation of dance achievement by students of Arthur Murray, Inc.…At another point, while she still had over 1,000 unused hours of instruction she was induced to buy 151 additional hours at a cost of $2,049.00 to be eligible for a “Student Trip to Trinidad”, at her own expense as she later learned.…

Finally, sandwiched in between other lesser sales promotions, she was influenced to buy an additional 481 hours of instruction at a cost of $6,523.81 in order to “be classified as a Gold Bar Member, the ultimate achievement of the dancing studio.”

All the foregoing sales promotions, illustrative of the entire fourteen separate contracts, were procured by defendant Davenport and Arthur Murray, Inc., by false representations to her that she was improving in her dancing ability, that she had excellent potential, that she was responding to instructions in dancing grace, and that they were developing her into a beautiful dancer, whereas in truth and in fact she did not develop in her dancing ability, she had no “dance aptitude,” and in fact had difficulty in “hearing that musical beat.” The complaint alleged that such representations to her “were in fact false and known by the defendant to be false and contrary to the plaintiff’s true ability, the truth of plaintiff’s ability being fully known to the defendants, but withheld from the plaintiff for the sole and specific intent to deceive and defraud the plaintiff and to induce her in the purchasing of additional hours of dance lessons.” It was averred that the lessons were sold to her “in total disregard to the true physical, rhythm, and mental ability of the plaintiff.” In other words, while she first exulted that she was entering the “spring of her life”, she finally was awakened to the fact there was “spring” neither in her life nor in her feet.

The complaint prayed that the Court decree the dance contracts to be null and void and to be cancelled, that an accounting be had, and judgment entered against, the defendants “for that portion of the $31,090.45 not charged against specific hours of instruction given to the plaintiff.” The Court held the complaint not to state a cause of action and dismissed it with prejudice. We disagree and reverse.

It is true that “generally a misrepresentation, to be actionable, must be one of fact rather than of opinion.” [Citations] But this rule has significant qualifications, applicable here. It does not apply where there is a fiduciary relationship between the parties, or where there has been some artifice or trick employed by the representor, or where the parties do not in general deal at “arm’s length” as we understand the phrase, or where the representee does not have equal opportunity to become apprised of the truth or falsity of the fact represented. [Citation] As stated by Judge Allen of this Court in [Citation]:

“* * * A statement of a party having * * * superior knowledge may be regarded as a statement of fact although it would be considered as opinion if the parties were dealing on equal terms.”…

In [Citation] it was said that “* * * what is plainly injurious to good faith ought to be considered as a fraud sufficient to impeach a contract.”… [Reversed.]

CASE QUESTIONS

1. What was the motivation of the “motivated acquaintance” in this case?
2. Why is it relevant that Mrs. Vokes was a “widow of 51 years and without family”?
3. How did the defendant J. P. Davenport entice her into spending a lot of money on dance lessons?
4. What was the defendants’ defense as to why they should not be liable for misrepresentation, and why was that defense not good?
5. Would you say the court here is rather condescending to Mrs. Vokes, all things considered?

Mutual Mistake

Konic International Corporation v. Spokane Computer Services, Inc.,

708 P.2d 932 (Idaho 1985)

The magistrate found the following facts. David Young, an employee of Spokane Computer, was instructed by his employer to investigate the possibility of purchasing a surge protector, a device which protects computers from damaging surges of electrical current. Young’s investigation turned up several units priced from $50 to $200, none of which, however, were appropriate for his employer’s needs. Young then contacted Konic. After discussing Spokane Computer’s needs with a Konic engineer, Young was referred to one of Konic’s salesmen. Later, after deciding on a certain unit, Young inquired as to the price of the selected item. The salesman responded, “fifty-six twenty.” The salesman meant $5,620. Young in turn thought $56.20.

The salesman for Konic asked about Young’s authority to order the equipment and was told that Young would have to get approval from one of his superiors. Young in turn prepared a purchase order for $56.20 and had it approved by the appropriate authority. Young telephoned the order and purchase order number to Konic who then shipped the equipment to Spokane Computer. However, because of internal processing procedures of both parties the discrepancy in prices was not discovered immediately. Spokane Computer received the surge protector and installed it in its office. The receipt and installation of the equipment occurred while the president of Spokane Computer was on vacation. Although the president’s father, who was also chairman of the board of Spokane Computer, knew of the installation, he only inquired as to what the item was and who had ordered it. The president came back from vacation the day after the surge protector had been installed and placed in operation and was told of the purchase. He immediately ordered that power to the equipment be turned off because he realized that the equipment contained parts which alone were worth more than $56 in value. Although the president then told Young to verify the price of the surge protector, Young failed to do so. Two weeks later, when Spokane Computer was processing its purchase order and Konic’s invoice, the discrepancy between the amount on the invoice and the amount on the purchase order was discovered. The president of Spokane Computer then contacted Konic, told Konic that Young had no authority to order such equipment, that Spokane Computer did not want the equipment, and that Konic should remove it. Konic responded that Spokane Computer now owned the equipment and if the equipment was not paid for, Konic would sue for the price. Spokane Computer refused to pay and this litigation ensued.

Basically what is involved here is a failure of communication between the parties. A similar failure to communicate arose over 100 years ago in the celebrated case of *Raffles v. Wichelhaus*, [Citation] which has become better known as the case of the good ship “Peerless.” In *Peerless*, the parties agreed on a sale of cotton which was to be delivered from Bombay by the ship “Peerless.” In fact, there were two ships named “Peerless” and each party, in agreeing to the sale, was referring to a different ship. Because the sailing time of the two ships was materially different, neither party was willing to agree to shipment by the “other” Peerless. The court ruled that, because each party had a different ship in mind at the time of the contract, there was in fact no binding contract.

The *Peerless* rule later was incorporated into section 71 of the Restatement of Contracts and has now evolved into section 20 of Restatement (Second) of Contracts (1981). Section 20 states in part:

(1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and

(a) neither knows or has reason to know the meaning attached by the other.

Comment (c) to Section 20 further explains that "even though the parties manifest mutual assent to the same words of agreement, there may be no contract because of a material difference of understanding as to the terms of the exchange." Another authority, Williston, discussing situations where a mistake will prevent formation of a contract, agrees that "where a phrase of contract…is reasonably capable of different interpretations…there is no contract." [Citation]

In the present case, both parties attributed different meanings to the same term, "fifty-six twenty." Thus, there was no meeting of the minds of the parties. With a hundred fold difference in the two prices, obviously price was a material term. Because the "fifty-six twenty" designation was a material term expressed in an ambiguous form to which two meanings were obviously applied, we conclude that no contract between the parties was ever formed. Accordingly, we do not reach the issue of whether Young had authority to order the equipment.

[Affirmed.]

CASE QUESTIONS

1. Why is it reasonable to say that no contract was made in this case?
2. A discrepancy in price of one hundred times is, of course, enormous. How could such an egregious mistake have occurred by both parties? In terms of running a sensible business, how could this kind of mistake be avoided before it resulted in expensive litigation?

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11.3.6: Summary and Exercises

Summary

No agreement is enforceable if the parties did not enter into it (1) of their own free will, (2) with adequate knowledge of the terms, and (3) with the mental capacity to appreciate the relationship.

Contracts coerced through duress will void a contract if actually induced through physical harm and will make the contract voidable if entered under the compulsion of many types of threats. The threat must be improper and leave no reasonable alternative, but the test is subjective—that is, what did the person threatened actually fear, not what a more reasonable person might have feared.

Misrepresentations may render an agreement void or voidable. Among the factors to be considered are whether the misrepresentation was deliberate and material; whether the promisee relied on the misrepresentation in good faith; whether the representation was of fact, opinion, or intention; and whether the parties had a special relationship.

Similarly, mistaken beliefs, not induced by misrepresentations, may suffice to avoid the bargain. Some mistakes on one side only make a contract voidable. More often, mutual mistakes of facts will show that there was no meeting of the minds.

Those who lack capacity are often entitled to avoid contract liability. Although it is possible to state the general rule, many exceptions exist—for example, in contracts for necessities, infants will be liable for the reasonable value of the goods purchased.

EXERCISES

1. Eulrich, an auto body mechanic who had never operated a business, entered into a Snap-On Tools franchise agreement. For $22,000 invested from his savings and the promise of another $22,000 from the sale of inventory, he was provided a truck full of tools. His job was to drive around his territory and sell them. The agreement allowed termination by either party; if Eulrich terminated, he was entitled to resell to Snap-On any new tools he had remaining. When he complained that his territory was not profitable, his supervisors told him to work it harder, that anybody could make money with Snap-On's marketing system. (In fact, the evidence was the system made money for the supervisors and little for dealers; dealers quickly failed and were replaced by new recruits.) Within several months Eulrich was out of money and desperate. He tried to "check in" his truck to get money to pay his household bills and uninsured medical bills for his wife; the supervisors put him off for weeks. On the check-in day, the exhausted Eulrich's supervisors berated him for being a bad businessman, told him no check would be forthcoming until all the returned inventory was sold, and presented him with a number of papers to sign, including a "Termination Agreement" whereby he agreed to waive any claims against Snap-On; he was not aware that was what he had signed. He sued to rescind the contract and for damages. The defendants held up the waiver as a defense. Under what theory might Eulrich recover?*Eulrich v. Snap-On Tools Corp.*, 853 P.2d 1350 (Or. Ct. App. 1993).
2. Chauncey, a college student, worked part-time in a restaurant. After he had worked for several months, the owner of the restaurant discovered that Chauncey had stolen $2,000 from the cash register. The owner called Chauncey's parents and told them that if they did not sign a note for $2,000, he would initiate criminal proceedings against Chauncey. The parents signed and delivered the note to the owner but later refused to pay. May the owner collect on the note? Why?
3. A restaurant advertised a steak dinner that included a "juicy, great-tasting steak, a fresh crisp salad, and a warm roll." After reading the ad, Clarence visited the restaurant and ordered the steak dinner. The steak was dry, the lettuce in the salad was old and limp with brown edges, and the roll was partly frozen. May Clarence recover from the restaurant on the basis of misrepresentation? Why?
4. Bert purchased Ernie's car. Before selling the car, Ernie had stated to Bert, "This car runs well and is reliable. Last week I drove the car all the way from Seattle to San Francisco to visit my mother and back again to Seattle." In fact, Ernie was not telling the truth: he had driven the car to San Francisco to visit his paramour, not his mother. Upon discovery of the truth, may Bert avoid the contract? Why?
5. Randolph enrolled in a business law class and purchased a new business law textbook from the local bookstore. He dropped the class during the first week and sold the book to his friend Scott. Before making the sale, Randolph told Scott that he had purchased the book new and had owned it for one week. Unknown to either Randolph or Scott, the book was in fact a used one. Scott later discovered some underlining in the middle of the book and attempted to avoid the contract. Randolph refused to refund the purchase price, claiming that he had not intentionally deceived his friend. May Scott avoid the contract? Why?

6. Langstraat was seventeen when he purchased a motorcycle. When applying for insurance, he signed a “Notice of Rejection,” declining to purchase uninsured motorist coverage. He was involved in an accident with an uninsured motorist and sought to disaffirm his rejection of the uninsured motorist coverage on the basis of infancy. May he do so?
7. Waters was attracted to Midwest Supply by its advertisements for doing federal income taxes. The ads stated “guaranteed accurate tax preparation.” Waters inquired about amending past returns to obtain refunds. Midwest induced him to apply for and receive improper refunds. When Waters was audited, he was required to pay more taxes, and the IRS put tax liens on his wages and bank accounts. In fact, Midwest hired people with no knowledge about taxes at all; if a customer inquired about employees’ qualifications, Midwest’s manual told the employees to say, “Midwest has been preparing taxes for twenty years.” The manual also instructed office managers never to refer to any employee as a “specialist” or “tax expert,” but never to correct any news reporters or commentators if they referred to employees as such. What cause of action has Waters, and for what remedies?
8. Mutschler Grain Company (later Jamestown Farmers Elevator) agreed to sell General Mills 30,000 bushels of barley at $1.22 per bushel. A dispute arose: Mutschler said that transportation was to be by truck but that General Mills never ordered any trucks to pick up the grain; General Mills said the grain was to be shipped by rail (railcars were in short supply). Nine months later, after Mutschler had delivered only about one-tenth the contracted amount, the price of barley was over $3.00 per bushel. Mutschler defaulted on, and then repudiated, the contract. Fred Mutschler then received this telephone call from General Mills: “We’re General Mills, and if you don’t deliver this grain to us, why we’ll have a battery of lawyers in there tomorrow morning to visit you, and then we are going to the North Dakota Public Service (Commission); we’re going to the Minneapolis Grain Exchange and we’re going to the people in Montana and there will be no more Mutschler Grain Company. We’re going to take your license.”

   Mutchsler then shipped 22,000 bushels of barley at the $1.22 rate and sued General Mills for the difference between that price and the market price of over $3.00. Summary judgment issued for General Mills. Upon what basis might Mutschler Grain appeal?
9. Duke decided to sell his car. The car’s muffler had a large hole in it, and as a result, the car made a loud noise. Before showing the car to potential buyers, Duke patched the hole with muffler tape to quiet it. Perry bought the car after test-driving it. He later discovered the faulty muffler and sought to avoid the contract, claiming fraud. Duke argued that he had not committed fraud because Perry had not asked about the muffler and Duke had made no representation of fact concerning it. Is Duke correct? Decide and explain.
10. At the end of the term at college, Jose, talking in the library with his friend Leanne, said, “I’ll sell you my business law notes for $25.” Leanne agreed and paid him the money. Jose then realized he’d made a mistake in that he had offered his notes when he meant to offer his book. Leanne didn’t want the book; she had a book. She wanted the notes. Would Leanne have a cause of action against Jose if he refused to deliver the notes? Decide and explain.

SELF-TEST QUESTIONS

1. Misrepresentation that does not go to the core of a contract is
   1. fraud in the execution
   2. fraud in the inducement
   3. undue influence
   4. an example of mistake
2. In order for a misrepresentation to make a contract voidable,
   1. it must have been intentional
   2. the party seeking to void must have relied on the misrepresentation
   3. it must always be material
   4. none of the above is required
3. A mistake by one party will not invalidate a contract unless
   1. the other party knew of the mistake
   2. the party making the mistake did not read the contract closely
   3. the parties to the contract had never done business before
   4. the party is mistaken about the law

4. Upon reaching the age of majority, a person who entered into a contract to purchase goods while a minor may
    1. ratify the contract and keep the goods without paying for them
    2. disaffirm the contract and keep the goods without paying for them
    3. avoid paying for the goods by keeping them without ratifying or disaffirming the contract
    4. none of these
5. Seller does not disclose to Buyer that the foundation of a house is infested with termites. Upon purchasing the house and remodeling part of the basement, Buyer discovers the termites. Has Buyer a cause of action against Seller?
    1. yes
    2. no

SELF-TEST AnswerS

1. a
2. d
3. a
4. e
5. b

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SECTION OVERVIEW

11.4: Consideration

Learning Objectives

After reading this chapter, you should understand the following:

1. What “consideration” is in contract law, what it is not, and what purposes it serves
2. How the sufficiency of consideration is determined
3. In what common situations an understanding of consideration is important
4. What promises are enforceable without consideration

11.4.1: General Perspectives on Consideration

11.4.2: Legal Sufficiency

11.4.3: Promises Enforceable without Consideration

11.4.4: Cases

11.4.5: Summary and Exercises

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11.4.1: General Perspectives on Consideration

LEARNING OBJECTIVES

1. Understand what “consideration” is in contract law.
2. Recognize what purposes the doctrine serves.
3. Understand how the law determines whether consideration exists.
4. Know the elements of consideration.

The Purpose of Consideration

This chapter continues our inquiry into whether the parties created a valid contract. In Chapter 9 "The Agreement", we saw that the first requisite of a valid contract is an agreement: offer and acceptance. In this chapter, we assume that agreement has been reached and concentrate on one of its crucial aspects: the existence of consideration. Which of the following, if any, is a contract?

1. Betty offers to give a book to Lou. Lou accepts.
2. Betty offers Lou the book in exchange for Lou’s promise to pay twenty-five dollars. Lou accepts.
3. Betty offers to give Lou the book if Lou promises to pick it up at Betty’s house. Lou agrees.

In American law, only the second situation is a binding contract, because only that contract contains **consideration**, a set of mutual promises in which each party agrees to give up something to the benefit of the other. This chapter will explore the meaning and rationale of that statement.

The question of what constitutes a binding contract has been answered differently throughout history and in other cultures. For example, under Roman law, a contract without consideration was binding if certain formal requirements were met. And in the Anglo-American tradition, the presence of a seal—the wax impression affixed to a document—was once sufficient to make a contract binding without any other consideration. The seal is no longer a substitute for consideration, although in some states it creates a presumption of consideration; in forty-nine states, the Uniform Commercial Code (UCC) has abolished the seal on contracts for the sale of goods. (Louisiana has not adopted UCC Article 2.)

Whatever its original historical purposes, and however apparently arcane, the doctrine of consideration serves some still-useful purposes. It provides objective evidence for asserting that a contract exists; it distinguishes between enforceable and unenforceable bargains; and it is a check against rash, unconsidered action, against thoughtless promise making.Lon L. Fuller, “Consideration and Form,” *Columbia Law Review* 41 (1941): 799.

A Definition of *Consideration*

Consideration is said to exist when the promisor receives some benefit for his promise and the promisee gives up something in return; it is the bargained-for price you pay for what you get. That may seem simple enough. But as with much in the law, the complicating situations are never very far away. The “something” that is promised or delivered cannot be just anything, such as a feeling of pride, warmth, amusement, or friendship; it must be something known as a **legal detriment**—an act, forbearance, or a promise of such from the promisee. The detriment need not be an actual detriment; it may in fact be a benefit to the promisee, or at least not a loss. The detriment to one side is usually a **legal benefit** to the other, but the detriment to the promisee need not confer a tangible benefit on the promisor; the promisee can agree to forego something without that something being given to the promisor. Whether consideration is legally sufficient has nothing to do with whether it is morally or economically adequate to make the bargain a fair one. Moreover, legal consideration need not even be certain; it can be a promise contingent on an event that may never happen. Consideration is a legal concept, and it centers on the giving up of a legal right or benefit.

Consideration has two elements. The first, as just outlined, is whether the promisee has incurred a legal detriment—given up something, paid some “price,” though it may be, for example, the promise to do something, like paint a house. (Some courts—although a minority—take the view that a bargained-for legal benefit to the promisor is sufficient consideration.) The second element is whether the legal detriment was bargained for: did the promisor specifically intend the act, forbearance, or promise in return for his promise? Applying this two-pronged test to the three examples given at the outset of the chapter, we can easily see why only in the second is there legally sufficient consideration. In the first, Lou incurred no legal detriment; he made no pledge to

act or to forbear from acting, nor did he in fact act or forbear from acting. In the third example, what might appear to be such a promise is not really so. Betty made a promise on a condition that Lou comes to her house; the intent clearly is to make a gift.

KEY TAKEAWAY

Consideration is—with some exceptions—a required element of a contract. It is the bargained-for giving up of something of legal value for something in return. It serves the purposes of making formal the intention to contract and reducing rash promise making.

EXERCISES

1. Alice promises to give her neighbor a blueberry bush; the neighbor says, “Thank you!” Subsequently, Alice changes her mind. Is she bound by her promise?
2. Why, notwithstanding its relative antiquity, does consideration still serve some useful purposes?
3. Identify the exchange of consideration in this example: A to B, “I will pay you $800 if you paint my garage.” B to A, “Okay, I’ll paint your garage for $800.”

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11.4.2: Legal Sufficiency

LEARNING OBJECTIVES

1. Know in general what “legal sufficiency” means when examining consideration.
2. Recognize how the concept operates in such common situations as threat of litigation, and accord and satisfaction.
3. Understand why illusory promises are unenforceable, and how courts deal with needs, outputs, and exclusive dealings contracts.

The Concept of Legal Sufficiency

As suggested in Section 11.1 "General Perspectives on Consideration", what is required in contract is the exchange of a legal detriment and a legal benefit; if that happens, the consideration is said to have **legal sufficiency**.

Actual versus Legal Detriment

Suppose Phil offers George $500 if George will quit smoking for one year. Is Phil’s promise binding? Because George is presumably benefiting by making and sticking to the agreement—surely his health will improve if he gives up smoking—how can his act be considered a legal detriment? The answer is that there is forbearance on George’s part: George is legally entitled to smoke, and by contracting not to, he suffers a loss of his legal right to do so. This is a legal detriment; consideration does not require an actual detriment.

Adequacy of Consideration

Scrooge offers to buy Caspar’s motorcycle, worth $700, for $10 and a shiny new fountain pen (worth $5). Caspar agrees. Is this agreement supported by adequate consideration? Yes, because both have agreed to give up something that is theirs: Scrooge, the cash and the pen; Caspar, the motorcycle. Courts are not generally concerned with the economic adequacy of the consideration but instead with whether it is present. As Judge Richard A. Posner puts it, “To ask whether there is consideration is simply to inquire whether the situation is one of exchange and a bargain has been struck. To go further and ask whether the consideration is adequate would require the court to do what…it is less well equipped to do than the parties—decide whether the price (and other essential terms) specified in the contract are reasonable.”Richard A. Posner, *Economic Analysis of Law* (New York: Aspen, 1973), 46. In short, “courts do not inquire into the adequacy of consideration.”

Of course, normally, parties to contracts will not make such a one-sided deal as Scrooge and Caspar’s. But there is a common class of contracts in which nominal consideration—usually one dollar—is recited in printed forms. Usually these are option contracts, in which “in consideration of one dollar in hand paid and receipt of which is hereby acknowledged” one party agrees to hold open the right of the other to make a purchase on agreed terms. The courts will enforce these contracts if the dollar is intended “to support a short-time option proposing an exchange on fair terms.”Restatement (Second) of Contracts, Section 87(b). If, however, the option is for an unreasonably long period of time and the underlying bargain is unfair (the Restatement gives as an example a ten-year option permitting the optionee to take phosphate rock from a widow’s land at a per-ton payment of only one-fourth the prevailing rate), then the courts are unlikely to hold that the nominal consideration makes the option irrevocable.

Because the consideration on such option contracts is nominal, its recital in the written instrument is usually a mere formality, and it is frequently never paid; in effect, the recital of nominal consideration is false. Nevertheless, the courts will enforce the contract —precisely because the recital has become a formality and nobody objects to the charade. Moreover, it would be easy enough to upset an option based on nominal consideration by falsifying oral testimony that the dollar was never paid or received. In a contest between oral testimonies where the incentive to lie is strong and there is a written document clearly incorporating the parties’ agreement, the courts prefer the latter. However, as Section 11.4.1 "Consideration for an Option", *Board of Control of Eastern Michigan University v. Burgess*, demonstrates, the state courts are not uniform on this point, and it is a safe practice always to deliver the consideration, no matter how nominal.

Applications of the Legal Sufficiency Doctrine

This section discusses several common circumstances where the issue of whether the consideration proffered (offered up) is adequate.

Threat of Litigation: Covenant Not to Sue

Because every person has the legal right to file suit if he or she feels aggrieved, a promise to refrain from going to court is sufficient consideration to support a promise of payment or performance. In *Dedeaux v. Young*, Dedeaux purchased property and promised to make certain payments to Young, the broker.*Dedeaux v. Young*, 170 So.2d 561 (1965). But Dedeaux thereafter failed to make these payments, and Young threatened suit; had he filed papers in court, the transfer of title could have been blocked. To keep Young from suing, Dedeaux promised to pay a 5 percent commission if Young would stay out of court. Dedeaux later resisted paying on the ground that he had never made such a promise and that even if he had, it did not amount to a contract because there was no consideration from Young. The court disagreed, holding that the evidence supported Young's contention that Dedeaux had indeed made such a promise and upholding Young's claim for the commission because "a request to forbear to exercise a legal right has been generally accepted as sufficient consideration to support a contract." If Young had had no grounds to sue—for example, if he had threatened to sue a stranger, or if it could be shown that Dedeaux had no obligation to him originally—then there would have been no consideration because Young would not have been giving up a legal right. A promise to forebear suing in return for settlement of a dispute is called a **covenant not to sue** (*covenant* is another word for agreement).

Accord and Satisfaction Generally

Frequently, the parties to a contract will dispute the meaning of its terms and conditions, especially the amount of money actually due. When the dispute is genuine (and not the unjustified attempt of one party to avoid paying a sum clearly due), it can be settled by the parties' agreement on a fixed sum as the amount due. This second agreement, which substitutes for the disputed first agreement, is called an accord, and when the payment or other term is discharged, the completed second contract is known as an **accord and satisfaction**. A suit brought for an alleged breach of the original contract could be defended by citing the later accord and satisfaction.

An accord is a contract and must therefore be supported by consideration. Suppose Jan owes Andy $7,000, due November 1. On November 1, Jan pays only $3,500 in exchange for Andy's promise to release Jan from the remainder of the debt. Has Andy (the promisor) made a binding promise? He has not, because there is no consideration for the accord. Jan has incurred no detriment; she has received something (release of the obligation to pay the remaining $3,500), but she has given up nothing. But if Jan and Andy had agreed that Jan would pay the $3,500 on October 25, then there would be consideration; Jan would have incurred a legal detriment by obligating herself to make a payment earlier than the original contract required her to. If Jan had paid the $3,500 on November 11 and had given Andy something else agreed to—a pen, a keg of beer, a peppercorn—the required detriment would also be present.

Let's take a look at some examples of the accord and satisfaction principle. The dispute that gives rise to the parties' agreement to settle by an accord and satisfaction may come up in several typical ways: where there is an unliquidated debt; a disputed debt; an "in-full-payment check" for less than what the creditor claims is due; unforeseen difficulties that give rise to a contract modification, or a novation; or a composition among creditors. But no obligation ever arises—and no real legal dispute can arise—where a person promises a benefit if someone will do that which he has a preexisting obligation to, or where a person promises a benefit to someone not to do that which the promisee is already disallowed from doing, or where one makes an illusory promise.

Settling an Unliquidated Debt

An **unliquidated debt** is one that is uncertain in amount. Such debts frequently occur when people consult professionals in whose offices precise fees are rarely discussed, or where one party agrees, expressly or by implication, to pay the customary or reasonable fees of the other without fixing the exact amount. It is certain that a debt is owed, but it is not certain how much. (A **liquidated debt**, on the other hand, is one that is fixed in amount, certain. A debt can be liquidated by being written down in unambiguous terms—"IOU $100"—or by being mathematically ascertainable—$1 per pound of ice ordered and 60 pounds delivered; hence the liquidated debt is $60.)

Here is how the matter plays out: Assume a patient goes to the hospital for a gallbladder operation. The cost of the operation has not been discussed beforehand in detail, although the cost in the metropolitan area is normally around $8,000. After the operation, the patient and the surgeon agree on a bill of $6,000. The patient pays the bill; a month later the surgeon sues for another $2,000. Who wins? The patient: he has forgone his right to challenge the reasonableness of the fee by agreeing to a fixed amount payable at a certain time. The agreement liquidating the debt is an accord and is enforceable. If, however, the patient and the surgeon had

agreed on an $8,000 fee before the operation, and if the patient arbitrarily refused to pay this liquidated debt unless the surgeon agreed to cut her fee in half, then the surgeon would be entitled to recover the other half in a lawsuit, because the patient would have given no consideration—given up nothing, "suffered no detriment"—for the surgeon's subsequent agreement to cut the fee.

Settling a Disputed Debt

A **disputed debt** arises where the parties *did* agree on (liquidated) the price or fee but subsequently get into a dispute about its fairness, and then settle. When this dispute is settled, the parties have given consideration to an agreement to accept a fixed sum as payment for the amount due. Assume that in the gallbladder case the patient agrees in advance to pay $8,000. Eight months after the operation and as a result of nausea and vomiting spells, the patient undergoes a second operation; the surgeons discover a surgical sponge embedded in the patient's intestine. The patient refuses to pay the full sum of the original surgeon's bill; they settle on $6,000, which the patient pays. This is a binding agreement because subsequent facts arose to make legitimate the patient's quarrel over his obligation to pay the full bill. As long as the dispute is based in fact and is not trumped up, as long as the promisee is acting in good faith, then consideration is present when a disputed debt is settled.

The "In-Full-Payment" Check Situation

To discharge his liquidated debt for $8,000 to the surgeon, the patient sends a check for $6,000 marked "payment in full." The surgeon cashes it. There is no dispute. May the surgeon sue for the remaining $2,000? This may appear to be an accord: by cashing the check, the surgeon seems to be agreeing with the patient to accept the $6,000 in full payment. But consideration is lacking. Because the surgeon is owed more than the face amount of the check, she causes the patient no legal detriment by accepting the check. If the rule were otherwise, debtors could easily tempt hard-pressed creditors to accept less than the amount owed by presenting immediate cash. The key to the enforceability of a "payment in full" legend is the character of the debt. If unliquidated, or if there is a dispute, then "payment in full" can serve as accord and satisfaction when written on a check that is accepted for payment by a creditor. But if the debt is liquidated and undisputed, there is no consideration when the check is for a lesser amount. (However, it is arguable that if the check is considered to be an agreement modifying a sales contract, no consideration is necessary under Uniform Commercial Code (UCC) Section 2-209.)

Unforeseen Difficulties

An **unforeseen difficulty** arising after a contract is made may be resolved by an accord and satisfaction, too. Difficulties that no one could foresee can sometimes serve as catalyst for a further promise that may appear to be without consideration but that the courts will enforce nevertheless. Suppose Peter contracts to build Jerry a house for $390,000. While excavating, Peter unexpectedly discovers quicksand, the removal of which will cost an additional $10,000. To ensure that Peter does not delay, Jerry promises to pay Peter $10,000 more than originally agreed. But when the house is completed, Jerry reneges on his promise. Is Jerry liable? Logically perhaps not: Peter has incurred no legal detriment in exchange for the $10,000; he had already contracted to build the house. But most courts would allow Peter to recover on the theory that the original contract was terminated, or modified, either by mutual agreement or by an implied condition that the original contract would be discharged if unforeseen difficulties developed. In short, the courts will enforce the parties' own mutual recognition that the unforeseen conditions had made the old contract unfair. The parties either have modified their original contract (which requires consideration at common law) or have given up their original contract and made a new one (called a **novation**).

It is a question of fact whether the new circumstance is new and difficult enough to make a preexisting obligation into an unforeseen difficulty. Obviously, if Peter encounters only a small pocket of quicksand—say two gallons' worth—he would have to deal with it as part of his already-agreed-to job. If he encounters as much quicksand as would fill an Olympic-sized swimming pool, that's clearly unforeseen, and he should get extra to deal with it. Someplace between the two quantities of quicksand there is enough of the stuff so that Peter's duty to remove it is outside the original agreement and new consideration would be needed in exchange for its removal.

Creditors' Composition

A **creditors' composition** may give rise to debt settlement by an accord and satisfaction. It is an agreement whereby two or more creditors of a debtor consent to the debtor's paying them pro rata shares of the debt due in full satisfaction of their claims. A composition agreement can be critically important to a business in trouble; through it, the business might manage to stave off

bankruptcy. Even though the share accepted is less than the full amount due and is payable after the due date so that consideration appears to be lacking, courts routinely enforce these agreements. The promise of each creditor to accept a lesser share than that owed in return for getting something is taken as consideration to support the promises of the others. A debtor has $3,000 on hand. He owes $3,000 each to A, B, and C. A, B, and C agree to accept $1,000 each and discharge the debtor. Each creditor has given up $2,000 but in return has at least received something, the $1,000. Without the composition, one might have received the entire amount owed her, but the others would have received nothing.

Preexisting Duty

Not amenable to settlement by an accord and satisfaction is the situation where a party has a **preexisting duty** and he or she is offered a benefit to discharge it. When the only consideration offered the promisor is an act or promise to act to carry out a preexisting duty, there is no valid contract. As *Denney v. Reppert* (Section 11.4.2 "Consideration: Preexisting Obligation") makes clear, the promisee suffers no legal detriment in promising to undertake that which he is already obligated to do. Where a person is promised a benefit not to do that which he is already disallowed from doing, there is no consideration. David is sixteen years old; his uncle promises him $50 if he will refrain from smoking. The promise is not enforceable: legally, David already must refrain from smoking, so he has promised to give up nothing to which he had a legal right. As noted previously, the difficulty arises where it is unclear whether a person has a preexisting obligation or whether such unforeseen difficulties have arisen as to warrant the recognition that the parties have modified the contract or entered into a novation. What if Peter insists on additional payment for him to remove one wheelbarrow full of quicksand from the excavation? Surely that's not enough "unforeseen difficulty." How much quicksand is enough?

Illusory Promises

Not every promise is a pledge to do something. Sometimes it is an **illusory promise**, where the terms of the contract really bind the promisor to give up nothing, to suffer no detriment. For example, Lydia offers to pay Juliette $10 for mowing Lydia's lawn. Juliette promises to mow the lawn if she feels like it. May Juliette enforce the contract? No, because Juliette has incurred no legal detriment; her promise is illusory, since by doing nothing she still falls within the literal wording of her promise. The doctrine that such bargains are unenforceable is sometimes referred to as the rule of mutuality of obligation: if one party to a contract has not made a binding obligation, neither is the other party bound. Thus if A contracts to hire B for a year at $6,000 a month, reserving the right to dismiss B at any time (an "option to cancel" clause), and B agrees to work for a year, A has not really promised anything; A is not bound to the agreement, and neither is B.

The illusory promise presents a special problem in agreements for exclusive dealing, outputs, and needs contracts.

Exclusive Dealing Agreement

In an **exclusive dealing agreement**, one party (the franchisor) promises to deal solely with the other party (the franchisee)—for example, a franchisor-designer agrees to sell all of her specially designed clothes to a particular department store (the franchisee). In return, the store promises to pay a certain percentage of the sales price to the designer. On closer inspection, it may appear that the store's promise is illusory: it pays the designer only if it manages to sell dresses, but it may sell none. The franchisor-designer may therefore attempt to back out of the deal by arguing that because the franchisee is not obligated to do anything, there was no consideration for her promise to deal exclusively with the store.

Courts, however, have upheld exclusive dealing contracts on the theory that the franchisee has an obligation to use reasonable efforts to promote and sell the product or services. This obligation may be spelled out in the contract or implied by its terms. In the classic statement of this concept, Judge Benjamin N. Cardozo, then on the New York Court of Appeals, in upholding such a contract, declared:

It is true that [the franchisee] does not promise in so many words that he will use reasonable efforts to place the defendant's endorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed.…His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts

monthly was a promise to use reasonable efforts to bring profits and revenues into existence.*Otis F. Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (1917).

The UCC follows the same rule. In the absence of language specifically delineating the seller's or buyer's duties, an exclusive dealing contract under Section 2-306(2) imposes "an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale."

Outputs Contracts and Needs Contracts

A similar issue arises with outputs contracts and needs contracts. In an **outputs contract**, the seller—say a coal company—agrees to sell its entire yearly output of coal to an electric utility. Has it really agreed to produce and sell any coal at all? What if the coal-mine owner decides to shut down production to take a year's vacation—is that a violation of the agreement? Yes. The law imposes upon the seller here a duty to produce and sell a reasonable amount. Similarly, if the electric utility contracted to buy all its requirements of coal from the coal company—a **needs contract**—could it decide to stop operation entirely and take no coal? No, it is required to take a reasonable amount.

KEY TAKEAWAY

Courts do not inquire into the adequacy of consideration, but (with some exceptions) do require the promisor to incur a legal detriment (the surrender of any legal right he or she possesses—to give up something) in order to receive the bargained-for benefit. The surrender of the right to sue is a legal detriment, and the issue arises in analyzing various kinds of dispute settlement agreements (accord and satisfaction): the obligation to pay the full amount claimed by a creditor on a liquidated debt, an unliquidated debt, and a disputed debt. Where unforeseen difficulties arise, an obligor will be entitled to additional compensation (consideration) to resolve them either because the contract is modified or because the parties have entered into a novation, but no additional consideration is owing to one who performs a preexisting obligation or forbears from performing that which he or she is under a legal duty not to perform. If a promisor gives an illusory promise, he or she gives no consideration and no contract is formed; but exclusive dealing agreements, needs contracts, and outputs contracts are not treated as illusory.

EXERCISES

1. What is meant by "legally sufficient" consideration?
2. Why do courts usually not "inquire into the adequacy of consideration"?
3. How can it be said there is consideration in the following instances: (a) settlement of an unliquidated debt? (b) settlement of a disputed debt? (c) a person agreeing to do more than originally contracted for because of unforeseen difficulties? (d) a creditor agreeing with other creditors for each of them to accept less than they are owed from the debtor?
4. Why is there no consideration where a person demands extra compensation for that which she is already obligated to do, or for forbearing to do that which she already is forbidden from doing?
5. What is the difference between a contract modification and a novation?
6. How do courts resolve the problem that a needs or outputs contract apparently imposes no detriment—no requirement to pass any consideration to the other side—on the promisor?

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11.4.3: Promises Enforceable without Consideration

LEARNING OBJECTIVE

1. Understand the exceptions to the requirement of consideration.

For a variety of policy reasons, courts will enforce certain types of promises even though consideration may be absent. Some of these are governed by the Uniform Commercial Code (UCC); others are part of the established common law.

Promises Enforceable without Consideration at Common Law

Past Consideration

Ordinarily, **past consideration** is not sufficient to support a promise. By past consideration, the courts mean an act that could have served as consideration if it had been bargained for at the time but that was not the subject of a bargain. For example, Mrs. Ace's dog Fluffy escapes from her mistress's condo at dusk. Robert finds Fluffy, sees Mrs. Ace, who is herself out looking for her pet, and gives Fluffy to her. She says, "Oh, thank you for finding my dear dog. Come by my place tomorrow morning and I'll give you fifty dollars as a reward." The next day Robert stops by Mrs. Ace's condo, but she says, "Well, I don't know. Fluffy soiled the carpet again last night. I think maybe a twenty-dollar reward would be plenty." Robert cannot collect the fifty dollars. Even though Mrs. Ace might have a moral obligation to pay him and honor her promise, there was no consideration for it. Robert incurred no legal detriment; his contribution—finding the dog—was paid out before her promise, and his past consideration is invalid to support a contract. There was no bargained-for exchange.

However, a valid consideration, given in the past to support a promise, can be the basis for another, later contract under certain circumstances. These occur when a person's duty to act for one reason or another has become no longer binding. If the person then makes a new promise based on the unfulfilled past duty, the new promise is binding without further consideration. Three types of cases follow.

Promise Revived after Statute of Limitations Has Passed

A **statute of limitations** is a law requiring a lawsuit to be filed within a specified period of years. For example, in many states a contract claim must be sued on within six years; if the plaintiff waits longer than that, the claim will be dismissed, regardless of its merits. When the time period set forth in the statute of limitations has lapsed, the statute is said to have "run." If a debtor renews a promise to pay or acknowledges a debt after the running of a statute of limitations, then under the common law the promise is binding, although there is no consideration in the usual sense. In many states, this promise or acknowledgment must be in writing and signed by the debtor. Also, in many states, the courts will imply a promise or acknowledgment if the debtor makes a partial payment after the statute has run.

Voidable Duties

Some promises that might otherwise serve as consideration are voidable by the promisor, for a variety of reasons, including infancy, fraud, duress, or mistake. But a voidable contract does not automatically become void, and if the promisor has not avoided the contract but instead thereafter renews his promise, it is binding. For example, Mr. Melvin sells his bicycle to Seth, age thirteen. Seth promises to pay Mr. Melvin one hundred dollars. Seth may repudiate the contract, but he does not. When he turns eighteen, he renews his promise to pay the one hundred dollars. This promise is binding. (However, a promise made up to the time he turned eighteen would not be binding, since he would still have been a minor.)

Promissory Estoppel

We examined the meaning of this forbidding phrase in Chapter 8 "Introduction to Contract Law" (recall the English *High Trees* case). It represents another type of promise that the courts will enforce without consideration. Simply stated, **promissory estoppel** means that the courts will stop the promisor from claiming that there was no consideration. The doctrine of promissory estoppel is invoked in the interests of justice when three conditions are met: (1) the promise is one that the promisor should reasonably expect to induce the promisee to take action or forbear from taking action of a definite and substantial character; (2) the action or forbearance is taken; and (3) injustice can be avoided only by enforcing the promise. (The complete phraseology is "promissory estoppel with detrimental reliance.")

Timko served on the board of trustees of a school. He recommended that the school purchase a building for a substantial sum of money, and to induce the trustees to vote for the purchase, he promised to help with the purchase and to pay at the end of five years the purchase price less the down payment. At the end of four years, Timko died. The school sued his estate, which defended on the ground that there was no consideration for the promise. Timko was promised or given nothing in return, and the purchase of the building was of no direct benefit to him (which would have made the promise enforceable as a unilateral contract). The court ruled that under the three-pronged promissory estoppel test, Timko's estate was liable.*Estate of Timko v. Oral Roberts Evangelistic Assn.*, 215 N.W.2d 750 (Mich. App. 1974).

Cases involving pledges of charitable contributions have long been troublesome to courts. Recognizing the necessity to charitable institutions of such pledges, the courts have also been mindful that a mere pledge of money to the general funds of a hospital, university, or similar institution does not usually induce substantial action but is, rather, simply a promise without consideration. When the pledge does prompt a charitable institution to act, promissory estoppel is available as a remedy. In about one-quarter of the states, another doctrine is available for cases involving simple pledges: the "mutual promises" theory, whereby the pledges of many individuals are taken as consideration for each other and are binding against each promisor. This theory was not available to the plaintiff in *Timko* because his was the only promise.

Moral Obligation

The Restatement allows, under some circumstances, the enforcement of past-consideration contracts. It provides as follows in Section 86, "Promise for Benefit Received":

A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.

A promise is not binding under Subsection (1)

if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or

to the extent that its value is disproportionate to the benefit.

Promises Enforceable without Consideration by Statute

We have touched on several common-law exceptions to the consideration requirement. Some also are provided by statute.

Under the UCC

The UCC permits one party to discharge, without consideration, a claim or right arising out of an alleged breach of contract by the other party. This is accomplished by delivering to the other party a signed written **waiver** or **renunciation**.Uniform Commercial Code, Section 1-107. This provision applies to any contract governed by the UCC and is not limited to the sales provisions of Article 2.

The UCC also permits a party to discharge the other side without consideration when there is no breach, and it permits parties to modify their Article 2 contract without consideration.Uniform Commercial Code, Sections 2-209(4) and 2-209(1). The official comments to the UCC section add the following: "However, modifications made thereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith."

Seller agrees to deliver a ton of coal within seven days. Buyer needs the coal sooner and asks Seller to deliver within four days. Seller agrees. This promise is binding even though Seller received no additional consideration beyond the purchase price for the additional duty agreed to (the duty to get the coal to Buyer sooner than originally agreed). The UCC allows a merchant's **firm offer**, signed, in writing, to bind the merchant to keep the offer to buy or sell open without consideration.Uniform Commercial Code, Section 2-205. This is the UCC's equivalent of a common-law option, which, as you recall, does require consideration.

Section 1-207 of the UCC allows a party a **reservation of rights** while performing a contract. This section raises a difficult question when a debtor issues an in-full-payment check in payment of a disputed debt. As noted earlier in this chapter, because under the common law the creditor's acceptance of an in-full-payment check in payment of a disputed debt constitutes an accord and satisfaction, the creditor cannot collect an amount beyond the check. But what if the creditor, in cashing the check, reserves the right (under Section 1-207) to sue for an amount beyond what the debtor is offering? The courts are split on the issue: regarding the

sale of goods governed by the UCC, some courts allow the creditor to sue for the unpaid debt notwithstanding the check being marked “paid in full,” and others do not.

Bankruptcy

Bankruptcy is, of course, federal statutory law. The rule here regarding a promise to pay after the obligation is discharged is similar to that governing statutes of limitations. Traditionally, a promise to repay debts after a bankruptcy court has discharged them makes the debtor liable once again. This traditional rule gives rise to potential abuse; after undergoing the rigors of bankruptcy, a debtor could be badgered by creditors into **reaffirmation**, putting him in a worse position than before, since he must wait six years before being allowed to avail himself of bankruptcy again.

The federal Bankruptcy Act includes certain procedural protections to ensure that the debtor knowingly enters into a reaffirmation of his debt. Among its provisions, the law requires the debtor to have reaffirmed the debt before the debtor is discharged in bankruptcy; he then has sixty days to rescind his reaffirmation. If the bankrupt party is an individual, the law also requires that a court hearing be held at which the consequences of his reaffirmation must be explained, and reaffirmation of certain consumer debts is subject to court approval if the debtor is not represented by an attorney.

International Contracts

Contracts governed by the Convention on Contracts for the International Sale of Goods (as mentioned in Chapter 8 "Introduction to Contract Law") do not require consideration to be binding.

KEY TAKEAWAY

There are some exceptions to the consideration requirement. At common law, past consideration doesn’t count, but no consideration is necessary in these cases: where a promise barred by the statute of limitations is revived, where a voidable duty is reaffirmed, where there has been detrimental reliance on a promise (i.e., promissory estoppel), or where a court simply finds the promisor has a moral obligation to keep the promise.

Under statutory law, the UCC has several exceptions to the consideration requirement. No consideration is needed to revive a debt discharged in bankruptcy, and none is called for under the Convention on Contracts for the International Sale of Goods.

EXERCISES

1. Melba began work for Acme Company in 1975 as a filing clerk. Thirty years later she had risen to be comptroller. At a thirty-year celebration party, her boss, Mr. Holder, said, “Melba, I hope you work here for a long time, and you can retire at any time, but if you decide to retire, on account of your years of good service, the company will pay you a monthly pension of $2,000.” Melba continued to work for another two years, then retired. The company paid the pension for three years and then, in an economic downturn, stopped. When Melba sued, the company claimed it was not obligated to her because the pension was of past consideration. What will be the result?
2. What theories are used to enforce charitable subscriptions?
3. What are the elements necessary for the application of the doctrine of promissory estoppel?
4. Under what circumstances does the Restatement employ moral obligation as a basis for enforcing an otherwise unenforceable contract?
5. Promises unenforceable because barred by bankruptcy or by the running of the statute of limitations can be revived without further consideration. What do the two circumstances have in common?
6. Under the UCC, when is no consideration required where it would be in equivalent situations at common law?

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11.4.4: Cases

Consideration for an Option

Board of Control of Eastern Michigan University v. Burgess

206 N.W.2d 256 (Mich. 1973)

Burns, J.

On February 15, 1966, defendant signed a document which purported to grant to plaintiff a 60-day option to purchase defendant's home. That document, which was drafted by plaintiff's agent, acknowledged receipt by defendant of "One and no/100 ($1.00) Dollar and other valuable consideration." Plaintiff concedes that neither the one dollar nor any other consideration was ever paid or even tendered to defendant. On April 14, 1966, plaintiff delivered to defendant written notice of its intention to exercise the option. On the closing date defendant rejected plaintiff's tender of the purchase price. Thereupon, plaintiff commenced this action for specific performance.

At trial defendant claimed that the purported option was void for want of consideration, that any underlying offer by defendant had been revoked prior to acceptance by plaintiff, and that the agreed purchase price was the product of fraud and mutual mistake. The trial judge concluded that no fraud was involved, and that any mutual mistake was not material. He also held that defendant's acknowledgment of receipt of consideration bars any subsequent contention to the contrary. Accordingly, the trial judge entered judgment for plaintiff.

Options for the purchase of land, if based on valid consideration, are contracts which may be specifically enforced. [Citations] Conversely, that which purports to be an option, but which is not based on valid consideration, is not a contract and will not be enforced. [Citations] One dollar is valid consideration for an option to purchase land, provided the dollar is paid or at least tendered. [Citations] In the instant case defendant received no consideration for the purported option of February 15, 1966.

A written acknowledgment of receipt of consideration merely creates a rebuttable presumption that consideration has, in fact, passed. Neither the parol evidence rule nor the doctrine of estoppel bars the presentation of evidence to contradict any such acknowledgment. [Citation]

It is our opinion that the document signed by defendant on February 15, 1966, is not an enforceable option, and that defendant is not barred from so asserting.

The trial court premised its holding to the contrary on *Lawrence v. McCalmont*…(1844). That case is significantly distinguishable from the instant case. Mr. Justice Story held that '(t)he guarantor acknowledged the receipt of one dollar, and is now estopped to deny it.' However, in reliance upon the guaranty substantial credit had been extended to the guarantor's sons. The guarantor had received everything she bargained for, save one dollar. In the instant case defendant claims that she never received any of the consideration promised her.

That which purports to be an option for the purchase of land, but which is not based on valid consideration, is a simple offer to sell the same land. [Citation] An option is a contract collateral to an offer to sell whereby the offer is made irrevocable for a specified period. [Citation] Ordinarily, an offer is revocable at the will of the offeror. Accordingly, a failure of consideration affects only the collateral contract to keep the offer open, not the underlying offer.

A simple offer may be revoked for any reason or for no reason by the offeror at any time prior to its acceptance by the offeree. [Citation] Thus, the question in this case becomes, 'Did defendant effectively revoke her offer to sell before plaintiff accepted that offer?'…

Defendant testified that within hours of signing the purported option she telephoned plaintiff's agent and informed him that she would not abide by the option unless the purchase price was increased. Defendant also testified that when plaintiff's agent delivered to her on April 14, 1966, plaintiff's notice of its intention to exercise the purported option, she told him that 'the option was off'.

Plaintiff's agent testified that defendant did not communicate to him any dissatisfaction until sometime in July, 1966.

If defendant is telling the truth, she effectively revoked her offer several weeks before plaintiff accepted that offer, and no contract of sale was created. If plaintiff's agent is telling the truth, defendant's offer was still open when plaintiff accepted that offer, and an enforceable contract was created. The trial judge thought it unnecessary to resolve this particular dispute. In light of our holding the dispute must be resolved.

An appellate court cannot assess the credibility of witnesses. We have neither seen nor heard them testify. [Citation] Accordingly, we remand this case to the trial court for additional findings of fact based on the record already before the court.…

Reversed and remanded for proceedings consistent with this opinion. Costs to defendant.

CASE QUESTIONS

1. Why did the lower court decide the option given by the defendant was valid?
2. Why did the appeals court find the option invalid?
3. The case was remanded. On retrial, how could the plaintiff (the university) still win?
4. It was not disputed that the defendant signed the purported option. Is it right that she should get out of it merely because she didn't really get the $1.00?

Consideration: Preexisting Obligation

Denney v. Reppert

432 S.W.2d 647 (Ky. 1968)

R. L. Myre, Sr., Special Commissioner.

The sole question presented in this case is which of several claimants is entitled to an award for information leading to the apprehension and conviction of certain bank robbers.…

On June 12th or 13th, 1963, three armed men entered the First State Bank, Eubank, Kentucky, and with a display of arms and threats robbed the bank of over $30,000 [about $208,000 in 2010 dollars]. Later in the day they were apprehended by State Policemen Garret Godby, Johnny Simms and Tilford Reppert, placed under arrest, and the entire loot was recovered. Later all of the prisoners were convicted and Garret Godby, Johnny Simms and Tilford Reppert appeared as witnesses at the trial.

The First State Bank of Eubank was a member of the Kentucky Bankers Association which provided and advertised a reward of $500.00 for the arrest and conviction of each bank robber. Hence the outstanding reward for the three bank robbers was $1,500.00 [about $11,000 in 2010 dollars]. Many became claimants for the reward and the Kentucky State Bankers Association being unable to determine the merits of the claims for the reward asked the circuit court to determine the merits of the various claims and to adjudge who was entitled to receive the reward or share in it. All of the claimants were made defendants in the action.

At the time of the robbery the claimants Murrell Denney, Joyce Buis, Rebecca McCollum and Jewell Snyder were employees of the First State Bank of Eubank and came out of the grueling situation with great credit and glory. Each one of them deserves approbation and an accolade. They were vigilant in disclosing to the public and the peace officers the details of the crime, and in describing the culprits, and giving all the information that they possessed that would be useful in capturing the robbers. Undoubtedly, they performed a great service. It is in the evidence that the claimant Murrell Denney was conspicuous and energetic in his efforts to make known the robbery, to acquaint the officers as to the personal appearance of the criminals, and to give other pertinent facts.

The first question for determination is whether the employees of the robbed bank are eligible to receive or share in the reward. The great weight of authority answers in the negative. [Citation] states the rule thusly:

'To the general rule that, when a reward is offered to the general public for the performance of some specified act, such reward may be claimed by any person who performs such act, is the exception of agents, employees and public officials who are acting within the scope of their employment or official duties. * * *.'…

At the time of the robbery the claimants Murrell Denney, Joyce Buis, Rebecca McCollum, and Jewell Snyder were employees of the First State Bank of Eubank. They were under duty to protect and conserve the resources and moneys of the bank, and safeguard every interest of the institution furnishing them employment. Each of these employees exhibited great courage, and cool bravery, in a time of stress and danger. The community and the county have recompensed them in commendation, admiration and high praise,

and the world looks on them as heroes. But in making known the robbery and assisting in acquainting the public and the officers with details of the crime and with identification of the robbers, they performed a duty to the bank and the public, for which they cannot claim a reward.

The claims of Corbin Reynolds, Julia Reynolds, Alvie Reynolds and Gene Reynolds also must fail. According to their statements they gave valuable information to the arresting officers. However, they did not follow the procedure as set forth in the offer of reward in that they never filed a claim with the Kentucky Bankers Association. It is well established that a claimant of a reward must comply with the terms and conditions of the offer of reward. [Citation]

State Policemen Garret Godby, Johnny Simms and Tilford Reppert made the arrest of the bank robbers and captured the stolen money. All participated in the prosecution. At the time of the arrest, it was the duty of the state policemen to apprehend the criminals. Under the law they cannot claim or share in the reward and they are interposing no claim to it.

This leaves the defendant, Tilford Reppert the sole eligible claimant. The record shows that at the time of the arrest he was a deputy sheriff in Rockcastle County, but the arrest and recovery of the stolen money took place in Pulaski County. He was out of his jurisdiction, and was thus under no legal duty to make the arrest, and is thus eligible to claim and receive the reward. In [Citation] it was said:

'It is * * * well established that a public officer with the authority of the law to make an arrest may accept an offer of reward or compensation for acts or services performed outside of his bailiwick or not within the scope of his official duties. * * *.'…

It is manifest from the record that Tilford Reppert is the only claimant qualified and eligible to receive the reward. Therefore, it is the judgment of the circuit court that he is entitled to receive payment of the $1,500.00 reward now deposited with the Clerk of this Court.

The judgment is affirmed.

CASE QUESTIONS

1. Why did the Bankers Association put the resolution of this matter into the court's hands?
2. Several claimants came forward for the reward; only one person got it. What was the difference between the person who got the reward and those who did not?

Consideration: Required for Contract Modification

Gross v. Diehl Specialties International, Inc.

776 S.W.2d 879 (Missouri Ct. App. 1989)

Smith, J.

Plaintiff appeals from a jury verdict and resultant judgment for defendant in a breach of employment contract case.…

Plaintiff was employed under a fifteen year employment contract originally executed in 1977 between plaintiff and defendant. Defendant, at that time called Dairy Specialties, Inc., was a company in the business of formulating ingredients to produce non-dairy products for use by customers allergic to cow's milk. Plaintiff successfully formulated [Vitamite]…for that usage.

Thereafter, on August 24, 1977, plaintiff and defendant corporation entered into an employment contract employing plaintiff as general manager of defendant for fifteen years. Compensation was established at $14,400 annually plus cost of living increases. In addition, when 10% of defendant's gross profits exceeded the annual salary, plaintiff would receive an additional amount of compensation equal to the difference between his compensation and 10% of the gross profits for such year. On top of that plaintiff was to receive a royalty for the use of each of his inventions and formulae of 1% of the selling price of all of the products produced by defendant using one or more of plaintiff's inventions or formulae during the term of the agreement. That amount was increased to 2% of the selling price following the term of the agreement. The contract further provided that during the term of the agreement the inventions and formulae would be owned equally by plaintiff and defendant and that following the term of the agreement the ownership would revert to plaintiff. During the term of the agreement defendant had exclusive rights to use of the inventions and formulae and after the term of agreement a non-exclusive right of use.

At the time of the execution of the contract, sales had risen from virtually nothing in 1976 to $750,000 annually from sales of Vitamite and a chocolate flavored product formulated by plaintiff called Chocolite. [Dairy's owner] was in declining health and in

1982 desired to sell his company. At that time yearly sales were $7,500,000. [Owner] sold the company to the Diehl family enterprises for 3 million dollars.

Prior to sale Diehl insisted that a new contract between plaintiff and defendant be executed or Diehl would substantially reduce the amount to be paid for [the company]. A new contract was executed August 24, 1982. It reduced the expressed term of the contract to 10 years, which provided the same expiration date as the prior contract. It maintained the same base salary of $14,400 effective September 1982, thereby eliminating any cost of living increases incurred since the original contract. The 10% of gross profit provision remained the same. The new contract provided that plaintiff's inventions and formula were exclusively owned by defendant during the term of the contract and after its termination. The 1% royalty during the term of the agreement remained the same, but no royalties were provided for after the term of the agreement. No other changes were made in the agreement. Plaintiff received no compensation for executing the new contract. He was not a party to the sale of the company by [Owner] and received nothing tangible from that sale.

After the sale plaintiff was given the title and responsibilities of president of defendant with additional duties but no additional compensation. In 1983 and 1984 the business of the company declined severely and in October 1984, plaintiff's employment with defendant was terminated by defendant. This suit followed.…

We turn now to the court's holding that the 1982 agreement was the operative contract. Plaintiff contends this holding is erroneous because there existed no consideration for the 1982 agreement. We agree. A modification of a contract constitutes the making of a new contract and such new contract must be supported by consideration. [Citation] Where a contract has not been fully performed at the time of the new agreement, the substitution of a new provision, resulting in a modification of the obligations on *both* sides, for a provision in the old contract still unperformed is sufficient consideration for the new contract. While consideration may consist of either a detriment to the promisee or a benefit to the promisor, a promise to carry out an already existing contractual duty does not constitute consideration. [Citation]

Under the 1982 contract defendant assumed no detriment it did not already have. The term of the contract expired on the same date under both contracts. Defendant undertook no greater obligations than it already had. Plaintiff on the other hand received less than he had under the original contract. His base pay was reduced back to its amount in 1977 despite the provision in the 1977 contract for cost of living adjustments. He lost his equal ownership in his formulae during the term of the agreement and his exclusive ownership after the termination of the agreement. He lost all royalties after termination of the agreement and the right to use and license the formulae subject to defendant's right to non-exclusive use upon payment of royalties. In exchange for nothing, defendant acquired exclusive ownership of the formulae during and after the agreement, eliminated royalties after the agreement terminated, turned its non-exclusive use after termination into exclusive use and control, and achieved a reduction in plaintiff's base salary. Defendant did no more than promise to carry out an already existing contractual duty. There was no consideration for the 1982 agreement.

Defendant asserts that consideration flowed to plaintiff because the purchase of defendant by the Diehls might not have occurred without the agreement and the purchase provided plaintiff with continued employment and a financially viable employer. There is no evidence to support this contention. Plaintiff had continued employment with the same employer under the 1977 agreement. Nothing in the 1982 agreement provided for any additional financial protection to plaintiff. The essence of defendant's position is that [the owner] received more from his sale of the company because of the new agreement than he would have without it. We have difficulty converting [the owner's] windfall into a benefit to plaintiff.

[Remanded to determine how much plaintiff should receive.]

CASE QUESTIONS

1. Why did the court determine that Plaintiff's postemployment benefits should revert to those in his original contract instead being limited to those in the modified contract?
2. What argument did Defendant make as to why the terms of the modified contract should be valid?

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11.4.5: Summary and Exercises

Summary

Most agreements—including contract modification at common law (but not under the Uniform Commercial Code [UCC])—are not binding contracts in the absence of what the law terms “consideration.” Consideration is usually defined as a “legal detriment”—an act, forbearance, or a promise. The act can be the payment of money, the delivery of a service, or the transfer of title to property. Consideration is a legal concept in that it centers on the giving up of a legal right or benefit.

An understanding of consideration is important in many commonplace situations, including those in which (1) a debtor and a creditor enter into an accord that is later disputed, (2) a duty is preexisting, (3) a promise is illusory, and (4) creditors agree to a composition.

Some promises are enforceable without consideration. These include certain promises under the UCC and other circumstances, including (1) contracts barred by the statute of limitations, (2) promises by a bankrupt to repay debts, and (3) situations in which justice will be served by invoking the doctrine of promissory estoppel. Determining whether an agreement should be upheld despite the lack of consideration, technically defined, calls for a diligent assessment of the factual circumstances.

EXERCISES

1. Hornbuckle purchased equipment from Continental Gin (CG) for $6,300. However, after some of the equipment proved defective, Hornbuckle sent CG a check for $4,000 marked “by endorsement this check is accepted in full payment,” and CG endorsed and deposited the check. May CG force Hornbuckle to pay the remaining $2,300? Why?
2. Joseph Hoffman alleged that Red Owl Stores promised him that it would build a store building in Chilton, Wisconsin, and stock it with merchandise for Hoffman to operate in return for Hoffman’s investment of $18,000. The size, cost, design, and layout of the store building was not discussed, nor were the terms of the lease as to rent, maintenance, and purchase options. Nevertheless, in reliance on Red Owl’s promise, the Hoffmans sold their bakery and grocery store business, purchased the building site in Chilton, and rented a residence there for the family. The deal was never consummated: a dispute arose, Red Owl did not build the store, and it denied liability to Hoffman on the basis that its promise to him was too indefinite with respect to all details for a contract to have resulted. Is Hoffman entitled to some relief? On what theory?
3. Raquel contracted to deliver one hundred widgets to Sam on December 15, for which he would pay $4,000. On November 25, Sam called her and asked if she could deliver the widgets on December 5. Raquel said she could, and she promised delivery on that day. Is her promise binding? Why?
4. Richard promised to have Darlene’s deck awning constructed by July 10. On June 20, Darlene called him and asked if he could get the job done by July 3, in time for Independence Day. Richard said he could, but he failed to do so, and Darlene had to rent two canopies at some expense. Darlene claims that because Richard breached his promise, he is liable for the cost of awning rental. Is she correct—was his promise binding? Why?
5. Seller agreed to deliver gasoline to Buyer at $3.15 per gallon over a period of one year. By the sixth month, gasoline had increased in price over a dollar a gallon. Although Seller had gasoline available for sale, he told Buyer the price would have to increase by that much or he would be unable to deliver. Buyer agreed to the increase, but when billed, refused to pay the additional amount. Is Buyer bound by the promise? Explain.
6. Montbanks’s son, Charles, was seeking an account executive position with Dobbs, Smith & Fogarty, Inc., a large brokerage firm. Charles was independent and wished no interference by his well-known father. The firm, after several weeks’ deliberation, decided to hire Charles. They made him an offer on April 12, 2010, and Charles accepted. Montbanks, unaware that his son had been hired and concerned that he might not be, mailed a letter to Dobbs on April 13 in which he promised to give the brokerage firm $150,000 in commission business if the firm would hire his son. The letter was received by Dobbs, and the firm wishes to enforce it against Montbanks. May Dobbs enforce the promise? Why?
7. In 1869, William E. Story promised his nephew, William E. Story II (then sixteen years old), $5,000 (about $120,000 in today’s money) if “Willie” would abstain from drinking alcohol, smoking, swearing, and playing cards or billiards for money until the nephew reached twenty-one years of age. All of these were legally permissible activities for the teenager at that time in New York State. Willie accepted his uncle’s promise and did refrain from the prohibited acts until he turned twenty-one. When the young man asked for the money, his uncle wrote to him that he would honor the promise but would rather wait until Willie was

older before delivering the money, interest added on. Willie agreed. Subsequently, Willie assigned the right to receive the money to one Hamer (Willie wanted the money sooner), and Story I died without making any payment. The estate, administered by Franklin Sidway, refused to pay, asserting there was no binding contract due to lack of consideration: the boy suffered no "detriment," and the uncle got no benefit. The trial court agreed with the estate, and the plaintiff appealed. Should the court on appeal affirm or reverse? Explain.

8. Harold Pearsall and Joe Alexander were friends for over twenty-five years. About twice a week, they bought what they called a package: a half-pint of vodka, orange juice, two cups, and two lottery tickets. They went to Alexander's house to watch TV, drink screwdrivers, and scratch the lottery tickets. The two had been sharing tickets and screwdrivers since the Washington, DC, lottery began. On the evening in issue, Pearsall bought the package and asked Alexander, "Are you in on it?" Alexander said yes. Pearsall asked for his half of the purchase price, but Alexander had no money. A few hours later, Alexander, having come by some funds of his own, bought another package. He handed one ticket to Pearsall, and they both scratched the tickets; Alexander's was a $20,000 winner. When Pearsall asked for his share, Alexander refused to give him anything. Are the necessary elements of offer, acceptance, and consideration present here so as to support Pearsall's assertion the parties had a contract?
9. Defendant, Lee Taylor, had assaulted his wife, who took refuge in the house of Plaintiff, Harrington. The next day, Taylor gained access to the house and began another assault upon his wife. Mrs. Taylor knocked him down with an axe and was on the point of cutting his head open or decapitating him while he was lying on the floor when Plaintiff intervened and caught the axe as it was descending. The blow intended for Defendant fell upon Harrington's hand, mutilating it badly, but saving Defendant's life. Subsequently, Defendant orally promised to pay Plaintiff her damages but, after paying a small sum, failed to pay anything more. Is Harrington entitled to enforce Taylor's entire promise?
10. White Sands Forest Products (Defendant) purchased logging equipment from Clark Corporation (Plaintiff) under an installment contract that gave Plaintiff the right to repossess and resell the equipment if Defendant defaulted on the contract. Defendant did default and agreed to deliver the equipment to Plaintiff if Plaintiff would then discharge Defendant from further obligation. Plaintiff accepted delivery and resold the equipment, but the sale left a deficiency (there was still money owing by Defendant). Plaintiff then sued for the deficiency, and Defendant set up as a defense the accord and satisfaction. Is the defense good?

SELF-TEST QUESTIONS

1. Consideration
    1. can consist of a written acknowledgment of some benefit received, even if in fact the benefit is not delivered
    2. cannot be nominal in amount
    3. is a bargained-for act, forbearance, or promise from the promisee
    4. is all of the above
2. An example of valid consideration is a promise
    1. by a seventeen-year-old to refrain from drinking alcohol
    2. to refrain from going to court
    3. to cook dinner if the promisor can get around to it
    4. to repay a friend for the four years of free legal advice he had provided
3. An unliquidated debt is a debt
    1. one is not able to pay
    2. not yet paid
    3. of uncertain amount
    4. that is unenforceable debt
4. The rule that if one party to a contract has not made a binding obligation, the other party is not bound is called
    1. revocation
    2. mutuality of obligation
    3. accord and satisfaction
    4. estoppel
5. Examples of promises enforceable without consideration include

1. an agreement modifying a sales contract
2. a promise to pay a debt after the statute of limitations has run
3. a debtor’s promise to repay a debt that has been discharged in bankruptcy
4. all of the above

SELF-TEST AnswerS

1. c
2. b
3. c
4. b
5. d

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SECTION OVERVIEW

11.5: Legality

Learning Objectives

After reading this chapter, you should understand the following:

- The types of contracts (bargains) that are deemed illegal
- How courts deal with disputes concerning illegal contracts
- Under what circumstances courts will enforce otherwise illegal contracts

11.5.1: General Perspectives on Illegality

11.5.2: Agreements in Violation of Statute

11.5.3: Bargains Made Illegal by Common Law

11.5.4: Effect of Illegality and Exceptions

11.5.5: Cases

11.5.6: Summary and Exercises

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11.5.1: General Perspectives on Illegality

LEARNING OBJECTIVES

1. Understand why courts refuse to enforce illegal agreements.
2. Recognize the rationale behind exceptions to the rule.

We have discussed the requirements of mutual assent, real assent, and consideration. We now turn to the fourth of the five requirements for a valid contract: the legality of the underlying bargain. The basic rule is that courts will not enforce an illegal bargain. (The term *illegal bargain* is better than *illegal contract* because a contract is by definition a legal agreement, but the latter terminology prevails in common usage.) Why should this be? Why should the courts refuse to honor contracts made privately by people who presumably know what they are doing—for example, a wager on the World Series or a championship fight? Two reasons are usually given. One is that refusal to enforce helps discourage unlawful behavior; the other is that honoring such contracts would demean the judiciary. Are these reasons valid? Yes and no, in the opinion of one contracts scholar:

[D]enying relief to parties who have engaged in an illegal transaction…helps to effectuate the public policy involved by discouraging the conduct that is disapproved. Mere denial of contractual and quasi-contractual remedy [however] rarely has a substantial effect in discouraging illegal conduct. A man who is hired to perform a murder is not in the least deterred by the fact that the courts are not open to him to collect his fee. Such a man has other methods of enforcement, and they are in fact more effective than legal process. The same is true in varying degrees where less heinous forms of illegal conduct are involved. Even in the matter of usury it was found that mere denial of enforcement was of little value in the effort to eliminate the loan shark. And restraints of trade were not curbed to an appreciable extent until contracts in restraint of trade were made criminal.

In most instances, then, the protection of the good name of the judicial institution must provide the principal reason for the denial of a remedy to one who has trafficked in the forbidden. This is, moreover, a very good reason. The first duty of an institution is to preserve itself, and if the courts to any appreciable extent busied themselves with “justice among thieves,” the community…would be shocked and the courts would be brought into disrepute.Harold C. Havighurst, review of *Corbin on Contracts*, by Arthur L. Corbin, *Yale Law Journal* 61 (1952): 1143, 1144–45.

Strictly enforced, the rule prohibiting courts from ordering the parties to honor illegal contracts is harsh. It means that a promisee who has already performed under the contract can neither obtain performance of the act for which he bargained nor recover the money he paid or the value of the performance he made. The court will simply leave the parties where it finds them, meaning that one of the parties will have received an uncompensated benefit.

Not surprisingly, the severity of the rule against enforcement has led courts to seek ways to moderate its impact, chiefly by modifying it according to the principle of **restitution**. In general, restitution requires that one who has conferred a benefit or suffered a loss should not unfairly be denied compensation.

Pursuing this notion, the courts have created several exceptions to the general rule. Thus a party who is excusably ignorant that his promise violates public policy and a party who is not equally in the wrong may recover. Likewise, when a party “would otherwise suffer a forfeiture that is disproportionate in relation to the contravention of public policy involved,” restitution will be allowed.Restatement (Second) of Contracts, Section 197(b). Other exceptions exist when the party seeking restitution withdraws from the transaction contemplated in the contract before the illegal purpose has been carried out and when “allowing the claim would put an end to a continuing situation that is contrary to the public interest.”Restatement (Second) of Contracts, Section 197(b). An example of the latter situation occurs when two bettors place money in the hands of a stakeholder. If the wager is unlawful, the loser of the bet has the right to recover his money from the stakeholder before it is paid out to the winner.

Though by and large courts enforce contracts without considering the worth or merits of the bargain they incorporate, freedom of contract can conflict with other public policies. Tensions arise between the desire to let people pursue their own ends and the belief that certain kinds of conduct should not be encouraged. Thus a patient may agree to be treated by an herbalist, but state laws prohibit medical care except by licensed physicians. Law and public policies against usury, gambling, obstructing justice, bribery, corrupt influence, perjury, restraint of trade, impairment of domestic relations, and fraud all significantly affect the authority and willingness of courts to enforce contracts.

In this chapter, we will consider two types of illegality: (1) that which results from a bargain that violates a statute and (2) that which the courts deem contrary to public policy, even though not expressly set forth in statutes.

KEY TAKEAWAY

Courts refuse to enforce illegal bargains notwithstanding the basic concept of freedom to contract because they do not wish to reward illegal behavior or sully themselves with adjudication of that which is forbidden to undertake. However, fairness sometimes compels courts to make exceptions.

EXERCISES

1. Why is *illegal contract* a contradiction in terms?
2. Why do courts refuse to enforce contracts (or bargains) made by competent adults if the contracts harm no third party but are illegal?

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11.5.2: Agreements in Violation of Statute

LEARNING OBJECTIVES

1. Understand that various types of bargains may be made illegal by statute, including gambling, some service-for-fee agreements involving unlicensed practitioners, and usury.
2. Recognize that while gambling contracts are often illegal, some agreements that might appear to involve gambling are not.

Overview

Any bargain that violates the criminal law—including statutes that govern extortion, robbery, embezzlement, forgery, some gambling, licensing, and consumer credit transactions—is illegal. Thus determining whether contracts are lawful may seem to be an easy enough task. Clearly, whenever the statute itself explicitly forbids the making of the contract or the performance agreed upon, the bargain (such as a contract to sell drugs) is unlawful. But when the statute does not expressly prohibit the making of the contract, courts examine a number of factors, as discussed in Section 12.5.1 "Extension of Statutory Illegality Based on Public Policy" involving the apparently innocent sale of a jewelry manufacturing firm whose real business was making marijuana-smoking paraphernalia.

Types of Bargains Made Illegal by Statute

Gambling Contracts

All states have regulations affecting gambling (wagering) contracts because gambling tends to be an antiutilitarian activity most attractive to those who can least afford it, because gambling tends to reinforce fatalistic mind-sets fundamentally incompatible with capitalism and democracy, because gambling can be addictive, and because gambling inevitably attracts criminal elements lured by readily available money. With the spread of antitax enthusiasms over the last thirty-some years, however, some kinds of gambling have been legalized and regulated, including state-sponsored lotteries. Gambling is betting on an outcome of an event over which the bettors have no control where the purpose is to play with the risk.

But because the outcome is contingent on events that lie outside the power of the parties to control does not transform a bargain into a wager. For example, if a gardener agrees to care for the grounds of a septuagenarian for life in return for an advance payment of $10,000, the uncertainty of the date of the landowner's death does not make the deal a wager. The parties have struck a bargain that accurately assesses, to the satisfaction of each, the risks of the contingency in question. Likewise, the fact that an agreement is phrased in the form of a wager does not make it one. Thus a father says to his daughter, "I'll bet you can't get an A in organic chemistry. If you do, I'll give you $50." This is a unilateral contract, the consideration to the father being the daughter's achieving a good grade, a matter over which she has complete control.

Despite the general rule against enforcing wagers, there are exceptions, most statutory but some rooted in the common law. The common law permits the sale or purchase of securities: Sally invests $6,000 in stock in Acme Company, hoping the stock will increase in value, though she has no control over the firm's management. It is not called gambling; it is considered respectable risk taking in the capitalist system, or "entrepreneurialism." (It really is gambling, though, similar to horse-race gambling.) But because there are speculative elements to some agreements, they are subject to state and federal regulation.

Insurance contracts are also speculative, but unless one party has no insurable interest (a concern for the person or thing insured) in the insured, the contract is not a wager. Thus if you took out a life insurance contract on the life of someone whose name you picked out of the phone book, the agreement would be void because you and the insurance company would have been gambling on a contingent event. (You bet that the person would die within the term of the policy, the insurance company that she would not.) If, however, you insure your spouse, your business partner, or your home, the contingency does not make the policy a wagering agreement because you will have suffered a direct loss should it occur, and the agreement, while compensating for a possible loss, does not create a new risk just for the "game."

Sunday Contracts

At common law, contracts entered into on Sundays, as well as other commercial activities, were valid and enforceable. But a separate, religious tradition that traces to the Second Commandment frowned on work performed on "the Lord's Day." In 1781 a

New Haven city ordinance banning Sunday work was printed on blue paper, and since that time such laws have been known as blue laws. The first statewide blue law was enacted in the United States in 1788; it prohibited travel, work, sports and amusements, and the carrying on of any business or occupation on Sundays. The only exceptions in most states throughout most of the nineteenth century were mutual promises to marry and contracts of necessity or charity. As the Puritan fervor wore off, and citizens were, more and more, importuned to consider themselves "consumers" in a capitalistic economic system, the laws have faded in importance and are mostly repealed, moribund, or unenforced. Washington State, up until 2008, completely prohibited hard alcohol sales on Sunday, and all liquor stores were closed, but subsequently the state—desperate for tax revenue—relaxed the prohibition.

Usury

A usury statute is one that sets the maximum allowable interest that may be charged on a loan; **usury** is charging illegal interest rates. Formerly, such statutes were a matter of real importance because the penalty levied on the lender—ranging from forfeiture of the interest, or of both the principal and the interest, or of some part of the principal—was significant. But usury laws, like Sunday contract laws, have been relaxed to accommodate an ever-more-frenzied consumer society. There are a number of transactions to which the laws do not apply, varying by state: small consumer loans, pawn shop loans, payday loans, and corporate loans. In *Marquette v. First Omaha Service Corp.*, the Supreme Court ruled that a national bank could charge the highest interest rate allowed in its home state to customers living anywhere in the United States, including states with restrictive interest caps.*Marquette v. First Omaha Service Corp.*, 439 US 299 (1978). Thus it was that in 1980 Citibank moved its credit card headquarters from cosmopolitan New York City to the somewhat less cosmopolitan Sioux Falls, South Dakota. South Dakota had recently abolished its usury laws, and so, as far as credit-card interest rates, the sky was the limit. That appealed to Citibank and a number of other financial institutions, and to the state: it became a major player in the US financial industry, garnering many jobs.See Thomas M. Reardon, "T. M. Reardon's first-hand account of Citibank's move to South Dakota," *NorthWestern Financial Review*, September 15, 2004, accessed March 1, 2011, http://www.highbeam.com/doc/1P3-708279811.html. Mr. Reardon was a member of the South Dakota Bankers' Association.

Licensing Statutes

To practice most professions and carry on the trade of an increasing number of occupations, states require that providers of services possess licenses—hairdressers, doctors, plumbers, real estate brokers, and egg inspectors are among those on a long list. As sometimes happens, though, a person may contract for the services of one who is unlicensed either because he is unqualified and carrying on his business without a license or because for technical reasons (e.g., forgetting to mail in the license renewal application) he does not possess a license at the moment. Robin calls Paul, a plumber, to install the pipes for her new kitchen. Paul, who has no license, puts in all the pipes and asks to be paid. Having discovered that Paul is unlicensed, Robin refuses to pay. May Paul collect?

To answer the question, a three-step analysis is necessary. First, is a license required? Some occupations may be performed without a license (e.g., lawn mowing). Others may be performed with or without certain credentials, the difference lying in what the professional may tell the public. (For instance, an accountant need not be a certified public accountant to carry on most accounting functions.) Let us assume that the state requires everyone who does any sort of plumbing for pay to have a valid license.

The second step is to determine whether the licensing statute explicitly bars recovery by someone who has performed work while unlicensed. Some do; many others contain no specific provision on the point. Statutes that do bar recovery must of course govern the courts when they are presented with the question.

If the statute is silent, courts must, in the third step of the analysis, distinguish between "regulatory" and "revenue" licenses. A **regulatory license** is intended to protect the public health, safety, and welfare. To obtain these licenses, the practitioner of the art must generally demonstrate his or her abilities by taking some sort of examination, like the bar exam for lawyers or the medical boards for doctors. A plumber's or electrician's licensing requirement might fall into this category. A revenue license generally requires no such examination and is imposed for the sake of raising revenue and to ensure that practitioners register their address so they can be found if a disgruntled client wants to serve them legal papers for a lawsuit. Some revenue licenses, in addition to requiring registration, require practitioners to demonstrate that they have insurance. A license to deliver milk, open to anyone who applies and pays the fee, would be an example of a revenue license. (In some states, plumbing licenses are for revenue purposes only.)

Generally speaking, failure to hold a regulatory license bars recovery, but the absence of a revenue or registration license does not—the person may obtain the license and then move to recover. See Section 12.5.2 "Unlicensed Practitioner Cannot Collect Fee" for an example of a situation in which the state statute demands practitioners be licensed.

KEY TAKEAWAY

Gambling, interest rates, and Sunday contracts are among the types of contracts that have, variously, been subject to legislative illegality. Laws may require certain persons to have licenses in order to practice a trade or profession. Whether an unlicensed person is barred from recovering a fee for service depends on the language of the statute and the purpose of the requirement: if it is a mere revenue-raising or registration statute, recovery will often be allowed. If the practitioner is required to prove competency, no recovery is possible for an unlicensed person.

EXERCISES

1. List the typical kinds of contracts made illegal by statute.
2. Why are some practitioners completely prohibited from collecting a fee for service if they don't have a license, and others allowed to collect the fee after they get the license?
3. If no competency test is required, why do some statutes require the practitioner to be licensed?

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11.5.3: Bargains Made Illegal by Common Law

LEARNING OBJECTIVE

1. Understand what contracts or bargains have been declared illegal by courts.

Overview

Public policy is expressed by courts as well as legislatures. In determining whether to enforce a contract where there is no legislative dictate, courts must ordinarily balance the interests at stake. To strike the proper balance, courts must weigh the parties' expectations, the forfeitures that would result from denial of enforcement, and the public interest favoring enforcement against these factors: the strength of the policy, whether denying enforcement will further the policy, the seriousness and deliberateness of the violation, and how direct the connection is between the misconduct and the contractual term to be enforced.Restatement (Second) of Contracts, Section 178.

Types of Bargains Made Illegal by Common Law

Common-Law Restraint of Trade

One of the oldest public policies evolved by courts is the common-law prohibition against restraint of trade. From the early days of industrialism, the courts took a dim view of ostensible competitors who agreed among themselves to fix prices or not to sell in each other's territories. Since 1890, with the enactment of the Sherman Act, the law of restraint of trade has been absorbed by federal and state antitrust statutes. But the common-law prohibition still exists. Though today it is concerned almost exclusively with promises not to compete in sales of businesses and employment contracts, it can arise in other settings. For example, George's promise to Arthur never to sell the parcel of land that Arthur is selling to him is void because it unreasonably restrains trade in the land.

The general rule is one of reason: not every restraint of trade is unlawful; only unreasonable ones are. As the Restatement puts it, "Every promise that relates to business dealings or to a professional or other gainful occupation operates as a restraint in the sense that it restricts the promisor's future activity. Such a promise is not, however, unenforceable, unless the restraint that it imposes is unreasonably detrimental to the smooth operation of a freely competitive private economy."Restatement (Second) of Contracts, Section 186(a). An agreement that restrains trade will be construed as unreasonable unless it is ancillary to a legitimate business interest and is no greater than necessary to protect the legitimate interest. Restraint-of-trade cases usually arise in two settings: (1) the sale of a business and an attendant agreement not to compete with the purchasers and (2) an employee's agreement not to compete with the employer should the employee leave for any reason.

Sale of a Business

A first common area where a restraint-of-trade issue may arise is with the sale of a business. Regina sells her lingerie store to Victoria and promises not to establish a competing store in town for one year. Since Victoria is purchasing Regina's goodwill (the fact that customers are used to shopping at her store), as well as her building and inventory, there is clearly a property interest to be protected. And the geographical limitation ("in town") is reasonable if that is where the store does business. But if Regina had agreed not to engage in any business in town, or to wait ten years before opening up a new store, or not to open up a new store anywhere within one hundred miles of town, she could avoid the noncompetition terms of the contract because the restraint in each case (nature, duration, and geographic area of restraint) would have been broader than necessary to protect Victoria's interest. Whether the courts will uphold an agreement not to compete depends on all the circumstances of the particular case, as the Connecticut barber in Section 12.5.3 "Unconscionability" discovered.

Employment Noncompete Agreements

A second common restraint-of-trade issue arises with regard to **noncompete agreements** in employment contracts. As a condition of employment by the research division of a market research firm, Bruce, a product analyst, is required to sign an agreement in which he promises, for a period of one year after leaving the company, not to "engage, directly or indirectly, in any business competing with the company and located within fifty miles of the company's main offices." The principal reason recited in the agreement for this covenant not to compete is that by virtue of the employment, Bruce will come to learn a variety of internal

secrets, including client lists, trade or business secrets, reports, confidential business discussions, ongoing research, publications, computer programs, and related papers. Is this agreement a lawful restraint of trade?

Here both the property interest of the employer and the extent of the restraint are issues. Certainly an employer has an important competitive interest in seeing that company information not walk out the door with former employees. Nevertheless, a promise by an employee not to compete with his or her former employer is scrutinized carefully by the courts, and an **injunction** (an order directing a person to stop doing what he or she should not do) will be issued cautiously, partly because the prospective employee is usually confronted with a **contract of adhesion** (take it or leave it) and is in a weak bargaining position compared to the employer, and partly because an injunction might cause the employee's unemployment. Many courts are not enthusiastic about employment noncompete agreements. The California Business and Professions Code provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."California Business and Professions Code, Section 16600. As a result of the statute, and to promote entrepreneurial robustness, California courts typically interpret the statute broadly and refuse to enforce noncompete agreements. Other states are less stingy, and employers have attempted to avoid the strictures of no-enforcement state rulings by providing that their employment contracts will be interpreted according to the law of a state where noncompetes are favorably viewed.

If a covenant not to compete is ruled unlawful, the courts can pursue one of three courses by way of remedy. A court can refuse to enforce the entire covenant, freeing the employee to compete thenceforth. The court could delete from the agreement only that part that is unreasonable and enforce the remainder (the "blue pencil" rule). In some states, the courts have moved away from this rule and have actually taken to rewriting the objectionable clause themselves. Since the parties intended that there be some form of restriction on competition, a reasonable modification would achieve a more just result.*Raimondo v. Van Vlerah*, 325 N.E.2d 544 (Ohio 1975).

Unconscionable Contracts

Courts may refuse to enforce **unconscionable contracts**, those that are very one-sided, unfair, the product of unequal bargaining power, or oppressive; a court may find the contract divisible and enforce only the parts that are not unconscionable.

The common-law rule is reflected in Section 208 of the Restatement: "If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."

And the Uniform Commercial Code (UCC) (again, of course, a statute, not common law) provides a similar rule in Section 2-302(1): "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

Unconscionable is not defined in the Restatement or the UCC, but cases have given gloss to the meaning, as in Section 12.5.3 "Unconscionability", *Williams v. Walker-Thomas Furniture Co.*, a well-known early interpretation of the section by the DC Court of Appeals.

Unconscionability may arise procedurally or substantively. A term is procedurally unconscionable if it is imposed upon the "weaker" party because of fine or inconspicuous print, unexpected placement in the contract, lack of opportunity to read the term, lack of education or sophistication that precludes understanding, or lack of equality of bargaining power. Substantive unconscionability arises where the affected terms are oppressive and harsh, where the term deprives a party of any real remedy for breach. Most often—but not always—courts find unconscionable contracts in the context of consumer transactions rather than commercial transactions. In the latter case, the assumption is that the parties tend to be sophisticated businesspeople able to look out for their own contract interests.

Exculpatory Clauses

The courts have long held that public policy disfavors attempts to contract out of tort liability. **Exculpatory clauses** that exempt one party from tort liability to the other for harm caused intentionally or recklessly are unenforceable without exception. A contract provision that exempts a party from tort liability for negligence is unenforceable under two general circumstances: (1) when it "exempts an employer from liability to an employee for injury in the course of his employment" or (2) when it exempts one

charged with a duty of public service and who is receiving compensation from liability to one to whom the duty is owed.Restatement (Second) of Contracts, Section 195. Contract terms with offensive exculpatory clauses may be considered somewhat akin to unconscionability.

Put shortly, exculpatory clauses are OK if they are reasonable. Put not so shortly, exculpatory clauses will generally be held valid if (1) the agreement does not involve a business generally thought suitable for public regulation (a twenty-kilometer bicycle race, for example, is probably not one thought generally suitable for public regulation, whereas a bus line is); (2) the party seeking exculpation is not performing a business of great importance to the public or of practical necessity for some members of the public; (3) the party does not purport to be performing the service to just anybody who comes along (unlike the bus line); (4) the parties are dealing at arms' length, able to bargain about the contract; (5) the person or property of the purchaser is not placed under control of the seller, subject to his or his agent's carelessness; or (6) the clause is conspicuous and clear.*Henrioulle v. Marin Ventures, Inc.*, 573 P.2d 465 (Calif. 1978).

Obstructing the Administration of Justice or Violating a Public Duty

It is well established under common law that contracts that would interfere with the administration of justice or that call upon a public official to violate a public duty are void and unenforceable. Examples of such contracts are numerous: to conceal or compound a crime, to pay for the testimony of a witness in court contingent on the court's ruling, to suppress evidence by paying a witness to leave the state, or to destroy documents. Thus, in an unedifying case in Arkansas, a gambler sued a circuit court judge to recover $1,675 allegedly paid to the judge as protection money, and the Arkansas Supreme Court affirmed the dismissal of the suit, holding, "The law will not aid either party to the alleged illegal and void contract…'but will leave them where it finds them, if they have been equally cognizant of the illegality.'"*Womack v. Maner*, 301 S.W.2d 438 (Ark. 1957). Also in this category are bribes, agreements to obstruct or delay justice (jury tampering, abuse of the legal process), and the like.

Family Relations

Another broad area in which public policy intrudes on private contractual arrangements is that of undertakings between couples, either prior to or during marriage. Marriage is quintessentially a relationship defined by law, and individuals have limited ability to change its scope through legally enforceable contracts. Moreover, marriage is an institution that public policy favors, and agreements that unreasonably restrain marriage are void. Thus a father's promise to pay his twenty-one-year-old daughter $100,000 if she refrains from marrying for ten years would be unenforceable. However, a promise in a **postnuptial (after marriage) agreement** that if the husband predeceases the wife, he will provide his wife with a fixed income for as long as she remains unmarried is valid because the offer of support is related to the need. (Upon remarriage, the need would presumably be less pressing.) Property settlements before, during, or upon the breakup of a marriage are generally enforceable, since property is not considered to be an essential incident of marriage. But agreements in the form of property arrangements that tend to be detrimental to marriage are void—for example, a **prenuptial (premarital) contract** in which the wife-to-be agrees on demand of the husband-to-be to leave the marriage and renounce any claims upon the husband-to-be at any time in the future in return for which he will pay her $100,000. Separation agreements are not considered detrimental to marriage as long as they are entered after or in contemplation of immediate separation; but a separation agreement must be "fair" under the circumstances, and judges may review them upon challenge. Similarly, child custody agreements are not left to the whim of the parents but must be consistent with the best interest of the child, and the courts retain the power to examine this question.

The types of contracts or bargains that might be found illegal are innumerable, limited only by the ingenuity of those who seek to overreach.

KEY TAKEAWAY

Courts will not enforce contracts that are, broadly speaking, contrary to public policy. These include some noncompete agreements, exculpatory clauses, unconscionable bargains, contracts to obstruct the public process or justice, and contracts interfering with family relations.

EXERCISES

1. Why are employment noncompete agreements viewed less favorably than sale-of-business noncompete agreements?
2. Can a person by contract exculpate herself from liability for gross negligence? For ordinary negligence?

3. A parking lot agreement says the parking lot is “not responsible for loss of contents or damage to the vehicle.” Is that acceptable? Explain.
4. A valet parking lot agreement—where the car owner gives the keys to the attendant who parks the car—has the same language as that for the lot in Exercise 3. Is that acceptable? Explain.

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11.5.4: Effect of Illegality and Exceptions

LEARNING OBJECTIVES

1. Recognize that courts will not enforce illegal bargains.
2. Know that there are exceptions to that rule.

Effect of Illegality

The general rule is this: courts will not enforce illegal bargains. The parties are left where the court found them, and no relief is granted: it's a hands-off policy. The illegal agreement is void, and that a wrongdoer has benefited to the other's detriment does not matter.

For example, suppose a specialty contractor, statutorily required to have a license, constructs a waterslide for Plaintiff, when the contractor knew or should have known he was unlicensed. Plaintiff discovers the impropriety and refuses to pay the contractor $80,000 remaining on the deal. The contractor will not get paid.*Pacific Custom Pools, Inc. v. Turner Construction*, 94 Cal. Rptr. 2d 756 (Calif. 2000). In another example, a man held himself out to be an architect in a jurisdiction requiring that architects pass a test to be licensed. He was paid $80,000 to design a house costing $900,000. The project was late and over budget, and the building violated relevant easement building-code rules. The unlicensed architect was not allowed to keep his fee.*Ransburg v. Haase*, 586 N.E. 2d 1295 (Ill. Ct. App. 1992).

Exceptions

As always in the law, there are exceptions. Of relevance here are situations where a court might permit one party to recover: party withdrawing before performance, party protected by statute, party not equally at fault, excusable ignorance, and partial illegality.

Party Withdrawing before Performance

Samantha and Carlene agree to bet on a soccer game and deliver their money to the stakeholder. Subsequently, but before the payout, Carlene decides she wants out; she can get her money from the stakeholder. Ralph hires Jacob for $5,000 to arrange a bribe of a juror. Ralph has a change of heart; he can get his money from Jacob.

Party Protected by Statute

An airline pilot, forbidden by federal law from working overtime, nevertheless does so; she would be entitled to payment for the overtime worked. Securities laws forbid the sale or purchase of unregistered offerings—such a contract is illegal; the statute allows the purchaser rescission (return of the money paid). An attorney (apparently unwittingly) charged his client beyond what the statute allowed for procuring for the client a government pension; the pensioner could get the excess from the attorney.

Party Not Equally at Fault

One party induces another to make an illegal contract by undue influence, fraud, or duress; the victim can recover the consideration conveyed to the miscreant if possible.

Excusable Ignorance

A woman agrees to marry a man not knowing that he is already married; bigamy is illegal, the marriage is void, and she may sue him for damages. A laborer is hired to move sealed crates, which contain marijuana; it is illegal to ship, sell, or use marijuana, but the laborer is allowed payment for his services.

Partial Illegality

A six-page employment contract contains two paragraphs of an illegal noncompete agreement. The illegal part is thrown out, but the legal parts are enforceable.

KEY TAKEAWAY

There are a number of exceptions to the general rule that courts give no relief to either party to an illegal contract. The rule may be relaxed in cases where justice would be better served than by following the stricture of hands off.

EXERCISES

1. When, in general, will a court allow a party relief from an illegal contract (or bargain)?
2. A and B engage in a game of high-stakes poker under circumstances making the game illegal in the jurisdiction. A owes B $5,000 when A loses. When A does not pay, B sues. Does B get the money? What if A had paid B the $5,000 and then sued to get it back?

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11.5.5: Cases

Extension of Statutory Illegality Based on Public Policy

Bovard v. American Horse Enterprises

247 Cal. Rptr. 340 (Calif. 1988)

[Bovard sued Ralph and American Horse Enterprises (a corporation) to recover on promissory notes that were signed when Ralph purchased the corporation, ostensibly a jewelry-making business. The trial court dismissed Bovard's complaint.]

Puglia, J.

The court found that the corporation predominantly produced paraphernalia used to smoke marijuana [roach clips and bongs] and was not engaged significantly in jewelry production, and that Bovard had recovered the corporate machinery through self-help [i.e., he had repossessed it]. The parties do not challenge these findings. The court acknowledged that the manufacture of drug paraphernalia was not itself illegal in 1978 when Bovard and Ralph contracted for the sale of American Horse Enterprises, Inc. However, the court concluded a public policy against the manufacture of drug paraphernalia was implicit in the statute making the possession, use and transfer of marijuana unlawful. The trial court held the consideration for the contract was contrary to the policy of express law, and the contract was therefore illegal and void. Finally, the court found the parties were in pari delicto [equally at fault] and thus with respect to their contractual dispute should be left as the court found them.

The trial court concluded the consideration for the contract was contrary to the policy of the law as expressed in the statute prohibiting the possession, use and transfer of marijuana. Whether a contract is contrary to public policy is a question of law to be determined from the circumstances of the particular case. Here, the critical facts are not in dispute. Whenever a court becomes aware that a contract is illegal, it has a duty to refrain from entertaining an action to enforce the contract. Furthermore the court will not permit the parties to maintain an action to settle or compromise a claim based on an illegal contract.…

[There are several] factors to consider in analyzing whether a contract violates public policy: "Before labeling a contract as being contrary to public policy, courts must carefully inquire into the nature of the conduct, the extent of public harm which may be involved, and the moral quality of the conduct of the parties in light of the prevailing standards of the community [Citations]"

These factors are more comprehensively set out in the Restatement Second of Contracts section 178:

(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

(2) In weighing the interest in the enforcement of a term, account is taken of

(a) the parties' justified expectations,

(b) any forfeiture that would result if enforcement were denied, and

(c) any special public interest in the enforcement of the particular term.

(3) In weighing a public policy against enforcement of a term, account is taken of

(a) the strength of that policy as manifested by legislation or judicial decisions,

(b) the likelihood that a refusal to enforce the term will further that policy,

(c) the seriousness of any misconduct involved and the extent to which it was deliberate, and

(d) the directness of the connection between that misconduct and the term.

Applying the Restatement test to the present circumstances, we conclude the interest in enforcing this contract is very tenuous. Neither party was reasonably justified in expecting the government would not eventually act to geld American Horse Enterprises, a business harnessed to the production of paraphernalia used to facilitate the use of an illegal drug. Moreover, although voidance of the contract imposed a forfeiture on Bovard, he did recover the corporate machinery, the only assets of the business which could be used for lawful purposes, i.e., to manufacture jewelry. Thus, the forfeiture was significantly mitigated if not negligible. Finally,

there is no special public interest in the enforcement of this contract, only the general interest in preventing a party to a contract from avoiding a debt.

On the other hand, the Restatement factors favoring a public policy against enforcement of this contract are very strong. As we have explained, the public policy against manufacturing paraphernalia to facilitate the use of marijuana is strongly implied in the statutory prohibition against the possession, use, etc., of marijuana, a prohibition which dates back at least to 1929.…Obviously, refusal to enforce the instant contract will further that public policy not only in the present circumstances but by serving notice on manufacturers of drug paraphernalia that they may not resort to the judicial system to protect or advance their business interests. Moreover, it is immaterial that the business conducted by American Horse Enterprises was not expressly prohibited by law when Bovard and Ralph made their agreement since both parties knew that the corporation's products would be used primarily for purposes which were expressly illegal. We conclude the trial court correctly declared the contract contrary to the policy of express law and therefore illegal and void.

CASE QUESTIONS

1. Why did the court think it was significant that Bovard had repossessed the jewelry-making equipment?
2. What did Bovard want in this case?
3. If it was not illegal to make bongs and roach clips, why did the court determine that this contract should not be enforced?

Unlicensed Practitioner Cannot Collect Fee

Venturi & Company v. Pacific Malibu Development Corp.

172 Cal.App.4th 1417 (Calif. Ct. App. 2009)

Rubin, J.

In June 2003, plaintiff Venturi & Company LLC and defendant Pacific Malibu Development Corp. entered into a contract involving development of a high-end resort on undeveloped property on the Bahamian island of Little Exuma. Under the contract, plaintiff agreed to serve as a financial advisor and find financing for the Little Exuma project.…[P]laintiff was entitled to some payment under the contract even if plaintiff did not secure financing for the project [called a success fee].

After signing the contract, plaintiff contacted more than 60 potential sources of financing for the project.…[I]n the end, defendants did not receive financing from any source that plaintiff had identified.

Defendants terminated the contract in January 2005. Two months earlier, however, defendants had signed a [financing agreement] with the Talisker Group. Plaintiff was not involved in defendants' negotiations with the Talisker Group.…Nevertheless, plaintiff claimed the contract's provision for a success fee entitled plaintiff to compensation following the [agreement]. When defendants refused to pay plaintiff's fee, plaintiff sued defendants for the fee and for the reasonable value of plaintiff's services.

Defendants moved for summary judgment. They argued plaintiff had provided the services of a real estate broker by soliciting financing for the Little Exuma project yet did not have a broker's license. Thus, defendants asserted…the Business and Professions Code barred plaintiff from receiving any compensation as an unlicensed broker.…Plaintiff opposed summary judgment. It argued that one of its managing principals, Jane Venturi, had a real estate sales license and was employed by a real estate broker (whom plaintiff did not identify) when defendants had signed their term sheet with the Talisker Group, the document that triggered plaintiff's right to a fee.

The court entered summary judgment for defendants. The court found plaintiff had acted as a real estate broker when working on the Little Exuma project. The court pointed, however, to plaintiff's lack of evidence that Jane Venturi's unnamed broker had employed or authorized her to work on the project.…[Summary judgment was issued in favor of defendants, denying plaintiff any recovery.] This appeal followed.

The court correctly ruled plaintiff could not receive compensation for providing real estate broker services to defendants because plaintiff was not a licensed broker. (Section 11136 [broker's license required to collect compensation for broker services].) But decisions such as *Lindenstadt* [Citation] establish that the court erred in denying plaintiff compensation to the extent plaintiff's services were not those of a real estate broker. In *Lindenstadt*, the parties entered into 25 to 30 written agreements in which the plaintiff promised to help the defendant find businesses for possible acquisition. After the plaintiff found a number of such businesses, the defendant refused to compensate the plaintiff. The defendant cited the plaintiff's performance of broker's services

without a license as justifying its refusal to pay. On appeal, the appellate court rejected the defendant's sweeping contention that the plaintiff's unlicensed services for *some* business opportunities meant the plaintiff could not receive compensation for *any* business opportunity. Rather, the appellate court directed the trial court to examine individually each business opportunity to determine whether the plaintiff acted as an unlicensed broker for that transaction or instead provided only services for which it did not need a broker's license.

Likewise here, the contract called for plaintiff to provide a range of services, some apparently requiring a broker's license, others seemingly not. Moreover, and more to the point, plaintiff denied having been involved in arranging, let alone negotiating, defendants' placement of Securities with the Talisker Group for which plaintiff claimed a "success fee" under the contract's provision awarding it a fee even if it had no role in procuring the financing. Thus, triable issues existed involving the extent to which plaintiff provided either unlicensed broker services or, alternatively, non-broker services for which it did not need a license. (Accord: [Citation] [severability allowed partial enforcement of personal manager employment contract when license required for some, but not all, services rendered under the contract].)

[T]he contract here…envisioned plaintiff directing its efforts toward many potential sources of financing. As to some of those sources, plaintiff may have crossed the line into performing broker services. But for other sources, plaintiff may have provided only financial and marketing advice for which it did not need a broker's license. (See, e.g. [Citation] [statute barring unlicensed contractor from receiving fees for some services did not prohibit recovery for work not within scope of licensing statute].) And finally, as to the Talisker Group, plaintiff may have provided even less assistance than financial and marketing advice, given that plaintiff denied involvement with the group. Whether plaintiff crossed the line into providing broker services is thus a triable issue of fact that we cannot resolve on summary judgment.

…Plaintiff…did not have a broker's license, and therefore was not entitled to compensation for broker's services. Plaintiff contends it was properly licensed because one of its managers, Jane Venturi, obtained a real estate sales license in February 2004. Thus, she, and plaintiff claims by extension itself, were licensed when defendants purportedly breached the contract by refusing to pay plaintiff months later for the Talisker Group placement. Jane Venturi's sales license was not, however, sufficient; only a licensed broker may provide broker services. A sales license does not permit its holder to represent another unless the salesperson acts under a broker's authority.

The judgment for defendants is vacated, and the trial court is directed to enter a new order denying defendants' motion for summary judgment.…

CASE QUESTIONS

1. Why did the plaintiff think it should be entitled to full recovery under the contract, including for services rendered as a real estate broker? Why did the court deny that?
2. Even if the plaintiff were not a real estate broker, why would that mean it could not recover for real estate services provided to the defendant?
3. The appeals court remanded the case; what did it suggest the plaintiff should recover on retrial?

Unconscionability

Williams v. Walker-Thomas Furniture Co.

350 F.2d 445 (D.C. Ct. App. 1965)

Wright, J.

Appellee, Walker-Thomas Furniture Company, operates a retail furniture store in the District of Columbia. During the period from 1957 to 1962 each appellant in these cases purchased a number of household items from Walker-Thomas, for which payment was to be made in installments. The terms of each purchase were contained in a printed form contract which set forth the value of the purchased item and purported to lease the item to appellant for a stipulated monthly rent payment. The contract then provided, in substance, that title would remain in Walker-Thomas until the total of all the monthly payments made equaled the stated value of the item, at which time appellants could take title. In the event of a default in the payment of any monthly installment, Walker-Thomas could repossess the item.

The contract further provided that 'the amount of each periodical installment payment to be made by (purchaser) to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by (purchaser) under such prior leases, bills or accounts; and all payments now and hereafter made by (purchaser) shall be credited pro rata on all outstanding leases, bills and accounts due the Company by (purchaser) at the time each such payment is made.' The effect of this rather obscure provision was to keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.

On May 12, 1962, appellant Thorne purchased an item described as a daveno, three tables, and two lamps, having total stated value of $391.11 [about $2,800 in 2011 dollars]. Shortly thereafter, he defaulted on his monthly payments and appellee sought to replevy [repossess] all the items purchased since the first transaction in 1958. Similarly, on April 17, 1962, appellant Williams bought a stereo set of stated value of $514.95 [about $3,600 in 2011 dollars]. She too defaulted shortly thereafter, and appellee sought to replevy all the items purchased since December, 1957. The Court of General Sessions granted judgment for appellee. The District of Columbia Court of Appeals affirmed, and we granted appellants' motion for leave to appeal to this court.

Appellants' principal contention, rejected by both the trial and the appellate courts below, is that these contracts, or at least some of them, are unconscionable and, hence, not enforceable. [In its opinion the lower court said:]

The record reveals that prior to the last purchase appellant had reduced the balance in her account to $164. The last purchase, a stereo set, raised the balance due to $678. Significantly, at the time of this and the preceding purchases, appellee was aware of appellant's financial position. The reverse side of the stereo contract listed the name of appellant's social worker and her $218 monthly stipend from the government. Nevertheless, with full knowledge that appellant had to feed, clothe and support both herself and seven children on this amount, appellee sold her a $514 stereo set.

We cannot condemn too strongly appellee's conduct. It raises serious questions of sharp practice and irresponsible business dealings. A review of the legislation in the District of Columbia affecting retail sales and the pertinent decisions of the highest court in this jurisdiction disclose, however, no ground upon which this court can declare the contracts in question contrary to public policy. We note that were the Maryland Retail Installment Sales Act…or its equivalent, in force in the District of Columbia, we could grant appellant appropriate relief. We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar.

We do not agree that the court lacked the power to refuse enforcement to contracts found to be unconscionable. In other jurisdictions, it has been held as a matter of common law that unconscionable contracts are not enforceable. While no decision of this court so holding has been found, the notion that an unconscionable bargain should not be given full enforcement is by no means novel.…

Since we have never adopted or rejected such a rule, the question here presented is actually one of first impression.…[W]e hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.…

In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be

considered ‘in the light of the general commercial background and the commercial needs of the particular trade or case.’ Corbin suggests the test as being whether the terms are ‘so extreme as to appear unconscionable according to the mores and business practices of the time and place.’ We think this formulation correctly states the test to be applied in those cases where no meaningful choice was exercised upon entering the contract. So ordered.

Danaher, J. (dissenting):

[The lower] court…made no finding that there had actually been sharp practice. Rather the appellant seems to have known precisely where she stood.

There are many aspects of public policy here involved. What is a luxury to some may seem an outright necessity to others. Is public oversight to be required of the expenditures of relief funds? A washing machine, e.g., in the hands of a relief client might become a fruitful source of income. Many relief clients may well need credit, and certain business establishments will take long chances on the sale of items, expecting their pricing policies will afford a degree of protection commensurate with the risk. Perhaps a remedy when necessary will be found within the provisions of the D.C. “Loan Shark” law, [Citation].

I mention such matters only to emphasize the desirability of a cautious approach to any such problem, particularly since the law for so long has allowed parties such great latitude in making their own contracts. I dare say there must annually be thousands upon thousands of installment credit transactions in this jurisdiction, and one can only speculate as to the effect the decision in these cases will have.

CASE QUESTIONS

1. Did the court here say that cross-collateral contracts are necessarily unconscionable?
2. Why is it relevant that the plaintiff had seven children and was on welfare?
3. Why did the defendant have a cross-collateral clause in the contract? What would happen if no such clauses were allowed?
4. What are the elements of unconscionability that the court articulates?

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11.5.6: Summary and Exercises

Summary

In general, illegal contracts are unenforceable. The courts must grapple with two types of illegalities: (1) statutory violations and (2) violations of public policy not expressly declared unlawful by statute. The former include gambling contracts, contracts with unlicensed professionals, and Sunday contracts.

Contracts that violate public policy include many types of covenants not to compete. No general rule for determining their legality can be given, except to say that the more rigid their restrictions against working or competing, the less likely they will withstand judicial scrutiny. Other types of agreements that may violate public policy and hence are unenforceable include provisions that waive tort liability and contracts that interfere with family relationships.

The exceptions to the rule that illegal agreements will not be enforced and that courts leave the parties where they are generally involve situations where the hands-off approach would lead to an unfair result: where the parties are not equally at fault, where one is excusably ignorant or withdraws before performance, or where one is protected by a statute. A court may sometimes divide a contract, enforcing the legal part and not the illegal part.

EXERCISES

1. Henrioulle was an unemployed widower with two children who received public assistance from the Marin County (California) Department of Social Services. There was a shortage of housing for low-income residents in Marin County. He entered into a lease agreement on a printed form by which the landlord disclaimed any liability for any injury sustained by the tenants anywhere on the property. Henrioulle fractured his wrist when he tripped on a rock on the common stairs in the apartment building. The landlord had been having a hard time keeping the area clean. Is the disclaimer valid? Explain.
2. Albert Bennett, an amateur cyclist, entered a bicycle race sponsored by the United States Cycling Federation. He signed a release exculpating the federation for liability: “I further understand that serious accidents occasionally occur during bicycle racing and that participants in bicycle racing occasionally sustain mortal or serious personal injuries, and/or property damage, as a consequence thereof. Knowing the risks of bicycle racing, nevertheless I hereby agree to assume those risks and to release and hold harmless all the persons or entities mentioned above who (through negligence or carelessness) might otherwise be liable to me (or my heirs or assigns) for damages.”

   During the race, Bennett was hit by an automobile that had been allowed on the otherwise blocked-off street by agents of the defendant. Bennett sued; the trial court dismissed the case on summary judgment. Bennett appealed. What was the decision on appeal?

3. Ramses owned an industrial supply business. He contracted to sell the business to Tut. Clause VI of their Agreement of Sale provided as follows: “In further consideration for the purchase, Ramses agrees that he shall not compete, either directly or indirectly, in the same business as is conducted by the corporation in its established territory.”

   Two months after the sale, Ramses opened a competing business across the street from the business now owned by Tut, who brought suit, asking the court to close Ramses’s business on the basis of Clause VI. What should the court decide? Why?

4. After taking a business law class at State U, Elke entered into a contract to sell her business law book to a classmate, Matthew, for $45. As part of the same contract, she agreed to prepare a will for Matthew’s mother for an additional $110. Elke prepared the will and sent the book to Matthew, but he refused to pay her. Is she entitled to any payment? Explain.
5. Elmo, a door-to-door salesman, entered into a contract to sell the Wilson family $320 worth of household products on credit. The Wilsons later learned that Elmo had failed to purchase a city license to make door-to-door sales and refused to pay him. May Elmo collect from the Wilsons? Why?
6. Gardner purchased from Singer a sewing machine ($700) and three vacuums (about $250 each), one after the other, on Singer’s “1 to 36 month plan.” Gardner defaulted after paying a total of $400 on account, and Singer sued to repossess all the purchases. Gardner defended by claiming the purchase plan was unconscionable and pointed to the *Williams* case (Section 12.5.3 "Unconscionability") as controlling law (that cross-collateral contracts are unconscionable). The trial court ruled for Gardner; Singer appealed. What was the result on appeal?

7. Blubaugh leased a large farm combine from John Deere Leasing by signing an agreement printed on very lightweight paper. The back side of the form was "written in such fine, light print as to be nearly illegible.…The court was required to use a magnifying glass." And the wording was "unreasonably complex," but it contained terms much in John Deere's favor. When Blubaugh defaulted, John Deere repossessed the combine, sold it for more than he had paid, and sued him for additional sums in accordance with the default clauses on the back side of the lease. Blubaugh defended by asserting the clauses were unconscionable. Is this a case of procedural, substantive, or no unconscionability? Decide.
8. Sara Hohe, a fifteen-year-old junior at Mission Bay High School in San Diego, was injured during a campus hypnotism show sponsored by the PTSA as a fund-raiser for the senior class. Hypnotism shows had been held annually since 1980, and Sara had seen the previous year's show. She was selected at random from a group of many volunteers. Her participation in the "Magic of the Mind Show" was conditioned on signing two release forms. Hohe's father signed a form entitled "Mission Bay High School PTSA Presents Dr. Karl Santo." Hohe and her father both signed a form titled "Karl Santo Hypnotist," releasing Santo and the school district from all liability. During the course of the show, while apparently hypnotized, Hohe slid from her chair and also fell to the floor about six times and was injured. She, through her father, then sued the school district. The Hohes claimed the release was contrary to public policy; the trial court dismissed the suit on summary judgment. Was the release contrary to public policy? Decide.
9. In 1963 the Southern Railway Company was disturbed by an order issued by the Interstate Commerce Commission, a federal agency, which would adversely affect the firm's profit by some $13 million [about $90 million in 2011 dollars]. Southern hired a lawyer, Robert Troutman, who was a friend of President John F. Kennedy, to lobby the president that the latter might convince the attorney general, Robert Kennedy, to back Southern's position in a lawsuit against the ICC. It worked; Southern won. Southern then refused to pay Troutman's bill in the amount of $200,000 [about $14 million in 2011 dollars] and moved for summary judgment dismissing Troutman's claim, asserting—among other things—that contracts whereby one person is hired to use his influence with a public official are illegal bargains. Should summary judgment issue? Decide.
10. Buyer, representing himself to be experienced in timber negotiations, contracted to buy the timber on Seller's land. The first $11,500 would go to Buyer, the next $2,000 would go to Seller, and the rest would be divided fifty-fifty after costs of removal of the timber. Buyer said the timber would be worth $18,000–$20,000. When Seller discovered the timber was in fact worth more than $50,000, he sued, claiming the contract was unconscionable. How should the court rule?

SELF-TEST QUESTIONS

1. Gambling contracts are
    1. always unenforceable
    2. enforceable if written
    3. in effect enforceable in certain situations involving the sale of securities
    4. always enforceable when made with insurance companies
2. In State X, plumbers must purchase a license but do not have to pass an examination. This is an example of
    1. a regulatory license
    2. a revenue license
    3. both a and b
    4. neither a nor b
3. A contract to pay a lobbyist to influence a public official is generally illegal.
    1. true
    2. false
4. Exculpatory clauses are sometimes enforceable when they relieve someone from liability for
    1. an intentional act
    2. recklessness
    3. negligence
    4. all of the above
5. An employee's promise not to compete with the employer after leaving the company
    1. is never enforceable because it restrains trade

2. is always enforceable if in writing
3. is always enforceable
4. is enforceable if related to the employer’s property interests

SELF-TEST AnswerS

1. c
2. b
3. b
4. c
5. d

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SECTION OVERVIEW

11.6: Form and Meaning

Learning Objectives

After reading this chapter, you should understand the following:

- What kinds of contracts must be evidenced by some writing under the Statute of Frauds, what the exceptions to the requirements are, and what satisfies a writing requirement
- What effect prior or contemporaneous “side” agreements have on a written contract
- How a contract is to be interpreted if its meaning is disputed

In four chapters, we have focused on the question of whether the parties created a valid contract and have examined the requirements of (1) agreement (offer and acceptance), (2) real consent (free will, knowledge, and capacity), (3) consideration, and (4) legality. Assuming that these requirements have been met, we now turn to the form and meaning of the contract itself. Does the contract have to be in a written form, and—if there is a dispute—what does the contract mean?

11.6.1: The Statute of Frauds

11.6.2: The Parol Evidence Rule

11.6.3: Interpretation of Agreements- Practicalities versus Legalities

11.6.4: Cases

11.6.5: Summary and Exercises

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11.6.1: The Statute of Frauds

LEARNING OBJECTIVES

1. Know which contracts are required to be evidenced by some writing to be enforceable.
2. Understand the exceptions to that requirement.
3. Recognize what the writing requirement means.
4. Understand the effect of noncompliance with the Statute of Frauds.

Overview of the Statute of Frauds

The general rule is this: a contract need not be in writing to be enforceable. An oral agreement to pay a high-fashion model $2 million to pose for photographs is as binding as if the language of the deal were printed on vellum and signed in the presence of twenty bishops. For three centuries, however, a large exception grew up around the Statute of Frauds, first enacted in England in 1677 under the formal name "An Act for the Prevention of Frauds and Perjuries." The **Statute of Frauds** requires that some contracts be evidenced by a writing, signed by the party to be bound. The English statute's two sections dealing with contracts read as follows:

[Sect. 4]…no action shall be brought

1. whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate;
2. or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person;
3. or to charge any person upon any agreement made upon consideration of marriage;
4. or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them;
5. or upon any agreement that is not to be performed within the space of one year from the making thereof;

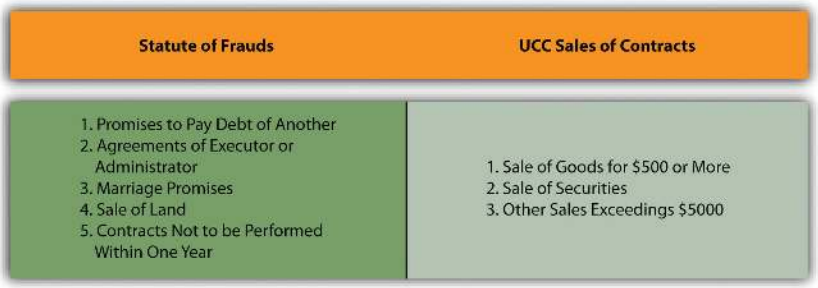
unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

[Sect. 17]…no contract for the sale of any goods, wares and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

As may be evident from the title of the act and its language, the general purpose of the law is to provide evidence, in areas of some complexity and importance, that a contract was actually made. To a lesser degree, the law serves to caution those about to enter a contract and "to create a climate in which parties often regard their agreements as tentative until there is a signed writing."Restatement (Second) of Contracts, Chapter 5, statutory note. Notice, of course, that this is a *statute*; it is a legislative intrusion into the common law of contracts. The name of the act is somewhat unfortunate: insofar as it deals with fraud at all, it does not deal with fraud as we normally think of it. It tries to avoid the fraud that occurs when one person attempts to impose on another a contract that never was agreed to.

The Statute of Frauds has been enacted in form similar to the seventeenth-century act in every state but Maryland and New Mexico, where judicial decisions have given it legal effect, and Louisiana. With minor exceptions in Minnesota, Wisconsin, North Carolina, and Pennsylvania, the laws all embrace the same categories of contracts that are required to be in writing. Early in the twentieth century, Section 17 was replaced by a section of the Uniform Sales Act, and this in turn has now been replaced by provisions in the Uniform Commercial Code (UCC).

Figure 13.1 Contracts Required to Be in Writing



However ancient, the Statute of Frauds is alive and well in the United States. Today it is used as a technical defense in many contract actions, often with unfair results: it can be used by a person to wriggle out of an otherwise perfectly fine oral contract (it is said then to be used "as a sword instead of a shield"). Consequently, courts interpret the law strictly and over the years have enunciated a host of exceptions—making what appears to be simple quite complex. Indeed, after more than half a century of serious scholarly criticism, the British Parliament repealed most of the statute in 1954. As early as 1885, a British judge noted that "in the vast majority of cases [the statute's] operation is simply to enable a man to break a promise with impunity because he did not write it down with sufficient formality." A proponent of the repeal said on the floor of the House of Commons that "future students of law will, I hope, have their labours lightened by the passage of this measure." In the United States, students have no such reprieve from the Statute of Frauds, to which we now turn for examination.

Types of Contracts Required in Writing and the Exceptions

Promises to Pay the Debt of Another

The rule: a promise to pay the debt of another person must be evidenced by some writing if it is a "**collateral promise** of suretyship (or 'guaranty')." A collateral promise is one secondary or ancillary to some other promise. A **surety** or **guarantor** (the terms are essentially synonymous) is one who promises to perform upon the default of another. Consider this:

A and B agree to pay C.

Here, both A and B are making a direct promise to pay C. Although A is listed first, both are promising to pay C. Now consider this:

B agrees to pay C if A does not.

Here it is clear that there must be another agreement somewhere for A to pay C, but that is not contained in this promise. Rather, B is making an agreement with C that is *collateral*—on the side—to the promise A is making to C. Sometimes the other agreement somewhere for A to pay C is actually in the same document as B's promise to pay C if A does not. That does not make B's promise a direct promise as opposed to a collateral one.

Suppose Lydia wishes to purchase on credit a coat at Miss Juliette's Fine Furs. Juliette thinks Lydia's creditworthiness is somewhat shaky. So Lydia's friend Jessica promises Miss Juliette's that if the store will extend Lydia credit, Jessica will pay whatever balance is due should Lydia default. Jessica is a surety for Lydia, and the agreement is subject to the Statute of Frauds; an oral promise will not be enforceable.Of course, if Jessica really *did* orally promise Miss Juliette's to pay in case Lydia didn't, it would be bad faith to lie about it. The proper course for Jessica is not to say, "Ha, ha, I promised, but it was only oral, so I'm not bound." Jessica should say, "I raise the Statute of Frauds as a defense." Suppose Jessica very much wants Lydia to have the coat, so she calls the store and says, "Send Lydia the fur, and I will pay for it." This agreement does not create a suretyship, because Jessica is primarily liable: she is making a direct promise to pay. To fall within the Statute of Frauds, the surety must back the debt of another person to a third-party promisee (also known as the obligee of the principal debtor). The "debt," incidentally, need not be a money obligation; it can be any contractual duty. If Lydia had promised to work as a cashier on Saturdays at Miss Juliette's in return for the coat, Jessica could become surety to that obligation by agreeing to work in Lydia's place if she failed to show up. Such a promise would need to be in writing to be enforceable.

The exception: the **main purpose doctrine**. The main purpose doctrine is a major exception to the surety provision of the Statute of Frauds. It holds that if the promisor's principal reason for acting as surety is to secure her own economic advantage, then the agreement is not bound by the Statute of Frauds writing requirement. Suppose, in the previous example, that Jessica is really the

one who wants the fur coat but cannot, for reasons of prudence, let it be known that she has bought one. So she proposes that Lydia "buy" it for her and that she will guarantee Lydia's payments. Since the main purpose of Jessica's promise is to advance her own interests, an oral agreement is binding. Normally, the main purpose rule comes into play when the surety desires a financial advantage to herself that cannot occur unless she provides some security. For example, the board chairman of a small company, who also owns all the voting stock, might guarantee a printer that if his company defaulted in paying the bill for desperately needed catalogs, he would personally pay the bill. If his main purpose in giving the guarantee was to get the catalogues printed in order to stave off bankruptcy, and thus to preserve his own interest in the company, he would be bound by an oral agreement.*Stuart Studio, Inc. v. National School of Heavy Equipment, Inc.*, 214 S.E.2d 192 (N.C. 1975). The same principle can be used to bind other creditors to oral agreements, as the bank discovered in Section 13.4.1 "The Statute of Frauds' Main Purpose Doctrine" (*Wilson Floors*).

Agreements of Executor or Administrator

The rule: the promise by an executor or administrator of an estate to answer personally for the debt or other duty of the deceased is analogous to the surety provision—it must be evidenced by some writing if it is to be enforced over an objection by the would-be obligor. For an agreement to be covered by the statute, there must have been an obligation before the decedent's death. Thus if the executor arranges for a funeral and guarantees payment should the estate fail to pay the fee, an oral contract is binding, because there was no preexisting obligation. If, however, the decedent has made his own arrangements and signed a note obligating his estate to pay, the executor's promise to guarantee payment would be binding only if written.

The exception: the main purpose exception to the surety provision applies to this section of the Statute of Frauds as well as to the "promises to pay the debts of another" section, noted earlier.

The Marriage Provision

The rule: if any part of the marriage or the promise to marry consists also of a promise to exchange some consideration, the Statute of Frauds requires that part to be evidenced by some writing.Restatement (Second) of Contracts, Section 125. Mutual promises to marry are not within the rule. John and Sally exchange promises to marry; the promise would not be unenforceable for failure to be evidenced by some writing. (Of course courts are very unlikely to force anybody to keep a promise to marry; the point is, the Statute of Frauds doesn't apply). But if Sally understands John to say, "If you marry me, I will deed to you my property in the Catskill Mountains," the part about the property would need to be evidenced by some writing to be enforced over John's denial. The Statute of Frauds governs such promises regardless of who makes them. Suppose John's father had said, "If you marry Sally and settle down, I will give you $1 million," and John agrees and marries Sally. The father's promise is not enforceable unless written, if he denies it.

Sometimes couples—especially rich people like movie stars—execute written property settlement agreements to satisfy the statute, stipulating how their assets will be treated upon marriage or upon divorce or death. If done before marriage, they are called **prenuptial (premarital) agreements**; if after marriage, **postnuptial (after marriage) agreements** ("prenupts" and "postnupts" in lawyer lingo).

The exception: there is no "named" exception here, but courts are free to make equitable adjustments of property of the marriage to avoid an injustice.

The factors to be considered in the division of the marital estate are set forth at [Citation], which states, inter alia [among other things], that the court shall finally and equitably apportion the property of the parties, however and whenever acquired. The statute vests wide discretion in the district court. [Citation]. The court is free to adopt any reasonable valuation of marital property which is supported by the record.*In re Marriage of Rada*, 402, 869 P.2d 254 (Mont. 1994).

Contracts Affecting an Interest in Real Estate

The rule: almost all contracts involving an interest in real estate are subject to the Statute of Frauds. "An interest in land" is a broad description, including the sale, mortgaging, and leasing of real property (including homes and buildings); profits from the land; the creation of easements; and the establishment of other interests through restrictive covenants and agreements concerning use. Short-term leases, usually for a term of one year or less, are exempt from the provision.

The exception: the **part performance doctrine**. The name here is a misnomer, because it is a doctrine of reliance, and the acts taken in reliance on the contract are not necessarily partial performances under it. As in all such cases, the rationale is that it is unjust not to give the promisee specific performance if he or she acted in reasonable reliance on the contract and the promisor has continued to manifest assent to its terms. An oral contract to sell land is not binding simply because the buyer has paid the purchase price; payment is not by itself reliance, and if the seller refuses to transfer title, the buyer may recover the purchase price. However, if the buyer has taken possession and made improvements on the property, courts will usually say the case is out of the statute, and the party claiming an oral contract can attempt to prove the existence of the oral contract.

The One-Year Rule

The rule: any agreement that cannot be performed within one year from its making must be evidenced by some writing to be enforceable. The purpose of this part is perhaps more obvious than most of the statute's provisions: memories fade regarding the terms of oral contracts made long ago; people die; disputes are not uncommon. Notice the critical time frame is not how long it will take to perform the contract, but how long from the time it is made until performance is complete. If a contract is made on January 1 for a house to be constructed starting on June 1 and to be completed on February 1 of the next year, the performance will be completed in eight months from the time it was begun, but thirteen months from the time the contract was made. It falls within the statute.

The exception: the **possibility test**. The statute's one-year rule has been universally interpreted to mean a contract that is impossible to be fully performed within one year; if there is even the slightest chance of carrying out the agreement completely within the year, an oral contract is enforceable. Thus an oral agreement to pay a sum of money on a date thirteen months hence is within the statute and not enforceable, but one calling for payment "within thirteen months" would be enforceable, since it is possible under the latter contract to pay in less than a year. Because in many cases strict application of the statute would dictate harsh results, the courts often strain for an interpretation that finds it possible to perform the agreement within the year. Courts will even hold that because any person may die within the year, a contract without a fixed term may be fully performed in under a year and does not, therefore, fall within the statute.

Under the UCC

The rule: contracts for the sale of goods in an amount greater than $500 must be evidenced by some writing to be enforceable. Section 2-201 of the UCC requires all contracts for the sale of goods for the price of $500 or more to be in writing, but oral agreements for the sale of goods valued at less than $500 are fully enforceable without exception.

Other Writing Requirements

In addition to these requirements, the UCC provides that agreements for the sale of securities (e.g., most stocks and bonds) usually need to be evidenced by a writing, and agreements for property not included in the sales or securities articles of the UCC that exceed $5,000 in value need to be so evidenced.Uniform Commercial Code, Sections 8-319 and 1-206. Included here would be intangible property such as rights to royalties and to mortgage payments, and other rights created by contract. And in many states, other statutes require a writing for several different kinds of contracts. These include agreements to pay commissions to real estate brokers, to make a will, to pay debts already discharged in bankruptcy, to arbitrate rather than litigate, to make loans, and to make installment contracts.

Exceptions under the UCC

There are four exceptions to the UCC's Statute of Frauds requirement that are relevant here.

The Ten-Day-Reply Doctrine

This provides that, as between merchants, if an oral agreement is reached and one party sends the other a written statement confirming it, the other party has ten days to object in writing or the agreement is enforceable.Uniform Commercial Code, Section 2-201(2).

“Specially Manufactured Goods”

This exception provides that a seller who has manufactured goods to the buyer’s specifications or who has made “either a substantial beginning of their manufacture or commitments for their procurement” will not be stuck if the buyer repudiates, assuming that the goods are unsuitable for sale to others.Uniform Commercial Code, Section 2-201(3)(a).

The “Admission” Exception

This exception arises—reasonably enough—when the party against whom enforcement is sought admits in testimony or legal papers that a contract was in fact made.Uniform Commercial Code, Section 2-201(3)(b). However, the admission will not permit enforcement of all claimed terms of the contract; enforcement is limited to the quantity of goods admitted.

The “Payment or Delivery and Acceptance” Exception

The UCC provides that an oral contract for goods in excess of $500 will be upheld if payment has already been made and accepted, or if the goods have been received and accepted.Uniform Commercial Code, Section 2-20l(3)(c).

Sufficiency of the Required Writing

At Common Law

We have been careful not to say “the contract needs to be in writing.” We have said, “a contractual intention must be evidenced by some writing, signed by the party to be bound.” A signed contract is not required. What is required in most states, following the wording of the original statute, is that there be at least some memorandum or note concerning the agreement—a logical consequence of the statute’s purpose to evidence the making of the contract. The words need not appear in a formal document; they are sufficient in any form in a will, or on a check or receipt, or in longhand on the back of an envelope—so long as the document is signed by the party to be charged (i.e., the party being sued on the contract).

Although the writing need not contain every term, it must recite the subject matter of the contract. It need not do so, however, in terms comprehensible to those who were not party to the negotiations; it is enough if it is understandable in context. A written agreement to buy a parcel of land is usually sufficiently definitive if it refers to the parcel in such a way that it could be mistaken for no other—for example, “seller’s land in Tuscaloosa,” assuming that the seller owned only one parcel there. Beyond the subject matter, the essential terms of promises to be performed must be written out; all details need not be. If an essential term is missing, it cannot be enforced, unless it can be inferred or imposed by rule of law. A written contract for the sale of land containing every term but the time for payment, which the parties orally agreed would be upon delivery of the deed, is sufficient. (A contract that omitted the selling price would not be.)

The parties must be named in the writing in a manner sufficient to identify them. Their whole names need not be given if initials or some other reference makes it inescapable that the writing does concern the actual parties. Reference to the agent of a party identifies the party. Possession of the writing may even be sufficient: if a seller gives a memorandum of an oral agreement for the sale of his land, stating all the terms, to the buyer, the latter may seek specific performance even though the writing omits to name or describe him or his agent.Restatement (Second) of Contracts, Section 207(f).

In a few states, consideration for the promise must be stated in writing, even if the consideration has already been given. Consequently, written contracts frequently contain such language as “for value received.” But in most states, failure to refer to consideration already given is unnecessary: “the prevailing view is that error or omission in the recital of past events does not affect the sufficiency of a memorandum.”Restatement (Second) of Contracts, Section 207(h). The situation is different, however, when the consideration is a return promise yet to be performed. Usually the return promise is an essential term of the agreement, and failure to state it will vitiate the writing.

Under the UCC

In contracts for the sale of goods, the writing must be signed by the party to be charged, and the parties must be sufficiently identified.Uniform Commercial Code, Section 2-210(1). But consideration, including the selling price, need not be set forth for the memorandum to meet the requirements of the UCC (“a writing is not insufficient because it omits or incorrectly states a term

agreed upon"), though obviously it makes sense to do so whenever possible. By contrast, UCC Sections 1-206 and 3-319 concerning intangible personal property and investment securities require "a defined or stated price."

Electronic Communications

One of the primary purposes of the Electronic Signatures in Global and National Commerce Act, S. 761, popularly referred to as ESign, is to repeal state law requirements for written instruments as they apply to electronic agreements and to make almost anything reasonably indicative of a signature good enough electronically.Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 96, 106th Congress (2000). It provides the following:

Notwithstanding any statute, regulation, or other rule of law [other than subsequent parts of this same statute], with respect to any transactions in or affecting interstate or foreign commerce—

1. a signature, contract, or other record relating to such transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form; and
2. a contract relating to such transaction may not be denied legal effect, validity or enforceability solely because an electronic signature or electronic record was used in its formation.…

The term "transaction" means an action or set of actions relating to the conduct of a business, consumer or commercial affairs between two or more persons, including any of the following types of conduct—

1. the sale, lease, exchange, or other disposition of [personal property and intangibles]
2. the sale, lease, exchange or other disposition of any interest in real property, or any combination thereof.

The term "electronic signature" means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

Effect of Noncompliance and Exceptions; Oral Rescission

The basic rule is that contracts governed by the Statute of Frauds are unenforceable if they are not sufficiently written down. If the agreement contains several promises, the unenforceability of one will generally render the others unenforceable also.

The Statute of Frauds can work injustices. In addition to the exceptions already noted, there are some general exceptions.

Full Performance

First, certainly, if the contract has been performed fully by both sides, its unenforceability under the statute is moot. Having fulfilled its function (neither side having repudiated the contract), the agreement cannot be rescinded on the ground that it should have been, but was not, reduced to writing.

Detrimental Reliance

Second, some relief may be granted to one who has relied on an oral contract to her detriment (similar to the part performance doctrine mentioned already). For a partially performed contract unenforceable under the Statute of Frauds, restitution may be available. Suppose George agrees orally to landscape Arthur's fifteen acres, in return for which George is to receive title to one acre at the far end of the lot. George is not entitled to the acre if Arthur defaults, but he may recover for the reasonable value of the services he has performed up to the time of repudiation. Somewhat related, if one side has reasonably and foreseeably relied upon a promise in such a way that injustice can only be avoided by enforcing it, some courts will use promissory estoppel to preclude the necessity of a writing, but the connection between the alleged oral contract and the detrimental reliance must be convincing.

Oral Rescission

Third, most contracts required to be in writing may be rescinded orally. The new agreement is treated in effect as a modification of the old one, and since a complete rescission will not usually trigger any action the statute requires to be in writing, the rescission becomes effective in the absence of any signed memorandum.

Some agreements, however, may not be rescinded orally. Those that by their terms preclude oral rescission are an obvious class. Under the UCC, certain agreements for the sale of goods may not be orally rescinded, depending on the circumstances. For instance, if title has already passed to the buyer under a written agreement that satisfies the statute, the contract can be rescinded

only by a writing. Contracts for the sale of land are another class of agreements that generally may not be orally rescinded. If title has already been transferred, or if there has been a material change of position in reliance on the contract, oral agreements to rescind are unenforceable. But a contract that remains wholly executory, even though enforceable because in writing, may be rescinded orally in most states.

Contract Modification

Fourth, contracts governed by the Statute of Frauds may be modified orally if the resulting contract, taken as a whole, falls outside the statute. The same rule applies under the UCC.Uniform Commercial Code, Section 2-209(3). Thus a written contract for the sale of a new bicycle worth $1,200 may be orally modified by substituting the sale of a used bicycle worth $450, but not by substituting the sale of a used bike worth $600. The modified contract effectively rescinds the original contract.

KEY TAKEAWAY

The Statute of Frauds, an ancient legislative intrusion into common-law contracts, requires that certain contracts be evidenced by some writing, signed by the party to be bound, to be enforceable. Among those affected by the statute are contracts for an interest in real estate, contracts that by their terms cannot be performed within one year, contracts whereby one person agrees to pay the debt of another, contracts involving the exchange of consideration upon promise to marry (except mutual promises to marry), and, under the UCC, contracts in an amount greater than $500. For each contract affected by the statute, there are various exceptions intended to prevent the statute from being used to avoid oral contracts when it is very likely such were in fact made.

The writing need not be a contract; anything in writing, signed by the person to be bound, showing adequate contractual intention will take the matter out of the statute and allow a party to attempt to show the existence of the oral contract.

There may be relief under restitution or promissory estoppel. Contracts affected by the statute can usually be orally rescinded. Any contract can be modified or rescinded; if the new oral contract as modified does not fall within the statute, the statute does not apply.

EXERCISES

1. What is the purpose of the Statute of Frauds?
2. What common-law contracts are affected by it, and what are the exceptions?
3. How does the UCC deal with the Statute of Frauds?
4. How is the requirement of the statute satisfied?
5. Contracts can always be modified. How does the Statute of Frauds play with contract modification?

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11.6.2: The Parol Evidence Rule

LEARNING OBJECTIVES

1. Understand the purpose and operation of the parol evidence rule, including when it applies and when it does not.
2. Know how the Uniform Commercial Code (UCC) deals with evidence to show a contract's meaning.

The Purpose of the Rule

Unlike Minerva sprung forth whole from the brow of Zeus in Greek mythology, contracts do not appear at a stroke memorialized on paper. Almost invariably, negotiations of some sort precede the concluding of a deal. People write letters, talk by telephone, meet face-to-face, send e-mails, and exchange thoughts and views about what they want and how they will reciprocate. They may even lie and cajole in duplicitous ways, making promises they know they cannot or will not keep in order not to kill the contract talks. In the course of these discussions, they may reach tentative agreements, some of which will ultimately be reflected in the final contract, some of which will be discarded along the way, and some of which perhaps will not be included in the final agreement but will nevertheless not be contradicted by it. Whether any weight should be given to these prior agreements is a problem that frequently arises.

Parol Evidence at Common-Law

The Rule

The rule at common law is this: a written contract intended to be the parties' complete understanding discharges all prior or contemporaneous promises, statements, or agreements that add to, vary, or conflict with it.

The **parol evidence rule** (*parol* means oral; it is related to *parliament* and *parly*—talking) is a substantive rule of law that operates to bar the introduction of evidence intended to show that the parties had agreed to something different from what they finally arrived at and wrote down. It applies to prior written as well as oral discussions that don't make it into the final written agreement. Though its many apparent exceptions make the rule seem difficult to apply, its purposes are simple: to give freedom to the parties to negotiate without fear of being held to the consequences of asserting preliminary positions, and to give finality to the contract.

The rule applies to all written contracts, whether or not the Statute of Frauds requires them to be in writing. The Statute of Frauds gets to whether there was a contract at all; the parol evidence rule says, granted there was a written contract, does it express the parties' understanding? But the rule is concerned only with events that transpired before the contract in dispute was signed. It has no bearing on agreements reached subsequently that may alter the terms of an existing contract.

The Exemptions and Exceptions

Despite its apparent stringency, the parol evidence rule does not negate all prior agreements or statements, nor preclude their use as evidence. A number of situations fall outside the scope of the rule and hence are not technically exceptions to it, so they are better phrased as exemptions (something not within the scope of a rule).

Not an Integrated Contract

If the parties never intended the written contract to be their full understanding—if they intended it to be partly oral—then the rule does not apply. If the document is fully integrated, no extrinsic evidence will be permitted to modify the terms of the agreement, even if the modification is in addition to the existing terms, rather than a contradiction of them. If the contract is partially integrated, prior consistent additional terms may be shown. It is the duty of the party who wants to exclude the parol evidence to show the contract was intended to be integrated. That is not always an easy task. To prevent a party later from introducing extrinsic evidence to show that there were prior agreements, the contract itself can recite that there were none. Here, for example, is the final clause in the National Basketball Association Uniform Player Contract: "This agreement contains the entire agreement between the parties and there are no oral or written inducements, promises or agreements except as contained herein." Such a clause is known as a **merger clause**.

Void or Voidable Contracts

Parol evidence is admissible to show the existence of grounds that would cause the contract to be void. Such grounds include illegality, fraud, duress, mistake, and lack of consideration. And parol evidence is allowed to show evidence of lack of contractual capacity. Evidence of infancy, incompetency, and so on would not change the terms of the contract at all but would show it was voidable or void.

Contracts Subject to a Condition Precedent

When the parties orally agree that a written contract is contingent on the occurrence of an event or some other condition (a **condition precedent**), the contract is not integrated and the oral agreement may be introduced. The classic case is that of an inventor who sells in a written contract an interest in his invention. Orally, the inventor and the buyer agree that the contract is to take effect only if the buyer's engineer approves the invention. (The contract was signed in advance of approval so that the parties would not need to meet again.) The engineer did not approve it, and in a suit for performance, the court permitted the evidence of the oral agreement because it showed "that in fact there never was any agreement at all."*Pym v. Campbell*, 119 Eng. Rep. 903 (Q.B. 1856). Note that the oral condition does not contradict a term of the written contract; it negates it. The parol evidence rule will not permit evidence of an oral agreement that is inconsistent with a written term, for as to that term the contract is integrated.

Untrue Recital or Errors

The parol evidence rule does not prevent a showing that a fact stated in a contract is untrue. The rule deals with prior agreements; it cannot serve to choke off inquiry into the facts. Thus the parol evidence rule will not bar a showing that one of the parties is a minor, even if the contract recites that each party is over eighteen. Nor will it prevent a showing that a figure in the contract had a typographical error—for example, a recital that the rate charged will be the plumber's "usual rate of $3 per hour" when both parties understood that the usual rate was in fact $30 per hour. A court would allow **reformation** (correction) of such errors.

Ambiguity

To enforce a contract, its terms must be understood, so parol evidence would be allowed, but a claim of ambiguity cannot be used to alter, vary, or change the contract's meaning.

Postcontract Modification

Ordinarily, an additional consistent oral term may be shown only if the contract was partially integrated. The parol evidence rule bars evidence of such a term if the contract was fully integrated. However, when there is additional consideration for the term orally agreed, it lies outside the scope of the **integrated contract** and may be introduced. In effect, the law treats each separate consideration as creating a new contract; the integrated written document does not undercut the separate oral agreement, as long as they are consistent. Buyer purchases Seller's business on a contract; as part of the agreement, Seller agrees to stay on for three weeks to help Buyer "learn the ropes." Buyer realizes she is not yet prepared to go on her own. She and Seller then agree that Seller will stay on as a salaried employee for five more weeks. Buyer cannot use the parol evidence rule to preclude evidence of the new agreement: it is a postcontract modification supported by new consideration. Similarly, parties could choose to rescind a previously made contract, and the parol evidence rule would not bar evidence of that.

The UCC Approach

Under Section 2-202 of the UCC, a course of dealing, a usage of trade, or a course of performance can be introduced as evidence to explain or supplement any written contract for the sale of goods. A **course of dealing** is defined as "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." A **usage of trade** is "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." A **course of performance** is the conduct of a party in response to a contract that calls for repeated action (e.g., a purchase agreement for a factory's monthly output, or an undertaking to wash a neighbor's car weekly).

KEY TAKEAWAY

The parol evidence rule is intended to preserve “the four corners” of the contract: it generally prohibits the introduction of contemporaneous oral or written elements of negotiation that did not get included in the written contract, subject to a number of exemptions.

The UCC allows evidence of course of dealing, course of performance, or usage of trade to give meaning to the contract.

EXERCISES

1. What is the purpose of the parol evidence rule?
2. How does it operate to crystallize the intention of the contracting parties?
3. To what kinds of contract issues does the rule not apply?
4. What “help” does the UCC give to fleshing out the parties’ contractual understanding?

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11.6.3: Interpretation of Agreements- Practicalities versus Legalities

LEARNING OBJECTIVES

1. Understand the purpose of contractual interpretation.
2. Know the tools courts use to interpret contracts.
3. Recognize that in everyday life, businesspeople tolerate oral contracts or poorly written ones, but a writing remains useful.

The General Problem and the Purpose of Contractual Interpretation

The General Problem

As any reader knows, the meaning of words depends in part on context and in part on the skill and care of the writer. As Justice Oliver Wendell Holmes Jr. once succinctly noted, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."*Towne v. Eisner*, 245 US 418, 425 (1917). Words and phrases can be ambiguous, either when they stand alone or when they take on a different coloration from words and phrases near them. A writer can be careless and contradict himself without intending to; people often read hurriedly and easily miss errors that a more deliberate perusal might catch. Interpretation difficulties can arise for any of a number of reasons: a form contract might contain language that is inconsistent with provisions specifically annexed; the parties might use jargon that is unclear; they might forget to incorporate a necessary term; assumptions about prior usage or performance, unknown to outsiders like judges, might color their understanding of the words they do use. Because ambiguities do arise, courts are frequently called on to give content to the words on paper.

The Basic Rule of Interpretation

Courts attempt to give meaning to the parties' understanding when they wrote the contract.

The intention of the parties governs, and if their purpose in making the contract is known or can be ascertained from all the circumstances, it will be given great weight in determining the meaning of an obscure, murky, or ambiguous provision or a pattern of conduct. A father tells the college bookstore that in consideration of its supplying his daughter, a freshman, with books for the coming year, he will guarantee payment of up to $350. His daughter purchases books totaling $400 the first semester, and he pays the bill. Midway through the second semester, the bookstore presents him with a bill for an additional $100, and he pays that. At the end of the year, he refuses to pay a third bill for $150. A court could construe his conduct as indicating a purpose to ensure that his daughter had whatever books she needed, regardless of cost, and interpret the contract to hold him liable for the final bill.

Tools of Interpretation

The policy of uncovering purpose has led to a number of tools of judicial interpretation:

- More specific terms or conduct are given more weight than general terms or unremarkable conduct. Thus a clause that is separately negotiated and added to a contract will be counted as more significant than a standard term in a form contract.
- A writing is interpreted as a whole, without undue attention to one clause.
- Common words and terms are given common meaning; technical terms are given their technical meaning.
- In the range of language and conduct that helps in interpretation, the courts prefer the following items in the order listed: express terms, course of performance, course of dealing, and usage of trade.
- If an amount is given in words and figures that differ, the words control.
- Writing controls over typing; typing controls over printed forms.
- Ambiguities are construed against the party that wrote the contract.

In this chapter, we have considered a set of generally technical legal rules that spell out the consequences of contracts that are wholly or partially oral or that, if written, are ambiguous or do not contain every term agreed upon. These rules fall within three general headings: the Statute of Frauds, the parol evidence rule, and the rules of interpretation. Obviously, the more attention paid to the contract before it is formally agreed to, the fewer the unforeseen consequences. In general, the conclusion is inescapable that a written contract will avoid a host of problems. Writing down an agreement is not always sensible or practical, but it can probably

be done more often than it is. Writing almost fifty years ago—and it is still true—a law professor studying business practices noted the following:

Businessmen often prefer to rely on “a man’s word” in a brief letter, a handshake or “common honesty and decency”—even when the transaction involves exposure to serious risks. Seven lawyers from law firms with business practices were interviewed. Five thought that businessmen often entered contracts with only a minimal degree of advanced planning. They complained that businessmen desire to “keep it simple and avoid red tape” even where large amounts of money and significant risks are involved.… Another said that businessmen when bargaining often talk only in pleasant generalities, think they have a contract, but fail to reach agreement on any of the hard, unpleasant questions until forced to do so by a lawyer.Stewart Macaulay, “Non-contractual Relations in Business: A Preliminary Study,” *American Sociological Review* 28, no. 1 (1963): 58–59.

Written contracts do not, to be sure, guarantee escape from disputes and litigation. Sometimes ambiguities are not seen; sometimes they are necessary if the parties are to reach an agreement at all. Rather than back out of the deal, it may be worth the risk to one or both parties deliberately to go along with an ambiguous provision and hope that it never arises to be tested in a dispute that winds up in court.

Nevertheless, it is generally true that a written contract has at least three benefits over oral ones, even those that by law are not required to be in writing. (1) The written contract usually avoids ambiguity. (2) It can serve both as a communications device and as a device for the allocation of power, especially within large companies. By alerting various divisions to its formal requirements, the contract requires the sales, design, quality-control, and financial departments to work together. By setting forth requirements that the company must meet, it can place the power to take certain actions in the hands of one division or another. (3) Finally, should a dispute later arise, the written contract can immeasurably add to proof both of the fact that a contract was agreed to and of what its terms were.

KEY TAKEAWAY

It is not uncommon for the meaning of a contract to be less than entirely clear. When called upon to interpret the meaning of a contract, courts try to give it the meaning the parties intended when they made it. Various tools of interpretation are used.

Businesspeople usually do not like to seem overbearing; they do not wish to appear untrusting; they often dislike unpleasantries. Therefore it is not uncommon for even big deals to be sealed with a handshake. But it’s a trade-off, because a written contract has obvious benefits, too.

EXERCISES

1. Why do courts fairly frequently have to interpret the meaning of contracts?
2. What is the purpose of contractual interpretation?
3. What tools do the courts use in interpreting contracts?
4. What is the social “cost” of insisting upon a written contract in a business setting? What are the benefits of the contract?

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11.6.4: Cases

The Statute of Frauds' Main Purpose Doctrine

Wilson Floors Co. v. Sciota Park, Ltd., and Unit, Inc.

377 N.E.2d 514 (1978)

Sweeny, J.

In December of 1971, Wilson Floors Company (hereinafter "Wilson") entered into a contract with Unit, Inc. (hereinafter "Unit"), a Texas corporation to furnish and install flooring materials for "The Cliffs" project, a development consisting of new apartments and an office building to be located in Columbus, Ohio. Unit…was the general manager for the project. The Pittsburgh National Bank (hereinafter the bank), as the construction lender for the project, held mortgages on The Cliffs property security for construction loans which the bank had made to Unit.

As the work progressed on the project Unit fell behind in making payments to Wilson for its completed work in the spring of 1973. At that time, the project was approximately two-thirds completed, the first mortgage money of seven million dollars having been fully dispersed by the bank to Unit. Appellant [Wilson] thereupon stopped work in May of 1973 and informed Unit that it would not continue until payments were forthcoming. On May 15, 1973, the bank conducted a meeting with the subcontractors in The Cliffs project, including Wilson.

At the meeting, the bank sought to determine whether it would be beneficial at that stage of the project to lend more money to Unit, foreclose on the mortgage and hire a new contractor to complete the work, or do nothing. Subcontractors were requested to furnish the bank an itemized account of what Unit owed them, and a cost estimate of future services necessary to complete their job contracts. Having reviewed the alternatives, the bank determined that it would be in its best interest to provide additional financing for the project. The bank reasoned that to foreclose on the mortgage and hire a new contractor at this stage of construction would result in higher costs.

There is conflicting testimony in regard to whether the bank made assurances to Wilson at this meeting that it would be paid for all work to be rendered on the project. However, after the May meeting, Wilson, along with the other subcontractors, did return to work.

Payments from Unit again were not forthcoming, resulting in a second work stoppage. The bank then arranged another meeting to be conducted on June 28, 1973.

At this second meeting, there is conflicting testimony concerning the import of the statements made by the bank representative to the subcontractors. The bank representative who spoke at the meeting testified at trial that he had merely advised the subcontractors that adequate funds would be available to complete the job. However, two representatives of Wilson, also in attendance at the meeting, testified that the bank representative had assured Wilson that if it returned to work, it would be paid.

After the meeting, Wilson returned to work and continued to submit its progress billings to Unit for payment. Upon completion of its portion of The Cliffs project, Wilson submitted its final invoice of $15,584.50 to Unit. This amount was adjusted downward to $15,443.06 upon agreement of Unit and Wilson. However, Wilson was not paid this amount.

As a result of nonpayment, Wilson filed suit…against Unit and the bank to recover the $15,443.06 [about $60,700 in 2010 dollars]. On September 26, 1975, Wilson and Unit stipulated that judgment for the sum of $15,365.84, plus interest, be entered against Unit. When Unit failed to satisfy the judgment, appellant proceeded with its action against the bank. [The trial court decided in favor of Wilson, but the intermediate appellate court reversed the trial court decision.]…[The Ohio statute of frauds provides]:

No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person…unless the agreement…or some memorandum thereof, is in writing and signed by the party to be charged.…

In paragraph one of *Crawford v. Edison* [an 1887 Ohio case], however, this court stated:

When the leading object of the promisor is, not to answer for another, but to subserve some pecuniary or business purpose of his own, involving a benefit to himself…his promise is not within the statute of frauds, although it may be in form a promise to pay the debt of another and its performance may incidentally have the effect of extinguishing that liability.…

So long as the promisor undertakes to pay the subcontractor whatever his services are worth irrespective of what he may owe the general contractor and so long as the main purpose of the promisor is to further his own business or pecuniary interest, the promise is enforceable.…

The facts in the instant case reflect that the bank made its guarantee to Wilson to subserve its own business interest of reducing costs to complete the project. Clearly, the bank induced Wilson to remain on the job and rely on its credit for future payments. To apply the statute of frauds and hold that the bank had no contractual duty to Wilson despite its oral guarantees would not prevent the wrong which the statute's enactment was to prevent, but would in reality effectuate a wrong.

Therefore, this court affirms the finding of the Court of Common Pleas that the verbal agreement made by the bank is enforceable by Wilson, and reverses the judgment of the Court of Appeals.

CASE QUESTIONS

1. The exception to the Statute of Frauds in issue here is the main purpose doctrine. How does this doctrine relate to the concept of promissory estoppel?
2. What was the main purpose behind the bank's purported promise?

The Statute of Frauds' One-Year Rule

Iacono v. Lyons

16 S.W.3d 92 (Texas Ct. App. 2000)

O'Connor, J.

Mary Iacono, the plaintiff below and appellant here, appeals from a take-nothing summary judgment rendered in favor of Carolyn Lyons, the defendant below and appellee here. We reverse and remand.

The plaintiff [Iacono] and defendant [Lyons] had been friends for almost 35 years. In late 1996, the defendant invited the plaintiff to join her on a trip to Las Vegas, Nevada. There is no dispute that the defendant paid all the expenses for the trip, including providing money for gambling.

The plaintiff contended she was invited to Las Vegas by the defendant because the defendant thought the plaintiff was lucky. Sometime before the trip, the plaintiff had a dream about winning on a Las Vegas slot machine. The plaintiff's dream convinced her to go to Las Vegas, and she accepted the defendant's offer to split "50-50" any gambling winnings.

In February 1997, the plaintiff and defendant went to Las Vegas. They started playing the slot machines at Caesar's Palace. The plaintiff contends that, after losing $47, the defendant wanted to leave to see a show. The plaintiff begged the defendant to stay, and the defendant agreed on the condition that she (the defendant) put the coins into the machines because doing so took the plaintiff too long. (The plaintiff, who suffers from advanced rheumatoid arthritis, was in a wheelchair.) The plaintiff agreed, and took the defendant to a dollar slot machine that looked like the machine in her dream. The machine did not pay on the first try. The plaintiff then said, "Just one more time," and the defendant looked at the plaintiff and said, "This one's for you, Puddin."

The slot machine paid $1,908,064. The defendant refused to share the winnings with the plaintiff, and denied they had an agreement to split any winnings. The defendant told Caesar's Palace she was the sole winner and to pay her all the winnings.

The plaintiff sued the defendant for breach of contract. The defendant moved for summary judgment on the grounds that any oral agreement was unenforceable under the statute of frauds or was voidable for lack of consideration. The trial court rendered summary judgment in favor of the defendant.…

[Regarding the "consideration" argument:] The defendant asserted the agreement, if any, was voidable because there was no consideration. The defendant contended the plaintiff's only contribution was the plaintiff's dream of success in Las Vegas and her "luck." The plaintiff asserted the defendant bargained with her to go to Las Vegas in return for intangibles that the defendant thought the plaintiff offered (good luck and the realization of the dream). The plaintiff said she gave up her right to remain in Houston in return for the agreement to split any winnings. The plaintiff also asserted the agreement was an exchange of promises.

…The plaintiff alleged she promised to share one-half of her winnings with the defendant in exchange for the defendant's promise to share one-half of her winnings with the plaintiff. These promises, if made, represent the respective benefits and detriments, or the bargained for exchange, necessary to satisfy the consideration requirement. *See* [Citation] (when no other consideration is

shown, mutual obligations by the parties to the agreement will furnish sufficient consideration to constitute a binding contract).… [Regarding the Statute of Frauds argument:] The defendant asserted the agreement, if any, was unenforceable under the statute of frauds because it could not be performed within one year. There is no dispute that the winnings were to be paid over a period of 20 years.…

[The statute] does not apply if the contract, from its terms, could possibly be performed within a year—however improbable performance within one year may be. [Citations] [It bars] only oral contracts that cannot be completed within one year. [Citation] (If the agreement, either by its terms or by the nature of the required acts, cannot be performed within one year, it falls within the statute of frauds and must be in writing).

To determine the applicability of the statute of frauds with indefinite contracts, this Court may use any reasonably clear method of ascertaining the intended length of performance. [Citation] The method is used to determine the parties' intentions at the time of contracting. The fact that the entire performance within one year is not required, or expected, will not bring an agreement within the statute. *See* [Citations].

Assuming without deciding that the parties agreed to share their gambling winnings, such an agreement possibly could have been performed within one year. For example, if the plaintiff and defendant had won $200, they probably would have received all the money in one pay-out and could have split the winnings immediately. Therefore, the defendant was not entitled to summary judgment based on her affirmative defense of the statute of frauds.

We reverse the trial court's judgment and remand for further proceedings.

CASE QUESTIONS

1. The defendant contended there was no consideration to support her alleged promise to split the winnings fifty-fifty. What consideration did the court find here?
2. The defendant contended that the Statute of Frauds' one-year rule prohibited the plaintiff from attempting to prove the existence of the alleged oral contract to split the winnings. What reasoning did the court give here as to why the statute did not apply?
3. After this case, the court remanded the matter to the lower court. What has to happen there before plaintiff gets her money?

The Parol Evidence Rule: Postcontract Modification

Hampden Real Estate, Inc. v. Metropolitan Management Group, Inc.

142 Fed. Appx. 600 (Fed. Ct. App. Pa. 2005)

Cowen, J.

[The court has jurisdiction based on diversity of citizenship.]

Hampden Real Estate sold Metropolitan Management a residential property pursuant to an Agreement of Sale (the "Sale Agreement"). The Sale Agreement provided that the property would be sold for $3.7 million, that Metropolitan would assume Hampden's mortgage on the building, and that Hampden would receive a credit in the amount of $120,549.78—the amount being held in escrow pursuant to the mortgage (the "Escrow Account Credit").

Between the execution of the Sale Agreement and the closing, the parties negotiated certain adjustments to the purchase price to compensate for required repairs. During these negotiations, the parties reviewed a draft and final Settlement Statement (the "Settlement Statement"), prepared by the closing agent, which did not list the Escrow Account Credit among the various debits and credits. A few weeks after the closing, Hampden demanded payment of the Escrow Account Credit.

Following Metropolitan's refusal to pay the Escrow Account Credit, Hampden filed a complaint claiming breach of contract, unjust enrichment, and conversion. Metropolitan brought counterclaims for breach of contract, unjust enrichment, and fraudulent or negligent misrepresentation. Hampden brought a partial motion for summary judgment as to the breach of contract claim, which was granted and its unjust enrichment and conversion claims were dismissed as moot.…

The District Court correctly determined that the threshold issue is the role of the Settlement Statement, "based on both the intent of the parties and the custom and usage of the document." However, the Court refused to consider extrinsic or parol evidence to determine the intent of the parties, reasoning that the parol evidence rule precluded such consideration absent ambiguity in the written contract. We find that the District Court misapplied the rule. The parol evidence rule seeks to preserve the integrity of

written agreements by precluding the introduction of contemporaneous or prior declarations to alter the meaning of written agreements. [Citation] The rule does not apply, however, where a party seeks to introduce evidence of subsequent oral modifications. *See* [Citation:] a "written agreement may be modified by a subsequent written or oral agreement and this modification may be shown by writings or by words or by conduct or by all three. In such a situation the parol evidence rule is inapplicable." Here, the parol evidence rule does not preclude testimony regarding the parties' intention to alter the final purchase price by executing a Settlement Statement, after the execution of the Sale Agreement, which omitted the Escrow Account Credit.

The cases cited by Hampden are not to the contrary as each involved the admissibility of prior negotiations to demonstrate misrepresentations made in the inducement of the contract. As example, the court in [Citation], held that "[i]f a party contends that a writing is not an accurate expression of the agreement between the parties, and that certain provisions were omitted therefrom, the parol evidence rule does not apply." (Permitting the introduction of parol evidence to establish that the contract omitted provisions which appellees represented would be included in the writing).…

The District Court further held that the integration clause contained in the written contract supports the conclusion that the Settlement Statement, which mentioned neither the Escrow Account Credit nor that it was amending the Sale Agreement, is not a modification of the Sale Agreement. The Court explained that the outcome might be different if the Settlement Statement mentioned "the escrow credit but provided different details, but as the [Settlement Statement] in this case simply ignored the escrow credit, and both parties agree that there were no oral discussions regarding the escrow credit, the [Settlement Statement] cannot be said to modify the escrow credit provision in the Agreement of Sale." We disagree.

It is well-settled law in Pennsylvania that a "written contract which is not for the sale of goods may be modified orally, even when the contract provides that modifications may only be made in writing." [Citition] "The modification may be accomplished either by words or conduct," [Citation] demonstrating that the parties intended to waive the requirement that amendments be made in writing. [Citation] An oral modification of a written contract must be proven by "clear, precise and convincing evidence." [Citation] Viewing the evidence in the light most favorable to Metropolitan, we find that the District Court erred in concluding that there was insufficient evidence in the record to raise a genuine issue of material fact as to whether the parties intended to orally modify the Sale Agreement. Metropolitan introduced a Settlement Statement which omitted the Escrow Account Credit, while listing all other debits and credits and submitted an affidavit from its President who "reviewed the Draft Settlement Statement and understood that the Escrow Account Credit had been omitted as part of the ongoing negotiations between the parties concerning the amount of the credit to which Metropolitan was entitled" due to the poor condition of the property.

Accordingly, the District Court erred in granting summary judgment in favor of Hampden. At a minimum, there was a triable issue of fact concerning whether the Settlement Statement was intended to modify the prior written Sale Agreement and serve as the final and binding manifestation of the purchase price. Specifically, whether the parties intended to exclude the Escrow Account Credit from the purchase price as part of the negotiations to address Hampden's failure to maintain the property.

[Reversed and remanded.]

CASE QUESTIONS

1. The contract had an integration clause. Why didn't that bar admission of the subsequent oral modification to the contract?
2. What rule of law was the plaintiff relying on in support of its contention that the original agreement should stand?
3. What rule of law was the defendant relying on in support of its contention that the original agreement had been modified?
4. According to the defendant, how had the original agreement been modified, and why?

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11.6.5: Summary and Exercises

Summary

In an economic system mostly governed by contract, parties may not only make the kinds of deals they wish but may make them in any form they wish—with some significant exceptions. The most significant issue of form in contract law is whether the contract must be written or may be oral and still be enforceable. The question can be answered by paying close attention to the Statute of Frauds and court decisions interpreting it. In general, as we have seen, the following types of contracts must be in writing: interests in real property, promises to pay the debt of another, certain agreements of executors and administrators, performances that cannot be completed within one year, sale of goods for $500 or more, and sale of securities. There are exceptions to all these rules.

Another significant rule that permeates contract law is the parol evidence rule: prior statements, agreements, or promises, whether oral or written, made during the negotiation process are often discharged by a subsequent written agreement. No matter what you were promised before you signed on the dotted line, you are stuck if you sign an integrated agreement without the promise. Again, of course, exceptions lie in wait for the unwary: Is the agreement only partially integrated? Are there grounds to invalidate the entire agreement? Is the contract subject to an oral condition? Is a fact recited in the contract untrue?

Contracts are not always clear and straightforward. Often they are murky and ambiguous. Interpreting them when the parties disagree is for the courts. To aid them in the task, the courts over the years have developed a series of guidelines such as these: Does the agreement have a plain meaning on its face? If there is an ambiguity, against whom should it be construed? Are there usages of trade or courses of dealing or performance that would help explain the terms?

EXERCISES

1. Plaintiff's and Defendant's cars crashed. Plaintiff hired an attorney, who negotiated with Defendant's insurance adjuster. Plaintiff's attorney claimed he and the adjuster reached an oral settlement, but the insurance company refused to honor it and filed for summary judgment, raising the Statute of Frauds' suretyship provision as a defense: a promise by one person (the insurance company here) to pay the debts of another (the insured) must be evidenced by some writing, and there was no writing. Is the defense good? Explain.
2. Plaintiff Irma Kozlowski cohabited with Defendant Thaddeus Kozlowski for fifteen years without marriage. She repeatedly asked him specifically about her financial situation should he predecease her, and he assured her—she said—that he would arrange to provide for her for the rest of her life. She had provided the necessary household services and emotional support to permit him to successfully pursue his business career; she had performed housekeeping, cleaning, and shopping services and had run the household and raised the children, her own as well as his. When they separated and she was "literally forced out of the house," she was sixty-three years old and had no means or wherewithal for survival. When she sued, he raised the Statute of Frauds' one-year rule as a defense. Is the defense good?*Kozlowski v. Kozlowski*, 395 A.2d 913 (N.J. 1978).
3. Carlson purchased a parcel of real estate that was landlocked. Carlson called his neighbor, Peterson, and asked if he could use an abandoned drive on Peterson's property to travel to his (Carlson's) property from the highway. Peterson said, "Sure, anytime." Later the two became engaged in a dispute, and Peterson blocked the drive. May Carlson enforce Peterson's promise that he could use the drive "anytime"? Why?
4. Silverman, who was elderly and somewhat disabled, lived alone on a farm. Silverman called Burch and said, "Burch, if you will move in with me and help me take care of the farm, it will be yours when I die." Burch did as Silverman requested and on Silverman's death two years later, claimed the farm on the basis of their oral agreement, but the estate resisted. Is Burch entitled to the farm? Why?
5. On February 12, Sally was hired to manage a company for a period of one year. She reported for work on February 26 but was fired two weeks later. She sued the owner of the company for breach of their one-year oral contract. May she recover? Why?
6. Baker entered into an oral contract to sell her car to Clyde for $8,600. She delivered the car to Clyde; Clyde inspected it, found no problems, kept it for three days, but then refused to pay and now wants to return the car. Is the contract enforceable? Why?
7. Wayne, a building contractor, built a new house and offered it for sale. A young couple accepted the offer, and the parties entered into an oral agreement covering all the terms of sale. The couple later tried to back out of the agreement. Wayne filed suit, and during the trial, the couple admitted making the contract. Is the contract enforceable? Why?

8. Plaintiff leased commercial space from Defendant for a florist shop. After the lease was signed, Plaintiff learned that the county code allowed only one freestanding sign on the property, and one was already up, advertising Defendant's business. Plaintiff claimed Defendant breached the lease by not providing them space for a sign; Defendant pointed to the lease, paragraph 16 of which provided that "Tenant shall not erect or install any sign…without written consent of the Landlord." But Plaintiff claimed Defendant said during negotiations he could have a sign, evidence Defendant objected to based on the parol evidence rule. Defendant admitted that during negotiations he told Plaintiff that despite paragraph 16, he could have a sign (but not freestanding); that despite language in the lease requiring renovation plans to be in writing, they did not have to be. Defendant also testified that the written form lease he used was not drafted specifically for this property, and that although the lease required attachments of exhibits, there were no attachments. Is Plaintiff barred by the parol evidence rule from showing that Defendant said he could have a freestanding sign?
9. On March 1, 2010, Milton talked to Harriet and, as Harriet claimed, said, "I will hire you as sales manager for one year at a salary of $57,000. You start next Monday, March 8." Harriet agreed. Four months later Milton discharged Harriet and she sued, claiming breach of employment contract. Is the alleged contract enforceable?
10. Al Booth's Inc. sued Boyd-Scarp (a contractor) and James Rathmann for nonpayment following delivery of various appliances to Rathmann's new home being built by Boyd-Scarp. Booth's was aware that Boyd-Scarp was having financial problems and allegedly contacted Rathmann prior to delivery, asking him to guarantee payment. Evidence was adduced that Rathmann orally promised to pay in the event the builder did not and that the goods were then delivered. Rathmann denied any such promise, raising the Statute of Frauds, and Al Booth's sued. Will Al Booth's prevail?

SELF-TEST QUESTIONS

1. As a general rule
    1. contracts do not have to be in writing to be enforceable
    2. contracts that can be performed in one year must be in writing
    3. all oral contracts are unenforceable
    4. a suretyship agreement need not be in writing to be enforceable
2. An exception to the UCC Statute of Frauds provision is
    1. the one-year rule
    2. the reply doctrine
    3. executor agreements
    4. all of the above
3. Rules that require certain contracts to be in writing are found in
    1. state statutory law
    2. the UCC
    3. the Statute of Frauds
    4. all of the above
4. The parol evidence rule
    1. applies only when contracts must be in writing
    2. does not apply to real estate contracts
    3. states that a written contract discharges all prior or contemporaneous promises that add to, vary, or conflict with it
    4. is designed to hold parties to promises they made during negotiations
5. A merger clause
    1. is required when goods are sold for $500 or more
    2. is used when two parcels of real estate are sold in the same contract
    3. invalidates a contract for the sale of securities
    4. evidences an intention that the written contract is the parties' full understanding

SELF-TEST AnswerS

1. a
2. b
3. d
4. c
5. d

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SECTION OVERVIEW

11.7: Third-Party Rights

Learning Objectives

After reading this chapter, you should understand the following:

1. How an assignment of contract rights is made and how it operates
2. What a delegation of duties is and how it operates
3. Under what circumstances a person not a party to a contract can enforce it

To this point, we have focused on the rights and duties of the two parties to the contract. In this chapter, we turn our attention to contracts in which outsiders acquire rights or duties or both. Three types of outsiders merit examination:

1. Assignees (outsiders who acquire rights after the contract is made)
2. Delegatees (outsiders who acquire duties after the contract is made)
3. Third-party beneficiaries (outsiders who acquire rights when the original contract is made)

11.7.1: Assignment of Contract Rights

11.7.2: Delegation of Duties

11.7.3: Third-Party Beneficiaries

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11.7.1: Assignment of Contract Rights

LEARNING OBJECTIVES

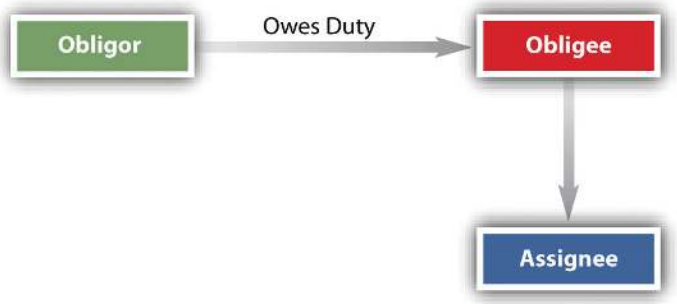
1. Understand what an assignment is and how it is made.
2. Recognize the effect of the assignment.
3. Know when assignments are not allowed.
4. Understand the concept of assignor's warranties.

The Concept of a Contract Assignment

Contracts create rights and duties. By an **assignment**, an **obligee** (one who has the right to receive a contract benefit) transfers a right to receive a contract benefit owed by the **obligor** (the one who has a duty to perform) to a third person (**assignee**); the obligee then becomes an **assignor** (one who makes an assignment).

The Restatement (Second) of Contracts defines an assignment of a right as "a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires the right to such performance."Restatement (Second) of Contracts, Section 317(1). The one who makes the assignment is both an obligee and a transferor. The assignee acquires the right to receive the contractual obligations of the promisor, who is referred to as the obligor (see Figure 14.1 "Assignment of Rights"). The assignor may assign any right unless (1) doing so would materially change the obligation of the obligor, materially burden him, increase his risk, or otherwise diminish the value to him of the original contract; (2) statute or public policy forbids the assignment; or (3) the contract itself precludes assignment. The common law of contracts and Articles 2 and 9 of the Uniform Commercial Code (UCC) govern assignments. Assignments are an important part of business financing, such as factoring. A **factor** is one who purchases the right to receive income from another.

Figure 14.1 Assignment of Rights



Method of Assignment

Manifesting Assent

To effect an assignment, the assignor must make known his intention to transfer the rights to the third person. The assignor's intention must be that the assignment is effective without need of any further action or any further manifestation of intention to make the assignment. In other words, the assignor must intend and understand himself to be making the assignment then and there; he is not promising to make the assignment sometime in the future.

Under the UCC, any assignments of rights in excess of $5,000 must be in writing, but otherwise, assignments can be oral and consideration is not required: the assignor could assign the right to the assignee for nothing (not likely in commercial transactions, of course). Mrs. Franklin has the right to receive $750 a month from the sale of a house she formerly owned; she assigns the right to receive the money to her son Jason, as a gift. The assignment is good, though such a gratuitous assignment is usually revocable, which is not the case where consideration has been paid for an assignment.

Acceptance and Revocation

For the assignment to become effective, the assignee must manifest his acceptance under most circumstances. This is done automatically when, as is usually the case, the assignee has given consideration for the assignment (i.e., there is a contract between the assignor and the assignee in which the assignment is the assignor's consideration), and then the assignment is not revocable without the assignee's consent. Problems of acceptance normally arise only when the assignor intends the assignment as a gift. Then, for the assignment to be irrevocable, either the assignee must manifest his acceptance or the assignor must notify the assignee in writing of the assignment.

Notice

Notice to the obligor is not required, but an obligor who renders performance to the assignor without notice of the assignment (that performance of the contract is to be rendered now to the assignee) is discharged. Obviously, the assignor cannot then keep the consideration he has received; he owes it to the assignee. But if notice is given to the obligor and she performs to the assignor anyway, the assignee can recover from either the obligor or the assignee, so the obligor could have to perform twice, as in Exercise 2 at the chapter's end, *Aldana v. Colonial Palms Plaza*. Of course, an obligor who receives notice of the assignment from the assignee will want to be sure the assignment has really occurred. After all, anybody could waltz up to the obligor and say, "I'm the assignee of your contract with the bank. From now on, pay me the $500 a month, not the bank." The obligor is entitled to verification of the assignment.

Effect of Assignment

General Rule

An assignment of rights effectively makes the assignee **stand in the shoes of** the assignor. He gains all the rights against the obligor that the assignor had, but no more. An obligor who could avoid the assignor's attempt to enforce the rights could avoid a similar attempt by the assignee. Likewise, under UCC Section 9-318(1), the assignee of an account is subject to all terms of the contract between the debtor and the creditor-assignor. Suppose Dealer sells a car to Buyer on a contract where Buyer is to pay $300 per month and the car is warranted for 50,000 miles. If the car goes on the fritz before then and Dealer won't fix it, Buyer could fix it for, say, $250 and deduct that $250 from the amount owed Dealer on the next installment (called a setoff). Now, if Dealer assigns the contract to Assignee, Assignee stands in Dealer's shoes, and Buyer could likewise deduct the $250 from payment to Assignee.

Exceptions

The "shoe rule" does not apply to two types of assignments. First, it is inapplicable to the sale of a negotiable instrument to a holder in due course. Second, the rule may be waived: under the UCC and at common law, the obligor may agree in the original contract not to raise defenses against the assignee that could have been raised against the assignor.Uniform Commercial Code, Section 9-206. While a **waiver of defenses** makes the assignment more marketable from the assignee's point of view, it is a situation fraught with peril to an obligor, who may sign a contract without understanding the full import of the waiver. Under the waiver rule, for example, a farmer who buys a tractor on credit and discovers later that it does not work would still be required to pay a credit company that purchased the contract; his defense that the merchandise was shoddy would be unavailing (he would, as used to be said, be "having to pay on a dead horse").

For that reason, there are various rules that limit both the holder in due course and the waiver rule. Certain defenses, the so-called real defenses (infancy, duress, and fraud in the execution, among others), may always be asserted. Also, the waiver clause in the contract must have been presented in good faith, and if the assignee has actual notice of a defense that the buyer or lessee could raise, then the waiver is ineffective. Moreover, in consumer transactions, the UCC's rule is subject to state laws that protect consumers (people buying things used primarily for personal, family, or household purposes), and many states, by statute or court decision, have made waivers of defenses ineffective in such **consumer transactions**. Federal Trade Commission regulations also affect the ability of many sellers to pass on rights to assignees free of defenses that buyers could raise against them. Because of these various limitations on the holder in due course and on waivers, the "shoe rule" will not govern in consumer transactions and, if there are real defenses or the assignee does not act in good faith, in business transactions as well.

When Assignments Are Not Allowed

The general rule—as previously noted—is that most contract rights are assignable. But there are exceptions. Five of them are noted here.

Material Change in Duties of the Obligor

When an assignment has the effect of materially changing the duties that the obligor must perform, it is ineffective. Changing the party to whom the obligor must make a payment is not a material change of duty that will defeat an assignment, since that, of course, is the purpose behind most assignments. Nor will a minor change in the duties the obligor must perform defeat the assignment.

Several residents in the town of Centerville sign up on an annual basis with the Centerville *Times* to receive their morning paper. A customer who is moving out of town may assign his right to receive the paper to someone else within the delivery route. As long as the assignee pays for the paper, the assignment is effective; the only relationship the obligor has to the assignee is a routine delivery in exchange for payment. Obligors can consent in the original contract, however, to a subsequent assignment of duties. Here is a clause from the World Team Tennis League contract: "It is mutually agreed that the Club shall have the right to sell, assign, trade and transfer this contract to another Club in the League, and the Player agrees to accept and be bound by such sale, exchange, assignment or transfer and to faithfully perform and carry out his or her obligations under this contract as if it had been entered into by the Player and such other Club." Consent is not necessary when the contract does not involve a personal relationship.

Assignment of Personal Rights

When it matters to the obligor who receives the benefit of his duty to perform under the contract, then the receipt of the benefit is a **personal right** that cannot be assigned. For example, a student seeking to earn pocket money during the school year signs up to do research work for a professor she admires and with whom she is friendly. The professor assigns the contract to one of his colleagues with whom the student does not get along. The assignment is ineffective because it matters to the student (the obligor) who the person of the assignee is. An insurance company provides auto insurance covering Mohammed Kareem, a sixty-five-year-old man who drives very carefully. Kareem cannot assign the contract to his seventeen-year-old grandson because it matters to the insurance company who the person of its insured is. Tenants usually cannot assign (sublet) their tenancies without the landlord's permission because it matters to the landlord who the person of their tenant is. Section 14.4.1 "Nonassignable Rights", *Nassau Hotel Co. v. Barnett & Barse Corp.*, is an example of the nonassignability of a personal right.

Assignment Forbidden by Statute or Public Policy

Various federal and state laws prohibit or regulate some contract assignment. The assignment of future wages is regulated by state and federal law to protect people from improvidently denying themselves future income because of immediate present financial difficulties. And even in the absence of statute, public policy might prohibit some assignments.

Contracts That Prohibit Assignment

Assignability of contract rights is useful, and prohibitions against it are not generally favored. Many contracts contain general language that prohibits assignment of rights or of "the contract." Both the Restatement and UCC Section 2-210(3) declare that in the absence of any contrary circumstances, a provision in the agreement that prohibits assigning "the contract" bars "only the delegation to the assignee of the assignor's performance."Restatement (Second) of Contracts, Section 322. In other words, unless the contract specifically prohibits assignment of any of its terms, a party is free to assign anything except his or her own duties.

Even if a contractual provision explicitly prohibits it, a right to damages for breach of the whole contract is assignable under UCC Section 2-210(2) in contracts for goods. Likewise, UCC Section 9-318(4) invalidates any contract provision that prohibits assigning sums already due or to become due. Indeed, in some states, at common law, a clause specifically prohibiting assignment will fail. For example, the buyer and the seller agree to the sale of land and to a provision barring assignment of the rights under the contract. The buyer pays the full price, but the seller refuses to convey. The buyer then assigns to her friend the right to obtain title to the land from the seller. The latter's objection that the contract precludes such an assignment will fall on deaf ears in some states; the assignment is effective, and the friend may sue for the title.

Future Contracts

The law distinguishes between assigning future rights under an existing contract and assigning rights that will arise from a future contract. Rights contingent on a future event can be assigned in exactly the same manner as existing rights, as long as the contingent rights are already incorporated in a contract. Ben has a long-standing deal with his neighbor, Mrs. Robinson, to keep the latter's walk clear of snow at twenty dollars a snowfall. Ben is saving his money for a new printer, but when he is eighty dollars shy of the purchase price, he becomes impatient and cajoles a friend into loaning him the balance. In return, Ben assigns his friend the earnings from the next four snowfalls. The assignment is effective. However, a right that will arise from a future contract cannot be the subject of a present assignment.

Partial Assignments

An assignor may assign part of a contractual right, but only if the obligor can perform that part of his contractual obligation separately from the remainder of his obligation. Assignment of part of a payment due is always enforceable. However, if the obligor objects, neither the assignor nor the assignee may sue him unless both are party to the suit. Mrs. Robinson owes Ben one hundred dollars. Ben assigns fifty dollars of that sum to his friend. Mrs. Robinson is perplexed by this assignment and refuses to pay until the situation is explained to her satisfaction. The friend brings suit against Mrs. Robinson. The court cannot hear the case unless Ben is also a party to the suit. This ensures all parties to the dispute are present at once and avoids multiple lawsuits.

Successive Assignments

It may happen that an assignor assigns the same interest twice (see Figure 14.2 "Successive Assignments"). With certain exceptions, the first assignee takes precedence over any subsequent assignee. One obvious exception is when the first assignment is ineffective or revocable. A subsequent assignment has the effect of revoking a prior assignment that is ineffective or revocable. Another exception: if in good faith the subsequent assignee gives consideration for the assignment and has no knowledge of the prior assignment, he takes precedence whenever he obtains payment from, performance from, or a judgment against the obligor, or whenever he receives some tangible evidence from the assignor that the right has been assigned (e.g., a bank deposit book or an insurance policy).

Some states follow the different English rule: the first assignee to give notice to the obligor has priority, regardless of the order in which the assignments were made. Furthermore, if the assignment falls within the filing requirements of UCC Article 9 (see Chapter 22 "Secured Transactions and Suretyship"), the first assignee to file will prevail.

Figure 14.2 Successive Assignments



Assignor's Warranties

An assignor has legal responsibilities in making assignments. He cannot blithely assign the same interests pell-mell and escape liability. Unless the contract explicitly states to the contrary, a person who assigns a right for value makes certain **assignor's warranties** to the assignee: that he will not upset the assignment, that he has the right to make it, and that there are no defenses that will defeat it. However, the assignor does not guarantee payment; assignment does not by itself amount to a warranty that the obligor is solvent or will perform as agreed in the original contract. Mrs. Robinson owes Ben fifty dollars. Ben assigns this sum to his friend. Before the friend collects, Ben releases Mrs. Robinson from her obligation. The friend may sue Ben for the fifty dollars. Or again, if Ben represents to his friend that Mrs. Robinson owes him (Ben) fifty dollars and assigns his friend that amount, but in fact Mrs. Robinson does not owe Ben that much, then Ben has breached his assignor's warranty. The assignor's warranties may be express or implied.

KEY TAKEAWAY

Generally, it is OK for an obligee to assign the right to receive contractual performance from the obligor to a third party. The effect of the assignment is to make the assignee stand in the shoes of the assignor, taking all the latter's rights and all the defenses against nonperformance that the obligor might raise against the assignor. But the obligor may agree in advance to waive defenses against the assignee, unless such waiver is prohibited by law.

There are some exceptions to the rule that contract rights are assignable. Some, such as personal rights, are not circumstances where the obligor's duties would materially change, cases where assignability is forbidden by statute or public policy, or, with some limits, cases where the contract itself prohibits assignment. Partial assignments and successive assignments can happen, and rules govern the resolution of problems arising from them.

When the assignor makes the assignment, that person makes certain warranties, express or implied, to the assignee, basically to the effect that the assignment is good and the assignor knows of no reason why the assignee will not get performance from the obligor.

EXERCISES

1. If Able makes a valid assignment to Baker of his contract to receive monthly rental payments from Tenant, how is Baker's right different from what Able's was?
2. Able made a valid assignment to Baker of his contract to receive monthly purchase payments from Carr, who bought an automobile from Able. The car had a 180-day warranty, but the car malfunctioned within that time. Able had quit the auto business entirely. May Carr withhold payments from Baker to offset the cost of needed repairs?
3. Assume in the case in Exercise 2 that Baker knew Able was selling defective cars just before his (Able's) withdrawal from the auto business. How, if at all, does that change Baker's rights?
4. Why are leases generally not assignable? Why are insurance contracts not assignable?

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11.7.2: Delegation of Duties

LEARNING OBJECTIVES

1. Know what a delegation of duty is.
2. Recognize how liability remains on the delegator following a delegation.
3. Understand what duties may not be delegated.

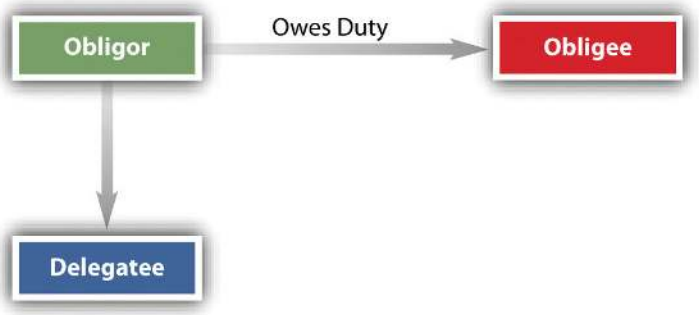
Basic Rules Regarding Delegation

General Rule

To this point, we have been considering the assignment of the assignor's rights (usually, though not solely, to money payments). But in every contract, a right connotes a corresponding duty, and these may be delegated. A **delegation** is the transfer to a third party of the duty to perform under a contract. The one who delegates is the **delegator**. Because most obligees are also obligors, most assignments of rights will simultaneously carry with them the delegation of duties. Unless public policy or the contract itself bars the delegation, it is legally enforceable.

In most states, at common law, duties must be expressly delegated. Under Uniform Commercial Code (UCC) Section 2-210(4) and in a minority of states at common law (as illustrated in Section 14.4.2 "Assignment Includes Delegation", *Rose v. Vulcan Materials Co.*), an assignment of "the contract" or of "all my rights under the contract" is not only an assignment of rights but also a delegation of duties to be performed; by accepting the assignment, the **delegatee** (one to whom the delegation is made) implies a promise to perform the duties. (See Figure 14.3 "Delegation of Duties")

Figure 14.3 Delegation of Duties



Effect on Obligor

An obligor who delegates a duty (and becomes a delegator) does not thereby escape liability for performing the duty himself. The obligee of the duty may continue to look to the obligor for performance unless the original contract specifically provides for substitution by delegation. This is a big difference between assignment of contract rights and delegation of contract duties: in the former, the assignor is discharged (absent breach of assignor's warranties); in the latter, the delegator remains liable. The obligee (again, the one to whom the duty to perform flows) may also, in many cases, look to the delegatee, because the obligee becomes an intended beneficiary of the contract between the obligor and the delegatee, as discussed in Section 14.3 "Third-Party Beneficiaries". Of course, the obligee may subsequently agree to accept the delegatee and discharge the obligor from any further responsibility for performing the duty. A contract among three persons having this effect is called a **novation**; it is a new contract. Fred sells his house to Lisa, who assumes his mortgage. Fred, in other words, has delegated the duty to pay the bank to Lisa. If Lisa defaults, Fred continues to be liable to the bank, unless in the original mortgage agreement a provision specifically permitted any purchaser to be substituted without recourse to Fred, or unless the bank subsequently accepts Lisa and discharges Fred.

Nondelegable Duties

Personal Services

Personal services are not delegable. If the contract is such that the promisee expects the obligor personally to perform the duty, the obligor may not delegate it. Suppose the Catskill Civic Opera Association hires a famous singer to sing in its production of *Carmen* and the singer delegates the job to her understudy. The delegation is ineffective, and performance by the understudy does not absolve the famous singer of liability for breach.

Many duties may be delegated, however. Indeed, if they could not be delegated, much of the world's work would not get done. If you hire a construction company and an architect to design and build your house to certain specifications, the contractor may in turn hire individual craftspeople—plumbers, electricians, and the like—to do these specialized jobs, and as long as they are performed to specification, the contract terms will have been met. If you hired an architecture firm, though, you might not be contracting for the specific services of a particular individual in that firm.

Public Policy

Public policy may prohibit certain kinds of delegations. A public official, for example, may not delegate the duties of her office to private citizens, although various statutes generally permit the delegation of duties to her assistants and subordinates.

Delegations Barred by Contract

As we have already noted, the contract itself may bar assignment. The law generally disfavors restricting the right to assign a benefit, but it will uphold a contract provision that prohibits delegation of a duty. Thus, as we have seen, UCC Section 2-210(3) states that in a contract for sale of goods, a provision against assigning "the contract" is to be construed only as a prohibition against delegating the duties.

KEY TAKEAWAY

The duty to perform a contractual obligation may usually be delegated to a third party. Such delegation, however, does not discharge the delegator, who remains liable on the contract absent a novation.

Some duties may not be delegated: personal services cannot be, and public policy or the contract itself may bar delegation.

EXERCISES

1. What is the difference between an assignment and a delegation?
2. Under what circumstances is the delegator discharged from liability on the contract?

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11.7.3: Third-Party Beneficiaries

LEARNING OBJECTIVES

1. Know what a third-party beneficiary is, and what the types of such beneficiaries are.
2. Recognize the rights obtained by third-party beneficiaries.
3. Understand when the public might be a third-party beneficiary of government contracts.

The fundamental issue with third-party beneficiaries gets to this: can a person who is not a party to a contract sue to enforce its terms?

The General Rule

The general rule is this: persons not a party to a contract cannot enforce its terms; they are said to lack **privity**, a private, face-to-face relationship with the contracting parties. But if the persons are intended to benefit from the performance of a contract between others, then they can enforce it: they are intended beneficiaries.

Two Types of Third-Party Beneficiaries

In the vocabulary of the Restatement, a third person whom the parties to the contract intend to benefit is an **intended beneficiary**—that is, one who is entitled under the law of contracts to assert a right arising from a contract to which he or she is not a party. There are two types of intended beneficiaries.

Creditor Beneficiary

A **creditor beneficiary** is one to whom the promisor agrees to pay a debt of the promisee. For example, a father is bound by law to support his child. If the child's uncle (the promisor) contracts with the father (the promisee) to furnish support for the child, the child is a creditor beneficiary and could sue the uncle. Or again, suppose Customer pays Ace Dealer for a new car, and Ace delegates the duty of delivery to Beta Dealer. Ace is now a debtor: he owes Customer something: a car. Customer is a creditor; she is owed something: a car. When Beta performs under his delegated contract with Ace, Beta is discharging the debt Ace owes to Customer. Customer is a creditor beneficiary of Dealers' contract and could sue either one for nondelivery. She could sue Ace because she made a contract with him, and she could sue Beta because—again—she was intended to benefit from the performance of Dealers' agreement.

Donee Beneficiary

The second type of intended beneficiary is a **donee beneficiary**. When the promisee is not indebted to the third person but intends for him or her to have the benefit of the promisor's performance, the third person is a donee beneficiary (and the promise is sometimes called a gift promise). For example, an insurance company (the promisor) promises to its policyholder (the promisee), in return for a premium, to pay $100,000 to his wife on his death; this makes the wife a donee beneficiary (see Figure 14.1 "Assignment of Rights"). The wife could sue to enforce the contract although she was not a party to it. Or if Able makes a contract with Woodsman for the latter to cut the trees in Able's backyard as a Christmas gift to Able's uphill Neighbor (so that Neighbor will have a view), Neighbor could sue Woodsman for breach of the contract.

If a person is not an intended beneficiary—not a creditor or donee beneficiary—then he or she is said to be only an **incidental beneficiary**, and that person has no rights. So if Able makes the contract with Woodsman not to benefit Neighbor but for Able's own benefit, the fact that the tree removal would benefit Neighbor does not make Neighbor an intended beneficiary.

The beneficiary's rights are always limited by the terms of the contract. A failure by the promisee to perform his part of the bargain will terminate the beneficiary's rights if the promisee's lapse terminates his own rights, absent language in the contract to the contrary. If Able makes the contract as a gift to Neighbor but doesn't make the required down payment to Woodsman, Neighbor's claim fails. In a suit by the beneficiary, the promisor may avail himself of any defense he could have asserted against the promisee. Woodsman may defend himself against Neighbor's claim that Woodsman did not do the whole job by showing that Able didn't make full payment for the work.

Modification of the Beneficiary's Rights

Conferring rights on an intended beneficiary is relatively simple. Whether his rights can be modified or extinguished by subsequent agreement of the promisor and promisee is a more troublesome issue. The general rule is that the beneficiary's rights may be altered as long as there has been no **vesting of rights** (the rights have not taken effect). The time at which the beneficiary's rights vest differs among jurisdictions: some say immediately, some say when the beneficiary assents to the receipt of the contract right, some say the beneficiary's rights don't vest until she has detrimentally relied on the right. The Restatement says that unless the contract provides that its terms cannot be changed without the beneficiary's consent, the parties may change or rescind the benefit unless the beneficiary has sued on the promise, has detrimentally relied, or has assented to the promise at the request of one of the parties.Restatement (Second) of Contracts, Section 311. Some contracts provide that the benefit never vests; for example, standard insurance policies today reserve to the insured the right to substitute beneficiaries, to borrow against the policy, to assign it, and to surrender it for cash.

Government Contracts

The general rule is that members of the public are only incidental beneficiaries of contracts made by the government with a contractor to do public works. It is not illogical to see a contract between the government and a company pledged to perform a service on behalf of the public as one creating rights in particular members of the public, but the consequences of such a view could be extremely costly because everyone has some interest in public works and government services.

A restaurant chain, hearing that the county was planning to build a bridge that would reroute commuter traffic, might decide to open a restaurant on one side of the bridge; if it let contracts for construction only to discover that the bridge was to be delayed or canceled, could it sue the county's contractor? In general, the answer is that it cannot. A promisor under contract to the government is not liable for the consequential damages to a member of the public arising from its failure to perform (or from a faulty performance) unless the agreement specifically calls for such liability or unless the promisee (the government) would itself be liable and a suit directly against the promisor would be consistent with the contract terms and public policy. When the government retains control over litigation or settlement of claims, or when it is easy for the public to insure itself against loss, or when the number and amount of claims would be excessive, the courts are less likely to declare individuals to be intended beneficiaries. But the service to be provided can be so tailored to the needs of particular persons that it makes sense to view them as intended beneficiaries—in the case, for example, of a service station licensed to perform emergency road repairs, as in Section 14.4.3 "Third party Beneficiaries and Foreseeable Damages", *Kornblut v. Chevron Oil Co.*

KEY TAKEAWAY

Generally, a person who is not a party to a contract cannot sue to enforce its terms. The exception is if the person is an intended beneficiary, either a creditor beneficiary or a donee beneficiary. Such third parties can enforce the contract made by others but only get such rights as the contract provides, and beneficiaries are subject to defenses that could be made against their benefactor.

The general rule is that members of the public are not intended beneficiaries of contracts made by the government, but only incidental beneficiaries.

EXERCISES

1. What are the two types of intended beneficiaries?
2. Smith contracted to deliver a truck on behalf of Truck Sales to Byers, who had purchased it from Truck Sales. Smith was entitled to payment by Byers for the delivery. The truck was defective. May Byers withhold payment from Smith to offset the repair costs?
3. Why is the public not usually considered an intended beneficiary of contracts made by the government?

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11.7.4: Cases

Nonassignable Rights

Nassau Hotel Co. v. Barnett & Barse Corporation

147 N.Y.S. 283 (1914)

McLaughlin, J.

Plaintiff owns a hotel at Long Beach, L. I., and on the 21st of November, 1912, it entered into a written agreement with the individual defendants Barnett and Barse to conduct the same for a period of years.…Shortly after this agreement was signed, Barnett and Barse organized the Barnett & Barse Corporation with a capital stock of $10,000, and then assigned the agreement to it. Immediately following the assignment, the corporation went into possession and assumed to carry out its terms. The plaintiff thereupon brought this action to cancel the agreement and to recover possession of the hotel and furniture therein, on the ground that the agreement was not assignable. [Summary judgment in favor of the plaintiff, defendant corporation appeals.]

The only question presented is whether the agreement was assignable. It provided, according to the allegations of the complaint, that the plaintiff leased the property to Barnett and Barse with all its equipment and furniture for a period of three years, with a privilege of five successive renewals of three years each. It expressly provided:

'That said lessees…become responsible for the operation of the said hotel and for the upkeep and maintenance thereof and of all its furniture and equipment in accordance with the terms of this agreement and the said lessees shall have the exclusive possession, control and management thereof. * * * The said lessees hereby covenant and agree that they will operate the said hotel at all times in a first-class business-like manner, keep the same open for at least six (6) months of each year, * * *' and 'in lieu of rental the lessor and lessees hereby covenant and agree that the gross receipts of such operation shall be, as received, divided between the parties hereto as follows: (a) Nineteen per cent. (19%) to the lessor. * * * In the event of the failure of the lessees well and truly to perform the covenants and agreements herein contained,' they should be liable in the sum of $50,000 as liquidated damages. That 'in consideration and upon condition that the said lessees shall well and faithfully perform all the covenants and agreements by them to be performed without evasion or delay the said lessor for itself and its successors, covenants and agrees that the said lessees, their legal representatives and assigns may at all times during said term and the renewals thereof peaceably have and enjoy the said demised premises.' And that 'this agreement shall inure to the benefit of and bind the respective parties hereto, their personal representatives, successors and assigns.'

The complaint further alleges that the agreement was entered into by plaintiff in reliance upon the financial responsibility of Barnett and Barse, their personal character, and especially the experience of Barnett in conducting hotels; that, though he at first held a controlling interest in the Barnett & Barse Corporation, he has since sold all his stock to the defendant Barse, and has no interest in the corporation and no longer devotes any time or attention to the management or operation of the hotel.

…[C]learly…the agreement in question was personal to Barnett and Barse and could not be assigned by them without the plaintiff's consent. By its terms the plaintiff not only entrusted them with the care and management of the hotel and its furnishings —valued, according to the allegations of the complaint, at more than $1,000,000—but agreed to accept as rental or compensation a percentage of the gross receipts. Obviously, the receipts depended to a large extent upon the management, and the care of the property upon the personal character and responsibility of the persons in possession. When the whole agreement is read, it is apparent that the plaintiff relied, in making it, upon the personal covenants of Barnett and Barse. They were financially responsible. As already said, Barnett had had a long and successful experience in managing hotels, which was undoubtedly an inducing cause for plaintiff's making the agreement in question and for personally obligating them to carry out its terms.

It is suggested that because there is a clause in the agreement to the effect that it should 'inure to the benefit of and bind the respective parties hereto, their personal representatives and assigns,' that Barnett and Barse had a right to assign it to the corporation. But the intention of the parties is to be gathered, not from one clause, but from the entire instrument [Citation] and when it is thus read it clearly appears that Barnett and Barse were to personally carry out the terms of the agreement and did not have a right to assign it. This follows from the language used, which shows that a personal trust or confidence was reposed by the plaintiff in Barnett and Barse when the agreement was made.

In [Citation] it was said: “Rights arising out of contract cannot be transferred if they…involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.”

This rule was applied in [Citation] the court holding that the plaintiff—the assignee—was not only technically, but substantially, a different entity from its predecessor, and that the defendant was not obliged to entrust its money collected on the sale of the presses to the responsibility of an entirely different corporation from that with which it had contracted, and that the contract could not be assigned to the plaintiff without the assent of the other party to it.

The reason which underlies the basis of the rule is that a party has the right to the benefit contemplated from the character, credit, and substance of him with whom he contracts, and in such case he is not bound to recognize…an assignment of the contract.

The order appealed from, therefore, is affirmed.

CASE QUESTIONS

1. The corporation created to operate the hotel was apparently owned and operated by the same two men the plaintiff leased the hotel to in the first place. What objection would the plaintiff have to the corporate entity—actually, of course, a legal fiction—owning and operating the hotel?
2. The defendants pointed to the clause about the contract inuring to the benefit of the parties “and assigns.” So the defendants assigned the contract. How could that not be allowed by the contract’s own terms?
3. What is the controlling rule of law upon which the outcome here depends?

Assignment Includes Delegation

Rose v. Vulcan Materials Co.

194 S.E.2d 521 (N.C. 1973)

Huskins, J.

…Plaintiff [Rose], after leasing his quarry to J. E. Dooley and Son, Inc., promised not to engage in the rock-crushing business within an eight-mile radius of [the city of] Elkin for a period of ten years. In return for this promise, J. E. Dooley and Son, Inc., promised, among other things, to furnish plaintiff stone f.o.b. the quarry site at Cycle, North Carolina, at stipulated prices for ten years.…

By a contract effective 23 April 1960, Vulcan Materials Company, a corporation…, purchased the stone quarry operations and the assets and obligations of J. E. Dooley and Son, Inc.…[Vulcan sent Rose a letter, part of which read:]

Mr. Dooley brought to us this morning the contracts between you and his companies, copies of which are attached. This is to advise that Vulcan Materials Company assumes all phases of these contracts and intends to carry out the conditions of these contracts as they are stated.

In early 1961 Vulcan notified plaintiff that it would no longer sell stone to him at the prices set out in [the agreement between Rose and Dooley] and would thereafter charge plaintiff the same prices charged all of its other customers for stone. Commencing 11 May 1961, Vulcan raised stone prices to the plaintiff to a level in excess of the prices specified in [the Rose-Dooley agreement].

At the time Vulcan increased the prices of stone to amounts in excess of those specified in [the Rose-Dooley contract], plaintiff was engaged in his ready-mix cement business, using large quantities of stone, and had no other practical source of supply. Advising Vulcan that he intended to sue for breach of contract, he continued to purchase stone from Vulcan under protest.…

The total of these amounts over and above the prices specified in [the Rose-Dooley contract] is $25,231.57, [about $152,000 in 2010 dollars] and plaintiff seeks to recover said amount in this action.

The [Rose-Dooley] agreement was an executory bilateral contract under which plaintiff’s promise not to compete for ten years gained him a ten-year option to buy stone at specified prices. In most states, the assignee of an executory bilateral contract is not liable to anyone for the nonperformance of the assignor’s duties thereunder unless he expressly promises his assignor or the other contracting party to perform, or ‘assume,’ such duties.…These states refuse to imply a promise to perform the duties, but if the assignee expressly promises his assignor to perform, he is liable to the other contracting party on a third-party beneficiary theory.

And, if the assignee makes such a promise directly to the other contracting party upon a consideration, of course he is liable to him thereon. [Citation]

A minority of states holds that the assignee of an executory bilateral contract under a general assignment becomes not only assignee of the rights of the assignor but also delegatee of his duties; and that, absent a showing of contrary intent, the assignee impliedly promises the assignor that he will perform the duties so delegated. This rule is expressed in Restatement, Contracts, s 164 (1932) as follows:

(1) Where a party under a bilateral contract which is at the time wholly or partially executory on both sides purports to assign the whole contract, his action is interpreted, in the absence of circumstances showing a contrary intention, as an assignment of the assignor's rights under the contract and a delegation of the performance of the assignor's duties.

(2) Acceptance by the assignee of such an assignment is interpreted, in the absence of circumstances showing a contrary intention, as both an assent to become an assignee of the assignor's rights and as **a promise to the assignor to assume the performance of the assignor's duties**.' (emphasis added)

We…adopt the Restatement rule and expressly hold that the assignee under a general assignment of an executory bilateral contract, in the absence of circumstances showing a contrary intention, becomes the delegatee of his assignor's duties and impliedly promises his assignor that he will perform such duties.

The rule we adopt and reaffirm here is regarded as the more reasonable view by legal scholars and textwriters. Professor Grismore says:

It is submitted that the acceptance of an assignment in this form does presumptively import a tacit promise on the part of the assignee to assume the burdens of the contract, and that this presumption should prevail in the absence of the clear showing of a contrary intention. The presumption seems reasonable in view of the evident expectation of the parties. The assignment on its face indicates an intent to do more than simply to transfer the benefits assured by the contract. It purports to transfer the contract as a whole, and since the contract is made up of both benefits and burdens both must be intended to be included.…Grismore, Is the Assignee of a Contract Liable for the Nonperformance of Delegated Duties? 18 Mich.L.Rev. 284 (1920).

In addition, with respect to transactions governed by the Uniform Commercial Code, an assignment of a contract in general terms is a delegation of performance of the duties of the assignor, and its acceptance by the assignee constitutes a promise by him to perform those duties. Our holding in this case maintains a desirable uniformity in the field of contract liability.

We further hold that the other party to the original contract may sue the assignee as a third-party beneficiary of his promise of performance which he impliedly makes to his assignor, under the rule above laid down, by accepting the general assignment. *Younce v. Lumber Co.*, [Citation] (1908), holds that where the assignee makes an express promise of performance to his assignor, the other contracting party may sue him for breach thereof. We see no reason why the same result should not obtain where the assignee breaches his promise of performance implied under the rule of Restatement s 164. 'That the assignee is liable at the suit of the third party where he expressly assumes and promises to perform delegated duties has already been decided in a few cases (citing Younce). If an express promise will support such an action it is difficult to see why a tacit promise should not have the same effect.' Grismore, supra. Parenthetically, we note that such is the rule under the Uniform Commercial Code, [2-210].

We now apply the foregoing principles to the case at hand. The contract of 23 April 1960, between defendant and J. E. Dooley and Son, Inc., under which, as stipulated by the parties, 'the defendant purchased the assets and obligations of J. E. Dooley and Son, Inc.,' was a general assignment of all the assets and obligations of J. E. Dooley and Son, Inc., including those under [the Rose-Dooley contract]. When defendant accepted such assignment it thereby became delegatee of its assignor's duties under it and impliedly promised to perform such duties.

When defendant later failed to perform such duties by refusing to continue sales of stone to plaintiff at the prices specified in [the Rose-Dooley contract], it breached its implied promise of performance and plaintiff was entitled to bring suit thereon as a third-party beneficiary.

The decision…is reversed with directions that the case be certified to the Superior Court of Forsyth County for reinstatement of the judgment of the trial court in accordance with this opinion.

CASE QUESTIONS

1. Why did Rose need the crushed rock from the quarry he originally leased to Dooley?
2. What argument did Vulcan make as to why it should not be liable to sell crushed rock to Rose at the price set out in the Rose-Dooley contract?
3. What rule did the court here announce in deciding that Vulcan was required to sell rock at the price set out in the Rose-Dooley contract? That is, what is the controlling rule of law in this case?

Third party Beneficiaries and Foreseeable Damages

Kornblut v. Chevron Oil Co.

62 A.D.2d 831 (N.Y. 1978)

Hopkins, J.

The plaintiff-respondent has recovered a judgment after a jury trial in the sum of $519,855.98 [about $1.9 million in 2010 dollars] including interest, costs and disbursements, against Chevron Oil Company (Chevron) and Lawrence Ettinger, Inc. (Ettinger) (hereafter collectively referred to as defendants) for damages arising from the death and injuries suffered by Fred Kornblut, her husband. The case went to the jury on the theory that the decedent was the third-party beneficiary of a contract between Chevron and the New York State Thruway Authority and a contract between Chevron and Ettinger.

On the afternoon of an extremely warm day in early August, 1970 the decedent was driving northward on the New York State Thruway. Near Sloatsburg, New York, at about 3:00 p.m., his automobile sustained a flat tire. At the time the decedent was accompanied by his wife and 12-year-old son. The decedent waited for assistance in the 92 degree temperature.

After about an hour a State Trooper, finding the disabled car, stopped and talked to the decedent. The trooper radioed Ettinger, which had the exclusive right to render service on the Thruway under an assignment of a contract between Chevron and the Thruway Authority. Thereafter, other State Troopers reported the disabled car and the decedent was told in each instance that he would receive assistance within 20 minutes.

Having not received any assistance by 6:00 p.m., the decedent attempted to change the tire himself. He finally succeeded, although he experienced difficulty and complained of chest pains to the point that his wife and son were compelled to lift the flat tire into the trunk of the automobile. The decedent drove the car to the next service area, where he was taken by ambulance to a hospital; his condition was later diagnosed as a myocardial infarction. He died 28 days later.

Plaintiff sued, *inter alia*, Chevron and Ettinger alleging in her complaint causes of action sounding in negligence and breach of contract. We need not consider the issue of negligence, since the Trial Judge instructed the jury only on the theory of breach of contract, and the plaintiff has recovered damages for wrongful death and the pain and suffering only on that theory.

We must look, then, to the terms of the contract sought to be enforced. Chevron agreed to provide “rapid and efficient roadside automotive service on a 24-hour basis from each gasoline service station facility for the areas…when informed by the authority or its police personnel of a disabled vehicle on the Thruway”. Chevron’s vehicles are required “to be used and operated in such a manner as will produce adequate service to the public, as determined in the authority’s sole judgment and discretion”. Chevron specifically covenanted that it would have “sufficient roadside automotive service vehicles, equipment and personnel to provide roadside automotive service to disabled vehicles within a maximum of thirty (30) minutes from the time a call is assigned to a service vehicle, subject to unavoidable delays due to extremely adverse weather conditions or traffic conditions.”…

In interpreting the contract, we must bear in mind the circumstances under which the parties bargained. The New York Thruway is a limited access toll highway, designed to move traffic at the highest legal speed, with the north and south lanes separated by green strips. Any disabled vehicle on the road impeding the flow of traffic may be a hazard and inconvenience to the other users. The income realized from tolls is generated from the expectation of the user that he will be able to travel swiftly and smoothly along the Thruway. Consequently, it is in the interest of the authority that disabled vehicles will be repaired or removed quickly to the end that any hazard and inconvenience will be minimized. Moreover, the design and purpose of the highway make difficult, if not impossible, the summoning of aid from garages not located on the Thruway. The movement of a large number of vehicles at high speed creates a risk to the operator of a vehicle who attempts to make his own repairs, as well as to the other users. These

considerations clearly prompted the making of contracts with service organizations which would be located at points near in distance and time on the Thruway for the relief of distressed vehicles.

Thus, it is obvious that, although the authority had an interest in making provision for roadside calls through a contract, there was also a personal interest of the user served by the contract. Indeed, the contract provisions regulating the charges for calls and commanding refunds be paid directly to the user for overcharges, evince a protection and benefit extended to the user only. Hence, in the event of an overcharge, the user would be enabled to sue on the contract to obtain a recovery.…Here the contract contemplates an individual benefit for the breach running to the user.…

By choosing the theory of recovery based on contract, it became incumbent on the plaintiff to show that the injury was one which the defendants had reason to foresee as a probable result of the breach, under the ancient doctrine of Hadley v Baxendale [Citation], and the cases following it…in distinction to the requirement of proximate cause in tort actions.…

The death of the decedent on account of his exertion in the unusual heat of the midsummer day in changing the tire cannot be said to have been within the contemplation of the contracting parties as a reasonably foreseeable result of the failure of Chevron or its assignee to comply with the contract.…

The case comes down to this, then, in our view: though the decedent was the intended beneficiary to sue under certain provisions of the contract—such as the rate specified for services to be rendered—he was not the intended beneficiary to sue for consequential damages arising from personal injury because of a failure to render service promptly. Under these circumstances, the judgment must be reversed and the complaint dismissed, without costs or disbursements.

[Martuscello, J., concurred in the result but opined that the travelling public was not an intended beneficiary of the contract.]

CASE QUESTIONS

1. Chevron made two arguments as to why it should not be liable for Mr. Kornblut's death. What were they?
2. Obviously, when Chevron made the contract with the New York State Thruway Authority, it did not know Mr. Kornblut was going to be using the highway. How could he, then, be an intended beneficiary of the contract?
3. Why was Chevron not found liable for Mr. Kornblut's death when, clearly, had it performed the contract properly, he would not have died?

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11.7.5: Summary and Exercises

Summary

The general rule that the promisee may assign any right has some exceptions—for example, when the promisor's obligation would be materially changed. Of course the contract itself may prohibit assignment, and sometimes statutes preclude it. Knowing how to make the assignment effective and what the consequences of the assignment are on others is worth mastering. When, for example, does the assignee not stand in the assignor's shoes? When may a future right be assigned?

Duties, as well as rights, may be transferred to third parties. Most rights (promises) contained in contracts have corresponding duties (also expressed as promises). Often when an entire contract is assigned, the duties go with it; the transferee is known, with respect to the duties, as the delegatee. The transferor himself does not necessarily escape the duty, however. Moreover, some duties are nondelegable, such as personal promises and those that public policy require to be carried out by a particular official. Without the ability to assign rights and duties, much of the modern economy would grind to a halt.

The parties to a contract are not necessarily the only people who acquire rights or duties under it. One major category of persons acquiring rights is third-party beneficiaries. Only intended beneficiaries acquire rights under the contract, and these are of two types: creditor and donee beneficiaries. The rules for determining whether rights have been conferred are rather straightforward; determining whether rights can subsequently be modified or extinguished is more troublesome. Generally, as long as the contract does not prohibit change and as long as the beneficiary has not relied on the promise, the change may be made.

EXERCISES

1. The Dayton Country Club offered its members various social activities. Some members were entitled, for additional payment, to use the golf course, a coveted amenity. Golfing memberships could not be transferred except upon death or divorce, and there was a long waiting list in this special category; if a person at the top of the list declined, the next in line was eligible. Golfing membership rules were drawn up by a membership committee. Magness and Redman were golfing members. They declared bankruptcy, and the bankruptcy trustee sought, in order to increase the value of their debtors' estates, to assume and sell the golfing memberships to members on the waiting list, other club members, or the general public, provided the persons joined the club. The club asserted that under relevant state law, it was "excused from rendering performance to an entity other than the debtor"—that is, it could not be forced to accept strangers as members. Can these memberships be assigned?
2. Tenant leased premises in Landlord's shopping center, agreeing in the lease "not to assign, mortgage, pledge, or encumber this lease in whole or in part." Under the lease, Tenant was entitled to a construction allowance of up to $11,000 after Tenant made improvements for its uses. Prior to the completion of the improvements, Tenant assigned its right to receive the first $8,000 of the construction allowance to Assignee, who, in turn, provided Tenant $8,000 to finance the construction. Assignee notified Landlord of the assignment, but when the construction was complete, Landlord paid Tenant anyway; when Assignee complained, Landlord pointed to the nonassignment clause. Assignee sued Landlord. Who wins?*Aldana v. Colonial Palms Plaza, Inc.*, 591 So.2d 953 (Fla. Ct. App., 1991).
3. Marian contracted to sell her restaurant to Billings for $400,000. The contract provided that Billings would pay $100,000 and sign a note for the remainder. Billings sold the restaurant to Alice, who agreed to assume responsibility for the balance due on the note held by Marian. But Alice had difficulties and declared bankruptcy. Is Billings still liable on the note to Marian?
4. Yellow Cab contracted with the Birmingham Board of Education to transport physically handicapped students. The contract provided, "Yellow Cab will transport the physically handicapped students of the School System…and furnish all necessary vehicles and personnel and will perform all maintenance and make all repairs to the equipment to keep it in a safe and efficient operating condition at all times."

   Yellow Cab subcontracted with Metro Limousine to provide transportation in connection with its contract with the board. Thereafter, Metro purchased two buses from Yellow Cab to use in transporting the students. DuPont, a Metro employee, was injured when the brakes on the bus that he was driving failed, causing the bus to collide with a tree. DuPont sued Yellow Cab, alleging that under its contract with the board, Yellow Cab had a nondelegable duty to properly maintain the bus so as to keep it in a safe operating condition; that that duty flowed to him as an intended third-party beneficiary of the contract; and that Yellow Cab had breached the contract by failing to properly maintain the bus. Who wins?*DuPont v. Yellow Cab Co. of Birmingham, Inc.*, 565 So.2d 190 (Ala. 1990).

5. Joan hired Groom to attend to her herd of four horses at her summer place in the high desert. The job was too much for Groom, so he told Tony that he (Groom) would pay Tony, who claimed expertise in caring for horses, to take over the job. Tony neglected the horses in hot weather, and one of them needed veterinarian care for dehydration. Is Groom liable?
6. Rensselaer Water Company contracted with the city to provide water for business, domestic, and fire-hydrant purposes. While the contract was in effect, a building caught on fire; the fire spread to Plaintiff's (Moch Co.'s) warehouse, destroying it and its contents. The company knew of the fire but was unable to supply adequate water pressure to put it out. Is the owner of the warehouse able to maintain a claim against the company for the loss?
7. Rusty told Alice that he'd do the necessary overhaul on her classic car for $5,000 during the month of May, and that when the job was done, she should send the money to his son, Jim, as a graduation present. He confirmed the agreement in writing and sent a copy to Jim. Subsequently, Rusty changed his mind. What right has Jim?
8. Fox Brothers agreed to convey to Clayton Canfield Lot 23 together with a one-year option to purchase Lot 24 in a subdivision known as Fox Estates. The agreement contained no prohibitions, restrictions, or limitations against assignments. Canfield paid the $20,000 and took title to Lot 23 and the option to Lot 24. Canfield thereafter assigned his option rights in Lot 24 to the Scotts. When the Scotts wanted to exercise the option, Fox Brothers refused to convey the property to them. The Scotts then brought suit for specific performance. Who wins?
9. Rollins sold Byers, a businessperson, a flatbed truck on a contract; Rollins assigned the contract to Frost, and informed Byers of the assignment. Rollins knew the truck had problems, which he did not reveal to Byers. When the truck needed $3,200 worth of repairs and Rollins couldn't be found, Byers wanted to deduct that amount from payments owed to Frost, but Frost insisted he had a right to payment. Upon investigation, Byers discovered that four other people in the state had experienced similar situations with Rollins and with Frost as Rollins's assignee. What recourse has Byers?
10. Merchants and resort owners in the San Juan Islands in Washington State stocked extra supplies, some perishable, in anticipation of the flood of tourists over Labor Day. They suffered inconvenience and monetary damage due to the union's Labor Day strike of the state ferry system, in violation of its collective bargaining agreement with the state and of a temporary restraining order. The owners sued the union for damages for lost profits, attorney fees, and costs, claiming the union should be liable for intentional interference with contractual relations (the owners' relations with their would-be customers). Do the owners have a cause of action?

SELF-TEST QUESTIONS

1. A creditor beneficiary is
    1. the same as a donee beneficiary
    2. a third-party beneficiary
    3. an incidental beneficiary
    4. none of the above
2. Assignments are not allowed
    1. for rights that will arise from a future contract
    2. when they will materially change the duties that the obligor must perform
    3. where they are forbidden by public policy
    4. for any of the above
3. When an assignor assigns the same interest twice,
    1. the subsequent assignee generally takes precedence
    2. the first assignee generally takes precedence
    3. the first assignee always takes precedence
    4. the assignment violates public policy
4. Factoring
    1. is an example of delegation of duties
    2. involves using an account receivable as collateral for a loan
    3. involves the purchase of a right to receive income from another
    4. is all of the above

5. Personal promises
    1. are always delegable
    2. are generally not delegable
    3. are delegable if not prohibited by public policy
    4. are delegable if not barred by the contract

SELF-TEST AnswerS

1. b
2. d
3. b
4. c
5. b

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SECTION OVERVIEW

11.8: Discharge of Obligations

Learning Objectives

After reading this chapter, you should understand the following:

1. What is meant by discharge of contract obligations
2. How contract obligations are discharged

11.8.1: Discharge of Contract Duties

11.8.2: Cases

11.8.3: Summary and Exercises

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11.8.1: Discharge of Contract Duties

LEARNING OBJECTIVES

1. Understand how performance, partial performance, or no performance may discharge contractual obligations.
2. Recognize what rights accrue to the nonbreaching party when the other side announces, before the time for performance, that performance will not be forthcoming—anticipatory breach.
3. Understand the concept of the right to adequate assurances, and the consequences if no such assurances are forthcoming.

A person is liable to perform agreed-to contract duties until or unless he or she is discharged. If the person fails to perform without being discharged, liability for damages arises. Here we deal with the second-to-the-last of the four broad themes of contract law: how contract duties are discharged.

Discharge by Performance (or Nonperformance) of the Duty

A contract can be discharged by complete performance or material nonperformance of the contractual duty. Note, in passing, that the modern trend at common law (and explicit under the Uniform Commercial Code [UCC], Section 1-203) is that the parties have a **good-faith duty** to perform to each other. There is in every contract "an implied covenant of good faith" (honesty in fact in the transaction) that the parties will deal fairly, keep their promises, and not frustrate the other party's reasonable expectations of what was given and what received.

Full Performance

Full performance of the contractual obligation discharges the duty. If Ralph does a fine job of plumbing Betty's new bathroom, she pays him. Both are discharged.

Nonperformance, Material Breach

If Ralph doesn't do any work at all on Betty's bathroom, or almost none, then Betty owes him nothing. She—the nonbreaching party—is discharged, and Ralph is liable for breach of contract.

Under UCC Section 2-106(4), a party that ends a contract breached by the other party is said to have effected a **cancellation**. The cancelling party retains the right to seek a remedy for breach of the whole contract or any unperformed obligation. The UCC distinguishes cancellation from **termination**, which occurs when either party exercises a lawful right to end the contract other than for breach. When a contract is terminated, all executory duties are discharged on both sides, but if there has been a partial breach, the right to seek a remedy survives.Uniform Commercial Code, Section 2-106(3).

Substantial Performance

Logically, anything less than full performance, even a slight deviation from what is owed, is sufficient to prevent the duty from being discharged and can amount to a breach of contract. So if Ralph does all the plumbing for Betty's new bathroom *except* hook up the toilet feed, he has not really "plumbed the new bathroom." He has only plumbed part of it. At classic common law, that was it: either you did the thing you promised completely or you had materially breached. But under modern theories, an ameliorative doctrine has developed, called **substantial performance**: if one side has substantially, but not completely, performed, so that the other side has received a benefit, the nonbreaching party owes something for the value received. The Restatement (Second) of Contracts puts it this way:Restatement (Second) of Contracts, Section 237(d).

Substantial Performance.

In an important category of disputes over failure of performance, one party asserts the right to payment on the ground that he has completed his performance, while the other party refuses to pay on the ground that there is an uncured material failure of performance.…In such cases it is common to state the issue…in terms of whether there has been substantial performance.…If there has been substantial although not full performance, the building contractor has a claim for the unpaid balance and the owner has a claim only for damages. If there has not been substantial performance, the building contractor has no claim for the unpaid balance, although he may have a claim in restitution.

The contest here is between the one who claims discharge by the other's material breach and the one who asserts there has been substantial performance. What constitutes substantial performance is a question of fact, as illustrated in Section 15.2.1 "Substantial Performance; Conditions Precedent", *TA Operating Corp. v. Solar Applications Engineering, Inc.* The doctrine has no applicability where the breaching party willfully failed to follow the contract, as where a plumber substitutes a different faucet for the one ordered; installation of the incorrect faucet is a breach, even if it is of equal or greater value than the one ordered.

Under the UCC, there is no such thing as substantial performance. Section 2-601 requires that the goods delivered according to the contract be the exact things ordered—that there be a **perfect tender** (unless the parties agree otherwise).

Anticipatory Breach and Demand for Reasonable Assurances

When a promisor announces before the time his performance is due that he will not perform, he is said to have committed an **anticipatory breach (or repudiation)**. Of course a person cannot fail to perform a duty before performance is due, but the law allows the promisee to treat the situation as a material breach that gives rise to a claim for damages and discharges the obligee from performing duties required of him under the contract. The common-law rule was first recognized in the well-known 1853 British case *Hochster v. De La Tour*. In April, De La Tour hired Hochster as his courier, the job to commence in June. In May, De La Tour changed his mind and told Hochster not to bother to report for duty. Before June, Hochster secured an appointment as courier to Lord Ashburton, but that job was not to begin until July. Also in May, Hochster sued De La Tour, who argued that he should not have to pay Hochster because Hochster had not stood ready and willing to begin work in June, having already agreed to work for Lord Ashburton. The court ruled for the plaintiff Hochster:

[I]t is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind.*Hochster v. De La Tour*, 2 Ellis & Blackburn 678 (Q.B. 1853).

Another type of anticipatory breach consists of any voluntary act by a party that destroys, or seriously impairs, that party's ability to perform the promise made to the other side. If a seller of land, having agreed to sell a lot to one person at a date certain, sells it instead to a third party before that time, there is an anticipatory breach. If Carpenter announces in May that instead of building Owner's deck in July, as agreed, he is going on a trip to Europe, there is an anticipatory breach. In the first instance, there would be no point to showing up at the lawyer's office when the date arrives to await the deed, so the law gives a right to sue when the land is sold to the other person. In the second instance, there would be no point to waiting until July, when indeed Carpenter does not do the job, so the law gives the right to sue when the future nonperformance is announced.

These same general rules prevail for contracts for the sale of goods under UCC Section 2-610.

Related to the concept of anticipatory breach is the idea that the obligee has a right to demand reasonable assurances from the obligor that contractual duties will be performed. If the obligee makes such a **demand for reasonable assurances** and no adequate assurances are forthcoming, the obligee may assume that the obligor will commit an anticipatory breach, and consider it so. That is, after making the contract, the obligee may come upon the disquieting news that the obligor's ability to perform is shaky. A change in financial condition occurs, an unknown claimant to rights in land appears, a labor strike arises, or any of a number of situations may crop up that will interfere with the carrying out of contractual duties. Under such circumstances, the obligee has the right to a demand for reasonable assurance that the obligor will perform as contractually obligated. The general reason for such a rule is given in UCC Section 2-609(1), which states that a contract "imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired." Moreover, an obligee would be foolish not to make alternative arrangements, if possible, when it becomes obvious that his original obligor will be unable to perform. The obligee must have reasonable grounds to believe that the obligor will breach. The fear must be that of a failure of performance that would amount to a total breach; a minor defect that can be cured and that at most would give rise to an offset in price for damages will not generally support a demand for assurances.

Under UCC Section 2-609(1), the demand must be in writing, but at common law the demand may be oral if it is reasonable in view of the circumstances. If the obligor fails within a reasonable time to give adequate assurance, the obligee may treat the failure to do so as an anticipatory repudiation, or she may wait to see if the obligor might change his mind and perform.

KEY TAKEAWAY

Contracts can be discharged by performance: complete performance discharges both sides; material breach discharges the breaching party, who has a right to claim damages; substantial performance obligates the promisee to pay something for the benefit conferred but is a breach. A party may demand reasonable assurances of performance, which, if not forthcoming, may be treated as an anticipatory breach (or repudiation).

EXERCISES

1. What types of performance discharge a contractual obligation?
2. Under the UCC, what is the difference between cancellation and termination of a contract?
3. What is an anticipatory breach, and under what circumstances can a party claim it?

Discharge by Conditions

LEARNING OBJECTIVES

1. Understand the concept of conditions in a contract.
2. Recognize that conditions can be classified on the basis of how they are created, their effect on the duty to perform, the essentialness of timely performance, or performance to someone's satisfaction.

Usually contracts consist of an exchange of promises—a pledge or commitment by each party that somebody will or will not do something. Andy's promise to cut Anne's lawn "over the weekend" in return for Anne's promise to pay twenty-five dollars is a commitment to have the lawn mowed by Sunday night or Monday morning. Andy's promise "not to tell anyone what I saw you doing Saturday night" in return for Anne's promise to pay one hundred dollars is a commitment that an event (the revealing of a secret) will not occur. These promises are known as independent or absolute or unconditional, because their performance does not depend on any outside event. Such promises, if contractually binding, create a present duty to perform (or a duty to perform at the time stated).

However, it is common that the obligation to perform a contract is conditioned (or conditional). A **condition** is an event the happening or nonhappening of which gives rise to a duty to perform (or discharges a duty to perform). Conditions may be express or implied; they may also be precedent, concurrent, subsequent, or to the satisfaction of a party.

Conditions Classified Based on How They Are Created

Express conditions are stated in words in the contract, orally or written. Andy promises to mow Anne's lawn "provided it doesn't rain." "Provided it doesn't rain" is an express condition. If rain comes, there is no duty to cut the lawn, and Andy's failure to do so is not a breach of promise. Express conditions are usually introduced by language such as "provided that," "if," "when," "assuming that," "as soon as," "after," and the like. **Implied conditions** are unexpressed but understood to be part of the contract. If Mr. Olson guarantees Jack's used car for ninety days, it is implied that his obligation to fix any defects doesn't arise until Jack lets him know the car is defective. If Ralph is hired to plumb Betty's new bathroom, it is implied that Betty's duty to pay is conditioned on Ralph's completion of the job.

Conditions Classified Based on Their Effect on Duty to Perform

A condition precedent is a term in a contract (express or implied) that requires performance only in the event something else happens first. Jack will buy a car from Mr. Olson if Jack gets financing. "If Jack gets financing" is a condition precedent. A **concurrent condition** arises when the duty to perform the contract is simultaneous: the promise of a landowner to transfer title to the purchaser and the purchaser to tender payment to the seller. The duty of each to perform is conditioned on the performance by the other. (As a practical matter, of course, somebody has to make the first move, proffering deed or tendering the check.) A condition that terminates an already existing duty of performance is known as a **condition subsequent**. Ralph agrees to do preventive plumbing maintenance on Deborah Dairy's milking equipment for as long as David Dairy, Deb's husband, is stationed overseas. When David returns, Ralph's obligation to do the maintenance (and Deb's duty to pay him) terminates.

Condition of Timeliness

If, as often occurs, it does not matter a great deal whether a contract is performed exactly on time, failure to do so is not a material breach, and the promisee has to accept the performance and deduct any losses caused by the delay. If, though, it makes a difference to the promisee whether the promisor acts on time, then it is said that "**time is of the essence**." Time as a condition can be made explicit in a clause reciting that time is of the essence. If there is no express clause, the courts will read it in when the purpose of the contract was clearly to provide for performance at or by a certain time, and the promisee will gain little from late performance. But even express clauses are subject to a rule of reason, and if the promisor would suffer greatly by enforcement of the clause (and the promisee would suffer only slightly or not at all from a refusal to invoke it), the courts will generally excuse the untimely performance, as long as it was completed within a reasonable time. A builder's failure to finish a house by July 1 will not discharge the buyer's obligation to pay if the house is finished a week or even a month later, although the builder will be liable to the buyer for expenses incurred because of the lateness (storage charges for furniture, costs for housing during the interim, extra travel, and the like).

Condition That a Party Must Be Satisfied

"You must be satisfied or your money back" is a common advertisement. A party to a contract can require that he need not pay or otherwise carry out his undertaking unless satisfied by the obligor's performance, or unless a third party is satisfied by the performance.

Parties may contract to perform to one side's personal satisfaction. Andy tells Anne, a prospective client, that he will cut her hair better than her regular hairdresser, and that if she is not satisfied, she need not pay him. Andy cuts her hair, but Anne frowns and says, "I don't like it." Assume that Andy's work is excellent. Whether Anne must pay depends on the standard for judging to be employed—a standard of objective or subjective satisfaction. The objective standard is that which would satisfy the reasonable purchaser. Most courts apply this standard when the contract involves the performance of a mechanical job or the sale of a machine whose performance is capable of objective measurement. So even if the obligee requires performance to his "personal satisfaction," the courts will hold that the obligor has performed if the service performed or the goods produced are in fact satisfactory. By contrast, if the goods or services contracted for involve personal judgment and taste, the duty to pay will be discharged if the obligee states personal (subjective) dissatisfaction. No reason at all need be given, but it must be for a good-faith reason, not just to escape payment.

The duty to make a contract payment may be conditioned on the satisfaction of a third party. Building contracts frequently make the purchaser's duty to pay conditional on the builder's receipt of an architect's certificate of compliance with all contractual terms; road construction contracts often require that the work be done "to the satisfaction of the County Engineer." These conditions can be onerous. The builder has already erected the structure and cannot "return" what he has done. Nevertheless, because the purchaser wants assurance that the building (obviously a major purchase) or road meets his specifications, the courts will hold the contractor to the condition unless it is impossible to provide a certificate (e.g., architect may have died) or the architect has acted in bad faith, or the purchaser has somehow prevented the certificate from issuing. The third party's refusal to issue a certificate needs to be reasonable.

KEY TAKEAWAY

Parties may, expressly or implicitly, condition the requirement for contractual performance on the happening or nonhappening of an event, or on timeliness. They may condition performance on satisfaction to one of the parties to the contract or to the satisfaction of a third party; in any event, dissatisfaction must be in good faith.

EXERCISES

1. What is "conditioned" by a condition in a contract?
2. What conditions are based on how they are made?
3. What conditions are based on their effect on the duty of performance?
4. What typical situations involve performance to a party's satisfaction?

Discharge by Agreement of the Parties

LEARNING OBJECTIVE

1. Recognize that there are various ways the parties may agree between themselves to terminate mutual obligations under the contract.

Parties are free to agree to almost any contract they want, and they are free to agree to end the contract whenever they want. There are several ways this is done.

Mutual Rescission

The parties may agree to give up the duties to perform, called **mutual rescission**. This may be by a formal written **release** saying the obligor is discharged upon delivery of the writing or upon occurrence of a condition. Or an obligation may be discharged by a contract not to sue about it.

The Restatement terms this an agreement of rescission.Restatement (Second) of Contracts, Section 283. An agreement to rescind will be given effect even though partial performance has been made or one or both parties have a claim for partial breach. The agreement need not be in writing or even expressed in words. By their actions, such as failure to take steps to perform or enforce, the parties may signal their mutual intent to rescind. Andy starts to mow Anne's lawn as they agreed. He begins the job, but it is unbearably hot. She sees how uncomfortable he is and readily agrees with him when he says, "Why don't we just forget the whole thing?" Andy's duty to finish mowing is discharged, as is Anne's duty to pay Andy, either for the whole job or for the part he has done.

Business executives live by contracts, but they do not necessarily die by them. A sociologist who studied business behavior under contract discovered a generation ago—and it is still valid—that in the great majority of cases in which one party wishes to "cancel an order," the other party permits it without renegotiation, even though the cancellation amounts to a repudiation of a contract. As one lawyer was quoted as saying,

Often business[people] do not feel they have "a contract"—rather they have an "order." They speak of "cancelling the order" rather than "breaching our contract." When I began practice I referred to order cancellations as breaches of contract, but my clients objected since they do not think of cancellation as wrong. Most clients, in heavy industry at least, believe that there is a right to cancel as part of the buyer-seller relationship. There is a widespread attitude that one can back out of any deal within some very vague limits. Lawyers are often surprised by this attitude.Stewart Macaulay, "Non-contractual Relations in Business: A Preliminary Study," *American Sociological Review* 28, no. 1 (1963): 55, 61.

This attitude is understandable. People who depend for their economic survival on continuing relationships will be loath to react to every change in plans with a lawsuit. The legal consequences of most of these cancellations are an agreement of rescission. Under UCC Section 2-720, the use of a word like "cancellation" or "rescission" does not by itself amount to a renunciation of the right to sue for breach of a provision that occurred before the rescission. If the parties mean to discharge each other fully from all duties owed, they must say so explicitly. Actions continue to speak more loudly than words, however, and in law, so can inactions. Legal rights under contracts may be lost by both parties if they fail to act; by abandoning their claims, they can affect rescission.

Waiver

A second means of discharge is by **waiver**, whereby a party voluntarily gives up a right she has under a contract but doesn't give up the entire right to performance by the other side. Tenant is supposed to pay rent on the first of the month, but because his employer pays on the tenth, Tenant pays Landlady on that day. If Landlady accepts the late payment without objection, she has waived her right to insist on payment by the first of the month, unless the lease provides that no waiver occurs from the acceptance of any late payments. See Section 15.2.2 "Waiver of Contract Rights; Nonwaiver Provisions", *Minor v. Chase Auto Finance Corporation*. A "waiver" is permission to deviate from the contract; a "release" means to let go of the whole thing.

Substituted Agreement

Discharge by substituted agreement is a third way of mutual rescission. The parties may enter into a **novation**, either a new contract or one whereby a new person is substituted for the original obligor, and the latter is discharged. If Mr. Olson is obligated to deliver

a car to Jack, Jack and Mr. Olson may agree that Dewey Dealer should deliver the car to Jack instead of Mr. Olson; the latter is discharged by this novation. A **substituted agreement** may also simply replace the original one between the original parties.

Accord and Satisfaction

Discharge by **accord and satisfaction** is a fourth way of mutual rescission. Here the parties to a contract (usually a disputed one) agree to substitute some performance different from what was originally agreed, and once this new agreement is executed, the original contract (as well as the more recent accord) is satisfied. But before then, the original agreement is only suspended: if the obligor does not satisfy the accord, the other side can sue on the original obligation or on the accord.

KEY TAKEAWAY

Parties to a contract may agree to give it up. This may be by mutual rescission, release, waiver, novation, substituted agreement, or accord and satisfaction.

EXERCISES

1. How does mutual rescission discharge a common-law contract without apparent new consideration?
2. What is the difference between a substituted agreement and a novation?
3. What happens if the parties negotiate an accord and satisfaction and one side fails to perform it?
4. If an obligee accepts performance from the obligor that deviates from the contract, under what circumstances can the obligee nevertheless insist on strict compliance in the future?

Discharge When Performance Becomes Impossible or Very Difficult

LEARNING OBJECTIVE

1. Recognize that there are several circumstances when performance of the contract becomes variously impossible, very difficult, or useless, and that these may give rise to discharge.

There are at least five circumstances in which parties may be discharged from contractual obligations because performance is impossible, difficult, or useless.

Overview

Every contract contains some element of risk: the buyer may run out of money before he can pay; the seller may run out of goods before he can deliver; the cost of raw materials may skyrocket, throwing off the manufacturer's fine financial calculations. Should the obligor's luck run out, he is stuck with the consequences—or, in the legal phrase, his liability is strict: he must either perform or risk paying damages for breach of contract, even if his failure is due to events beyond his control. Of course, an obligor can always limit his liability through the contract itself. Instead of obligating himself to deliver one million units, he can restrict his obligation to "one million units or factory output, whichever is less." Instead of guaranteeing to finish a job by a certain date, he can agree to use his "best efforts" to do so. Similarly, damages in the event of breach can be limited. A party can even include a clause canceling the contract in the event of an untoward happening. But if these provisions are absent, the obligor is generally held to the terms of his bargain.

Exceptions include the concepts of impossibility, impracticability, and frustration of purpose.

Impossibility

If performance is impossible, the duty is discharged. The categories here are death or incapacity of a personal services contractor, destruction of a thing necessary for performance, and performance prohibited by government order.

Death or Incapacity of a Personal Services Contractor

If Buyer makes a contract to purchase a car and dies before delivery, Buyer's estate could be held liable; it is not impossible (for the estate) to perform. The estate of a painter hired to do a portrait cannot be sued for damages because the painter died before she could complete the work.

Destruction or Deterioration of a Thing Necessary for Performance

When a specific object is necessary for the obligor's performance, its destruction or deterioration making its use impracticable (or its failure to come into existence) discharges the obligor's duty. Diane's Dyers contracts to buy the annual wool output of the Sheepish Ranch, but the sheep die of an epidemic disease before they can be shorn. Since the specific thing for which the contract was made has been destroyed, Sheepish is discharged from its duty to supply Diane's with wool, and Diane's has no claim against the Ranch. However, if the contract had called for a quantity of wool, without specifying that it was to be from Sheepish's flock, the duty would not be discharged; since wool is available on the open market, Sheepish could buy that and resell it to Diane's.

Performance Prohibited by Government Regulation or Order

When a government promulgates a rule after a contract is made, and the rule either bars performance or will make it impracticable, the obligor's duty is discharged. An obligor is not required to break the law and risk the consequences. Financier Bank contracts to sell World Mortgage Company certain collateralized loan instruments. The federal government, in a bank reform measure, prohibits such sales. The contract is discharged. If the Supreme Court later declared the prohibition unconstitutional, World Mortgage's duty to buy (or Financier Bank's to sell) would not revive.

Impracticability

Less entirely undoable than impossibility, but still grounds for discharge, are common-law impracticability and its relative, commercial impracticability.

Common-Law Impracticability

Impracticability is said to exist when there is a radical departure from the circumstances that the parties reasonably contemplated would exist at the time they entered into the contract; on such facts, the courts might grant relief. They will do so when extraordinary circumstances (often called "acts of God" or "force majeure") make it unjust to hold a party liable for performance. Although the justification for judicial relief could be found in an implied condition in all contracts that extraordinary events shall not occur, the Restatement eschews so obvious a bootstrap logic and adopts the language of UCC Section 2-615(a), which states that the crux of the analysis is whether the nonoccurrence of the extraordinary circumstance was "a basic assumption on which the contract was made."Restatement (Second) of Contracts, Section 261. If it was—if, that is, the parties assumed that the circumstance would not occur—then the duty is discharged if the circumstance later does occur.

In one well-known case, *Autry v. Republic Productions*, the famous cowboy movie star Gene Autry had a contract to perform to the defendant. He was drafted into the army in 1942; it was temporarily, at least, impossible for him to perform his movie contractual obligations incurred prior to his service. When he was discharged in 1945, he sued to be relieved of the prewar obligations. The court took notice that there had been a long interruption in Autry's career and of "the great decrease in the purchasing power of the dollar"—postwar inflation—and determined that to require him to perform under the old contract's terms would work a "substantial hardship" on him. A world war is an extraordinary circumstance. The temporary impossibility had transformed into impracticability.*Autry v. Republic Productions*, 180 P.2d 144 (Calif. 1947).

Impracticability refers to the performance, not to the party doing it. Only if the performance is impracticable is the obligor discharged. The distinction is between "the thing cannot be done" and "I cannot do it." The former refers to that which is **objectively impracticable**, and the latter to that which is subjectively impracticable. That a duty is subjectively impracticable does not excuse it if the circumstances that made the duty difficult are not extraordinary. A buyer is liable for the purchase price of a house, and his inability to raise the money does not excuse him or allow him to escape from a suit for damages when the seller tenders the deed.*Christy v. Pilkinton*, 273 S.W.2d 533 (Ark. 1954). If Andy promises to transport Anne to the football stadium for ten dollars, he cannot wriggle out of his agreement because someone smashed into his car (rendering it inoperable) a half hour before he was due to pick her up. He could rent a car or take her in a taxi, even though that will cost considerably more than the sum she agreed to pay him. But if the agreement was that he would transport her in his car, then the circumstances make his performance **objectively impracticable**—the equivalent of impossible—and he is excused.

Commercial Impracticability

This common-law concept of impracticability has been adopted by the UCC.Uniform Commercial Code, Section 2-615. When performance cannot be undertaken except with extreme difficulty or at highly unreasonable expense, it might be excused on the theory of **commercial impracticability**. However, “impracticable” (the action is impossible) is not the same as “impractical” (the action would yield an insufficient return or would have little practical value). The courts allow a considerable degree of fluctuation in market prices, inflation, weather, and other economic and natural conditions before holding that an extraordinary circumstance has occurred. A manufacturer that based its selling price on last year’s costs for raw materials could not avoid its contracts by claiming that inflation within the historical range had made it difficult or unprofitable to meet its commitments. Examples of circumstances that could excuse might be severe limitations of supply due to war, embargo, or a natural disaster. Thus a shipowner who contracted with a purchaser to carry goods to a foreign port would be excused if an earthquake destroyed the harbor or if war broke out and the military authorities threatened to sink all vessels that entered the harbor. But if the shipowner had planned to steam through a canal that is subsequently closed when a hostile government seizes it, his duty is not discharged if another route is available, even if the route is longer and consequently more expensive.

Frustration of Purpose

If the parties made a basic assumption, express or implied, that certain circumstances would not arise, but they do arise, then a party is discharged from performing his duties if his principal purpose in making the contract has been “substantially frustrated.” This is not a rule of objective impossibility. It operates even though the parties easily might be able to carry out their contractual duties. The **frustration of purpose** doctrine comes into play when circumstances make the value of one party’s performance virtually worthless to the other. This rule does not permit one party to escape a contract simply because he will make less money than he had planned or because one potential benefit of the contract has disappeared. The purpose that is frustrated must be the core of the contract, known and understood by both parties, and the level of frustration must be severe; that is, the value of the contract to the party seeking to be discharged must be destroyed or nearly destroyed.

The classic illustration of frustration of purpose is the litigation that gave birth to the rule: the so-called coronation cases. In 1901, when King Edward VII was due to be crowned following the death of Queen Victoria, a parade route was announced for the coronation. Scores of people rented rooms in buildings that lined the streets of the route to watch the grand spectacle. But the king fell ill, and the procession was canceled. Many expectant viewers failed to pay, and the building owners took them to court; many lessees who had paid took the owners to court to seek refunds. The court declared that the lessees were not liable because the purpose of the contract had been frustrated by the king’s illness.

Supervening government regulations (though here different from illegality), floods that destroy buildings in which an event was to take place, and business failures may all contribute to frustration of purpose. But there can be no general rule: the circumstances of each case are determinative. Suppose, for example, that a manufacturer agrees to supply a crucial circuit board to a computer maker who intends to sell his machine and software to the government for use in the international space station’s ventilation systems. After the contract is made but before the circuit boards are delivered, the government decides to scrap that particular space station module. The computer manufacturer writes the circuit board maker, canceling the contract. Whether the manufacturer is discharged depends on the commercial prospects for the computer and the circuit board. If the circuit board can be used only in the particular computer, and it in turn is only of use on the space station, the duty to take the boards is discharged. But if the computer can be sold elsewhere, or the circuit boards can be used in other computers that the manufacturer makes, it is liable for breach of contract, since its principal purpose—selling computers—is not frustrated.

As before, the parties can provide in the contract that the duty is absolute and that no supervening event shall give rise to discharge by reason of frustration of purpose.

KEY TAKEAWAY

The obligations to perform under a contract cannot be dismissed lightly, but a person’s duty to perform a contract duty may be discharged if it becomes impossible or very difficult to do it. This includes impossibility, common-law impracticability, commercial impracticability under the UCC, and frustration of purpose.

EXERCISES

1. If it is possible to perform a contract, why might a party be excused because of frustration of purpose?
2. What is the difference between impractical and impracticable?
3. How would supervening government regulation be different from supervening illegality?

Other Methods of Discharge

LEARNING OBJECTIVES

1. Recognize when alteration, power of avoidance, the statute of limitations, and bankruptcy discharge parties from contracts.
2. In addition to performance (or lack of it), agreement of the parties, the happening or nonhappening of conditions, and variations on the theme of impossibility, there are several other ways contract duties may be discharged.

Cancellation, Destruction, or Surrender

An obligee may unilaterally discharge the obligor's duty toward him by canceling, destroying, or surrendering the written document embodying the contract or other evidence of the duty. No consideration is necessary; in effect, the obligee is making a gift of the right that he possesses. No particular method of cancellation, destruction, or surrender is necessary, as long as the obligee manifests his intent that the effect of his act is to discharge the duty. The entire document can be handed over to the obligor with the words, "Here, you don't owe me anything." The obligee can tear the paper into pieces and tell the obligor that he has done so because he does not want anything more. Or he can mutilate the signatures or cross out the writing.

Power of Avoidance

A contractual duty can be discharged if the obligor can avoid the contract. As discussed in Chapter 10 "Real Assent", a contract is either void or can be avoided if one of the parties lacked capacity (infancy, insanity); if there has been duress, undue influence, misrepresentation, or mistake; or the contract is determined to be unconscionable. Where a party has a **power of avoidance** and exercises it, that party is discharged from further obligation.

Statute of Limitations

When an obligor has breached a contract, the obligee has the right to sue in court for a remedy. But that right does not last forever. Every state has statutes of limitations that establish time periods within which the suit must be brought (different time periods are spelled out for different types of legal wrongs: contract breach, various types of torts, and so on). The time period for contract actions under most statutes of limitations ranges between two and six years. The UCC has a four-year **statute of limitations**.Uniform Commercial Code, Section 2-725. The period begins to run from the day on which the suit could have been filed in court—for example, from the moment of contract breach. An obligee who waits until after the statute has run—that is, does not seek legal relief within the period prescribed by the statute of limitations—is barred from going to court thereafter (unless she is under some incapacity like infancy), but the obligor is not thereby discharged. The effect is simply that the obligee has no legal remedy. If the parties have a continuing relationship, the obligee might be able to recoup—for example, by applying a payment for another debt to the one barred by the statute, or by offsetting a debt the obligee owes to the obligor.

Bankruptcy

Under the federal bankruptcy laws certain obligations are discharged once a court declares a debtor to be bankrupt. The law spells out the particular types of debts that are canceled upon bankruptcy.

KEY TAKEAWAY

Contract duties may be discharged by cancellation, destruction, or surrender of the written contract; by the running of the statute of limitations; or by bankruptcy.

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11.8.2: Cases

Substantial Performance; Conditions Precedent

TA Operating Corp. v. Solar Applications Engineering, Inc.

191 S.W.3d 173 (Tex. Ct. App. 2005)

TA Operating Corporation, a truck stop travel center company, contracted with Solar Applications Engineering, Inc. to construct a prototype multi-use truck stop in San Antonio for a fixed price of $3,543,233.…

[When the project was near] completion, TA sent Solar a "punch list" of items that needed to be finished to complete the building. Solar disputed several items on the list and delivered a response to TA listing the items Solar would correct.…Solar began work on the punch list items and filed a lien affidavit [a property that carries a lien can be forced into sale by the creditor in order to collect what is owed] against the project on October 2, 2000 in the amount of $472,392.77. TA understood the lien affidavit to be a request for final payment.

On October 18, 2000, TA sent notice to Solar that Solar was in default for not completing the punch list items, and for failing to keep the project free of liens. TA stated in the letter that Solar was not entitled to final payment until it completed the remainder of the punch list items and provided documentation that liens filed against the project had been paid.…Solar acknowledged at least two items on the punch list had not been completed, and submitted a final application for payment in the amount of $472,148,77.… TA refused to make final payment, however, contending that Solar had not complied with section 14.07 of the contract, which expressly made submission of a [lien-release] affidavit a condition precedent to final payment:…

The final Application for Payment shall be accompanied by:…complete and legally effective releases or waivers…of all lien rights arising out of or liens filed in connection with the work.

Although Solar did not comply with this condition precedent to final payment, Solar sued TA for breach of contract under the theory of substantial performance.…TA [asserts that] the doctrine of substantial performance does not excuse Solar's failure to comply with an express condition precedent to final payment.…

The first issue we must resolve is whether the doctrine of substantial performance excuses the breach of an express condition precedent to final payment that is unrelated to completion of the building. TA acknowledges that Solar substantially performed its work on the project, but contends its duty to pay was not triggered until Solar pleaded or proved it provided TA with documentation of complete and legally effective releases or waivers of all liens filed against the project.…TA contends that when the parties have expressly conditioned final payment on submission of [a liens-release] affidavit, the owner's duty to pay is not triggered until the contractor pleads or proves it complied with the condition precedent.

Solar contends that although it did not submit [a liens-release] affidavit in accordance with the contract, it may still recover under the contract pursuant to the substantial performance doctrine. Solar argues that to hold otherwise would bring back the common law tradition that the only way for a contractor to recover under a contract is full, literal performance of the contract's terms.…

While the common law did at one time require strict compliance with the terms of a contract, this rule has been modified for building or construction contracts by the doctrine of substantial performance. "Substantial performance" was defined by the Texas [court] in [Citation]:

To constitute substantial compliance the contractor must have in good faith intended to comply with the contract, and shall have substantially done so in the sense that the defects are not pervasive, do not constitute a deviation from the general plan contemplated for the work, and are not so essential that the object of the parties in making the contract and its purpose cannot without difficulty, be accomplished by remedying them. Such performance permits only such omissions or deviation from the contract as are inadvertent and unintentional, are not due to bad faith, do not impair the structure as a whole, and are remediable without doing material damage to other parts of the building in tearing down and reconstructing.

…The doctrine of substantial performance recognizes that the contractor has not completed construction, and therefore is in breach of the contract. Under the doctrine, however, the owner cannot use the contractor's failure to complete the work as an excuse for non-payment. "By reason of this rule a contractor who has in good faith substantially performed a building contract is permitted to

sue under the contract, substantial performance being regarded as full performance, so far as a condition precedent to a right to recover thereunder is concerned." [Citation]…

Solar argues that by agreeing substantial performance occurred, TA acknowledged that Solar was in "full compliance" with the contract and any express conditions to final payment did not have to be met. [Citation]: "[a] finding that a contract has been substantially completed is the legal equivalent of full compliance, less any offsets for remediable defects." Solar argues that TA may not expressly provide for substantial performance in its contract and also insist on strict compliance with the conditions precedent to final payment. We disagree. While the substantial performance doctrine permits contractors to sue under the contract, it does not ordinarily excuse the non-occurrence of an express condition precedent:

The general acceptance of the doctrine of substantial performance does not mean that the parties may not expressly contract for literal performance of the contract terms.…Stated otherwise, if the terms of an agreement make full or strict performance an express condition precedent to recovery, then substantial performance will not be sufficient to enable recovery under the contract.

15 Williston on Contracts § 44.53 (4th Ed.2000) (citing Restatement (Second) of Contracts, § 237, cmt. d (1981)).…

TA, seeking protection from double liability and title problems, expressly conditioned final payment on Solar's submission of a [liens-release] affidavit. Solar did not dispute that it was contractually obligated to submit the affidavit as a condition precedent to final payment, and it was undisputed at trial that $246,627.82 in liens had been filed against the project. Though the doctrine of substantial performance permitted Solar to sue under the contract, Solar did not plead or prove that it complied with the express condition precedent to final payment. Had Solar done so, it would have been proper to award Solar the contract balance minus the cost of remediable defects. While we recognize the harsh results occasioned from Solar's failure to perform this express condition precedent, we recognize that parties are free to contract as they choose and may protect themselves from liability by requesting literal performance of their conditions for final payment.…

[T]he trial court erred in awarding Solar the contract balance [as] damages, and we render judgment that Solar take nothing on its breach of contract claim.

CASE QUESTIONS

1. Why did Solar believe it was entitled to the contract balance here?
2. Why did the court determine that Solar should not have been awarded the contract damages that it claimed, even though it substantially complied?
3. How has the common law changed in regard to demanding strict compliance with a contract?

Waiver of Contract Rights; Nonwaiver Provisions

Minor v. Chase Auto Finance Corporation

—S.W.3d——, 2010 WL 2006401 (Ark. 2010)

Sheffield, J.

We have been asked to determine whether non-waiver and no-unwritten-modifications clauses in a [contract] preclude a creditor from waiving future strict compliance with the agreement by accepting late payments.…

Appellant Mose Minor (Minor) entered into a Simple Interest Motor Vehicle Contract and Security Agreement with Appellee Chase Auto Finance Corporation (Chase) to finance the purchase of a 2003 Toyota Tundra. By the terms of the agreement, Minor was to make sixty-six payments of $456.99 on the fourteenth of each month.…The agreement also included the following relevant provisions:

G. Default: If you…default in the performance of any promise you make in this contract or any other contract you have with us, including, but not limited to, failing to make any payments when due, or become insolvent, or file any proceeding under the U.S. Bankruptcy Code,…we may at our option and without notice or demand (1) declare all unpaid sums immediately due and payable subject to any right of reinstatement as required by law (2) file suit against you for all unpaid sums (3) take immediate possession of the vehicle (4) exercise any other legal or equitable remedy.…Our remedies are cumulative and taking of any action shall not be a waiver or prohibit us from pursuing any other remedy. You agree that upon your default we shall be entitled to recover from you our reasonable collection costs, including, but not limited to, any attorney's fee. In addition, if we repossess the vehicle, you grant

to us and our agents permission to enter upon any premises where the vehicle is located. Any repossession will be performed peacefully.…

J. Other Agreements of Buyer:…(2) You agree that if we accept moneys in sums less than those due or make extensions of due dates of payments under this contract, doing so will not be a waiver of any later right to enforce the contract terms as written.…(12) All of the agreements between us and you are set forth in this contract and no modification of this contract shall be valid unless it is made in writing and signed by you and us.…

K. Delay in Enforcement: We can delay or waive enforcement of any of our rights under this contract without losing them.

Minor's first payment was late, as were several subsequent payments. At times he failed to make any payment for months. Chase charged a late fee for each late payment, and sent several letters requesting payment and offering to assist Minor with his account. Chase also warned Minor that continued failure to make payments would result in Chase exercising its legal options available under the agreement, including repossession of the vehicle.…At one point, Minor fell so far behind in his payments that Chase was on the verge of repossessing the vehicle. However…the parties agreed to a two-month extension of the agreement.…The extension agreement indicated that all other terms and conditions of the original contract would remain the same.

On November 2, 2004, Minor filed for Chapter 7 "Introduction to Tort Law" bankruptcy [after which] Chase sent Minor a letter acknowledging that Minor's debt to Chase had been discharged in bankruptcy. The letter further stated that Chase still had a valid lien on the vehicle, and if Minor wished to keep the vehicle, he would have to continue to make payments to Chase. Otherwise, Chase would repossess the vehicle.…

On September 28, 2006, a repossession agent…arrived at Minor's home some time in the afternoon to repossess the vehicle.… [Notwithstanding Minor's insistence that the agent stop] the agent removed Minor's possessions from the vehicle and towed it away. Chase sold the vehicle. The amount of the purchase price was reflected on Minor's account.…

On January 7, 2008, Minor filed a complaint against Chase [alleging] that, during the course of the contract, the parties had altered the provisions of the contract regarding Chase's right to repossess the vehicle and Chase had waived the right to strictly enforce the repossession clause. Minor further claimed that the repossession agent committed trespass and repossessed the vehicle forcibly, without Minor's permission, and through trickery and deceit, in violation of [state law]. Also, Minor asserted that he was not in default on his payments, pursuant to the repayment schedule, at the time Chase authorized repossession. Therefore, according to Minor, Chase committed conversion, and breached the Arkansas Deceptive Trade Practices Act [Citation], and enhanced by Arkansas Code Annotated section 4-88-202, because Minor is an elderly person. Minor sought compensatory and punitive damages.…

After hearing these arguments, the circuit court ruled that Minor had presented no evidence that the conduct of Chase or the repossession agent constituted grounds for punitive damages; that by the express terms of the contract Chase's acceptance of late payments did not effect a waiver of its rights in the future; that at the time of repossession, Minor was behind in his payments and in breach of the contract; that Chase had the right under the contract to repossess the vehicle and did not commit conversion; and that there was no evidence to support a claim that Chase had violated the Arkansas Deceptive Trade Practices Act.…

[W]e affirm our previous decisions that when a contract does not contain a non-waiver and a no-unwritten-modification provision and the creditor has established a course of dealing in accepting late payments from the debtor, the creditor waives its right to insist on strict compliance with the contract and must give notice to the debtor that it will no longer accept late payments before it can declare default of the debt. However, we announce today that, if a contract includes non-waiver and no-unwritten-modification clauses, the creditor, in accepting late payments, does not waive its right under the contract to declare default of the debt, and need not give notice that it will enforce that right in the event of future late payments.…

In arriving at this conclusion, we adhere to the principle that "a [contract] is effective according to its terms between the parties."… We have long held that non-waiver clauses are legal and valid. *See* [Citations] Also, [the Arkansas UCC 2-209(2)] declares that no-unwritten-modification provisions are binding.

We acknowledge that there is a difference of opinion amongst the courts in other jurisdictions over the effect of non-waiver and no-unwritten-modification clauses.…

We concur with the Supreme Court of Indiana's decision in [Citation], that a rule providing that non-waiver clauses could themselves be waived by the acceptance of late payments is "illogical, since the very conduct which the [non-waiver] clause is

designed to permit[,] acceptance of late payment[,] is turned around to constitute waiver of the clause permitting the conduct." We also agree that the approach of jurisdictions that require creditors who have accepted late payments in the past to notify debtors that they expect strict compliance in the future, despite the existence of a non-waiver provision in the contract, is not "sound." Such a rule, we recognize, "begs the question of validity of the non-waiver clause." Finally, our holding is in line with the Indiana Supreme Court's ruling that it would enforce the provisions of the contract, since the parties had agreed to them, and that it would not require the creditor to give notice, because the non-waiver clause placed the [creditor] in the same position as one who had never accepted a late payment. [Citations]…

Certified question answered; remanded to court of appeals.

CASE QUESTIONS

1. What is a nonwaiver clause?
2. Why did Mose think his late payments were not grounds for repossession of his truck?
3. Why would a creditor accept late payments instead of immediately repossessing the collateral?
4. Why did Mose lose?

Impossibility as a Defense

Parker v. Arthur Murray, Inc.

295 N.E.2d 487 (Ill. Ct. App. 1973)

Stamos, J.

The operative facts are not in dispute. In November, 1959 plaintiff went to the Arthur Murray Studio in Oak Park to redeem a certificate entitling him to three free dancing lessons. At that time he was a 37 year-old college-educated bachelor who lived alone in a one-room attic apartment in Berwyn, Illinois. During the free lessons the instructor told plaintiff he had 'exceptional potential to be a fine and accomplished dancer' and generally encouraged further participation. Plaintiff thereupon signed a contract for 75 hours of lessons at a cost of $1000. At the bottom of the contract were the bold-type words, 'NON-CANCELABLE, NEGOTIABLE CONTRACT.' This initial encounter set the pattern for the future relationship between the parties. Plaintiff attended lessons regularly. He was praised and encouraged regularly by the instructors, despite his lack of progress. Contract extensions and new contracts for additional instructional hours were executed. Each written extension contained the bold-type words, 'NON-CANCELABLE CONTRACT,' and each written contract contained the bold-type words, 'NON-CANCELABLE NEGOTIABLE CONTRACT.' Some of the agreements also contained the bold-type statement, 'I UNDERSTAND THAT NO REFUNDS WILL BE MADE UNDER THE TERMS OF THIS CONTRACT.'

On September 24, 1961 plaintiff was severely injured in an automobile collision, rendering him incapable of continuing his dancing lessons. At that time he had contracted for a total of 2734 hours of lessons, for which he had paid $24,812.80 [about $176,000 in 2010 dollars]. Despite written demand defendants refused to return any of the money, and this suit in equity ensued. At the close of plaintiff's case the trial judge dismissed the fraud count (Count II), describing the instructors' sales techniques as merely 'a matter of pumping salesmanship.' At the close of all the evidence a decree was entered under Count I in favor of plaintiff for all prepaid sums, plus interest, but minus stipulated sums attributable to completed lessons.

Plaintiff was granted rescission on the ground of impossibility of performance. The applicable legal doctrine is expressed in the Restatement of Contracts, s 459, as follows:

A duty that requires for its performance action that can be rendered only by the promisor or some other particular person is discharged by his death or by such illness as makes the necessary action by him impossible or seriously injurious to his health, unless the contract indicates a contrary intention or there is contributing fault on the part of the person subject to the duty.…

Defendants do not deny that the doctrine of impossibility of performance is generally applicable to the case at bar. Rather they assert that certain contract provisions bring this case within the Restatement's limitation that the doctrine is inapplicable if 'the contract indicates a contrary intention.' It is contended that such bold type phrases as 'NON-CANCELABLE CONTRACT,' 'NON-CANCELABLE NEGOTIABLE CONTRACT' and 'I UNDERSTAND THAT NO REFUNDS WILL BE MADE UNDER THE TERMS OF THIS CONTRACT' manifested the parties' mutual intent to waive their respective rights to invoke the doctrine of impossibility. This is a construction which we find unacceptable. Courts engage in the construction and interpretation of contracts

with the sole aim of determining the intention of the parties. We need rely on no construction aids to conclude that plaintiff never contemplated that by signing a contract with such terms as 'NON-CANCELABLE' and 'NO REFUNDS' he was waiving a remedy expressly recognized by Illinois courts. Were we also to refer to established tenets of contractual construction, this conclusion would be equally compelled. An ambiguous contract will be construed most strongly against the party who drafted it. [Citation] Exceptions or reservations in a contract will, in case of doubt or ambiguity, be construed least favorably to the party claiming the benefit of the exceptions or reservations. Although neither party to a contract should be relieved from performance on the ground that good business judgment was lacking, a court will not place upon language a ridiculous construction. We conclude that plaintiff did not waive his right to assert the doctrine of impossibility.

Plaintiff's Count II, which alleged fraud and sought punitive damages, was dismissed by the trial judge at the close of plaintiff's case. It is contended on appeal that representations to plaintiff that he had 'exceptional potential to be a fine and accomplished dancer,' that he had 'exceptional potential' and that he was a 'natural born dancer' and a 'terrific dancer' fraudulently induced plaintiff to enter into the contracts for dance lessons.

Generally, a mere expression of opinion will not support an action for fraud. [Citation] In addition, misrepresentations, in order to constitute actionable fraud, must pertain to present or pre-existing facts, rather than to future or contingent events, expectations or probabilities. [Citation] Whether particular language constitutes speculation, opinion or averment of fact depends upon all the attending facts and circumstances of the case. [Citation] Mindful of these rules, and after carefully considering the representations made to plaintiff, and taking into account the business relationship of the parties as well as the educational background of plaintiff, we conclude that the instructors' representations did not constitute fraud. The trial court correctly dismissed Count II. We affirm.

Affirmed.

CASE QUESTIONS

1. Why is it relevant that the plaintiff was "a bachelor who lived alone in a one-room attic apartment"?
2. The contract here contained a "no cancellation" clause; how did the court construe the contract to allow cancellation?
3. Plaintiff lost on his claim of fraud (unlike Mrs. Vokes in the similar case in Chapter 10 "Real Assent" against another franchisee of Arthur Murray, Inc.). What defense was successful?
4. What is the controlling rule of law here?

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11.8.3: Summary and Exercises

Summary

The law of contracts has various rules to determine whether obligations have been discharged. Of course, if both parties have fully performed the contract, duties will have terminated. But many duties are subject to conditions, including conditions precedent and subsequent, conditions requiring approval of the promisee or someone else, and clauses that recite time to be of the essence.

A contract obligation may be discharged if the promisor has not received the benefit of the promisee's obligation. In some cases, failure to carry out the duty completely will discharge the corresponding obligation (material breach); in other cases, the substantial performance doctrine will require the other party to act.

A contract may have terminated because one of the parties tells the other in advance that he will not carry out his obligations; this is called anticipatory breach. The right to adequate assurance allows one party to determine whether the contract will be breached by the other party.

There are other events, too, that may excuse performance: impracticability (including the UCC rules governing impracticability in contracts for the sale of goods), death or incapacity of the obligor, destruction of the thing necessary for the performance, government prohibition, frustration of purpose, and power of avoidance.

Finally, note that not all obligations are created by contract, and the law has rules to deal with discharge of duties in general. Thus, in the appropriate cases, the obligee may cancel or surrender a written contract, may enter into an accord, may agree to rescind the agreement, or may release the obligor. Or the obligor may show a material alteration in the contract, may become bankrupt, or may plead the statute of limitations—that is, plead that the obligee waited too long to sue. Or the parties may, by word or deed, mutually abandon the agreement. In all these ways, duties may be discharged.

EXERCISES

1. Theresa hired Contractor to construct a large office building. Theresa's duty to pay Contractor was conditioned on receipt of a statement from her architect that the building complied with the terms of the contract. Contractor completed the building but used the wrong color fixtures in the bathrooms. The architect refused to approve the work, but under state law, Contractor was considered to have substantially performed the contract. Is he entitled to payment, less damages for the improper fixtures? Explain.
2. In early 1987, Larry McLanahan submitted a claim to Farmers Insurance for theft of his 1985 Lamborghini while it was on consignment for sale in the Los Angeles area. The car had sustained extensive damage, which McLanahan had his mechanic document. The insurance policy contained this language: "Allow us to inspect and appraise the damaged vehicle before its repair or disposal." But after considerable delay by Farmers, McLanahan sold the car to a cash buyer without notifying Farmers. He then sued Farmers for its refusal to pay for damages to his car. Upon what legal theory did Farmers get a summary judgment in its favor?
3. Plaintiff sold a tavern to Defendants. Several months later, Defendants began to experience severe problems with the septic tank system. They informed Plaintiff of the problem and demanded the return of their purchase money. Plaintiff refused. Defendants took no formal action against Plaintiff at that time, and they continued to operate the tavern and make their monthly payments under the contract. Some months later, Defendants met with state officials from the Departments of Environmental Quality, Health, and Liquor Control Commission. The officials warned Defendants that because of the health hazards posed by the septic tank problems, Defendants' licenses might not be renewed. As a result, Defendants decided to close the tavern and attempt to reopen when the septic tank was repaired. Defendants advertised a going-out-of-business sale. The purpose of the sale was to deplete the tavern's inventory before closing. Plaintiff learned about the sale and discovered that Defendants had removed certain personal property from the tavern. He sued the Defendants, claiming, among other things, that they had anticipatorily breached their contract with him, though he was receiving payments on time. Did the Defendants' actions amount to an anticipatory breach?*Crum v. Grant*, 692 P.2d 147 (Or. App., 1984).
4. Julius, a manufacturer of neckties, contracted to supply neckties to a wholesaler. When Julius's factory burned, he failed to supply any, and the wholesaler sued. Is Julius excused from performance by impossibility?
5. The Plaintiff (a development corporation) contracted to buy Defendant's property for $1.8 million. A term in the contract read: "The sale…shall be closed at the office of Community Title Company on May 16th at 10:00 am.…Time is of the essence in this

contract." Defendant appeared at the office at 10:00 a.m. on the day designated, but the Plaintiff's agent was not there. Defendant waited for twenty minutes, then left. Plaintiff's agent arrived at 10:30 a.m. and announced that he would not have funds for payment until 1:30 p.m., but Defendant refused to return; she had already made other arrangements to finance her purchase of other real estate. Plaintiff sued Defendant for specific performance. Who wins, and why?

6. A contract between the Koles and Parker-Yale provided for completion of the Koles's condominium unit within 180 days. It also authorized the Koles to make written changes in the plans and specifications. Construction was not completed within the 180-day period, and the Koles, prior to completion, sent a letter to Parker-Yale rescinding the contract. Were the Koles within their rights to rescind the contract?
7. Plaintiff contracted to buy Defendant's commercial property for $1,265,000. Under the terms of the agreement, Defendant paid $126,000 as an earnest-money deposit, which would be retained by Plaintiff as liquidated damages if Defendant failed to close by the deadline. Tragically, Defendant's husband died four days before the closing deadline, and she was not able to close by the deadline. She was relying on her husband's business to assist her in obtaining the necessary financing to complete the purchase, and after his death, she was not able to obtain it. Plaintiff sued for the $126,000; Defendant argued that the purpose of the contract was frustrated due to the untimely death of her husband. Is this a good argument?
8. Buyer contracted to buy Seller's house for $290,000; the contract included a representation by Buyer "that he has sufficient cash available to complete this purchase." Buyer was a physician who practiced with his uncle. He had received assurances from his uncle of a loan of $200,000 in order to finance the purchase. Shortly after the contract was executed, the uncle was examined by a cardiologist, who found his coronary arteries to be dangerously clogged. As a result, the uncle immediately had triple bypass surgery. After the operation, he told Buyer that his economic future was now uncertain and that therefore it was impossible for him to finance the house purchase. Meanwhile, Seller, who did not know of Buyer's problem, committed herself to buy a house in another state and accepted employment there as well. Buyer was unable to close; Seller sued. Buyer raised as a defense impossibility or impracticability of performance. Is the defense good?
9. Pursuant to a contract for the repair and renovation of a swimming pool owned by Defendant (City of Fort Lauderdale), Plaintiff commenced the work, which included resurfacing the inside of the pool, and had progressed almost to completion. Overnight, vandals damaged the work Plaintiff had done inside the pool, requiring that part of the work be redone. Plaintiff proceeded to redo the work and billed Defendant, who paid the contract price but refused to pay for the additional work required to repair the damage. Did the damage constitute destruction of subject matter discharging Plaintiff from his obligation to complete the job without getting paid extra?
10. Apache Plaza (the landlord) leased space to Midwest Savings to construct a bank building in Apache's shopping mall, based on a prototype approved by Apache. Midwest constructed the building and used it for twelve years until it was destroyed by a tornado. Midwest submitted plans for a new building to Apache, but Apache rejected the plans because the new building was larger and had less glass than the old building or the prototype. Midwest built it anyway. Its architect claimed that certain changes in the structure of the new building were required by new regulations and building codes, but he admitted that a building of the stipulated size could have been constructed in compliance with the applicable codes. Apache claimed $210,000 in damages over the term of the lease because the new building consumed more square feet of mall space and required more parking. Midwest claimed it had substantially complied with the lease requirements. Is this a good defense?*Apache Plaza, Ltd. v. Midwest Sav. Ass'n*, 456 N.W.2d 729 (Minn. App. 1990).

SELF-TEST QUESTIONS

1. A condition precedent
    1. is a condition that terminates a duty
    2. is always within the control of one of the parties
    3. is an event giving rise to performance
    4. is a condition that follows performance
2. If Al and Betty have an executory contract, and if Betty tells Al that she will not be fulfilling her side of the bargain,
    1. Al must wait until the date of performance to see if Betty in fact performs
    2. Al can sue immediately for full contract damages
    3. Al can never sue because the contract was executory when Betty notified him of nonperformance
    4. none of the above

3. Jack contracts with Anne to drive her to the airport Wednesday afternoon in his specially designed stretch limousine. On Wednesday morning Jack's limousine is hit by a drunken driver, and Jack is unable to drive Anne. This is an example of
    1. impossibility of performance
    2. frustration of purpose
    3. discharge by merger
    4. none of the above
4. Jack is ready and willing to drive Anne to the airport. But Anne's flight is cancelled, and she refuses to pay. This is an example of
    1. impracticability of performance
    2. frustration of purpose
    3. discharge of merger
    4. none of the above
5. Rescission is
    1. the discharge of one party to a contract through substitution of a third person
    2. an agreement to settle for substitute performance
    3. a mutual agreement between parties to a contract to discharge each other's contractual duties
    4. none of the above

SELF-TEST AnswerS

1. c
2. b
3. a
4. b
5. c

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SECTION OVERVIEW

11.9: Remedies

Learning Objectives

After reading this chapter, you should understand the following:

1. The basic theory of contract remedies, and why courts don't just order the promisor to perform as promised
2. The interests that are protected by contract remedies
3. The types of legal remedies
4. The types of equitable remedies
5. The limitations on remedies

We come at last to the question of remedies. A valid agreement has been made, the promisor's duties have not been discharged; he or she has breached the contract. When one party has failed to perform, what are the rights of the parties? Or when the contract has been avoided because of incapacity or misrepresentation and the like, what are the rights of the parties after disaffirmance? These questions form the focus of this chapter. Remedies for breach of contracts for the sale of goods will be considered separately, in Chapter 18.

11.9.1: Theory of Contract Remedies

11.9.2: Promisee's Interests Protected by Contract

11.9.3: Legal Remedies- Damages

11.9.4: Equitable Remedies

11.9.5: Limitations on Contract Remedies

11.9.6: Cases

11.9.7: Summary and Exercises

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11.9.1: Theory of Contract Remedies

LEARNING OBJECTIVES

1. Understand the basic purpose of remedies.
2. Recognize that there are two general categories of remedies: legal and equitable.
3. See that courts do not simply order obligors to keep their promise but instead allow them to breach and the nonbreaching party to have remedies for that breach.

Purpose of Remedies

The fundamental purpose of remedies in noncriminal cases is not to punish the breaching party but—if possible—to put the nonbreaching party in the position he or she would have been in had there been no breach. Or, as is said, the purpose is to make the nonbreaching party whole.

There are two general categories of remedies—legal and equitable. In the category of legal remedies are **damages**. Damages are money paid by one party to another; there are several types of damages. In the category of equitable remedies are these three: **specific performance**, which means a person is ordered to deliver a unique thing (land or a unique personal property, such as a painting or an antique car); **injunction**, a judicial order directing a person to stop doing what he or she should not do (such as competing with a former employer in violation of a noncompete agreement); and **restitution**, which means putting the parties back into the position they were in before the contract was made.

Parties Have the Power—but Not the Right—to Breach

In view of the importance given to the intention of the parties in forming and interpreting contracts, it may seem surprising that the remedy for every breach is not a judicial order that the obligor carry out his or her undertakings. But it is not. Of course, some duties cannot be performed after a breach, because time and circumstances will have altered their purpose and rendered many worthless. Still, there are numerous occasions on which it would be theoretically possible for courts to order the parties to carry out their contracts, yet the courts will not do it. In 1897, Justice Oliver Wendell Holmes Jr. declared in a famous line that “the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it.” By that, he meant simply that the common law looks more toward compensating the promisee for his or her loss than toward compelling the promisor to perform. Indeed, the law of remedies often provides the parties with an incentive to break the contract. In short, the promisor has a choice: perform or pay.

The logic of this position is clear in many typical cases. The computer manufacturer orders specially designed circuit boards, then discovers before the circuits are made that a competitor has built a better machine and destroyed his market. The manufacturer cancels the order. It would make little economic sense for the circuit board maker to fabricate the boards if they could not be used elsewhere. A damage remedy to compensate the maker for out-of-pocket loss or lost profits is sensible; a judicial decree forcing the computer manufacturer to pay for and take delivery of the boards would be wasteful.

In general and if possible, the fundamental purpose of contract remedies is to put the nonbreaching party in the position it would have been in had there been no breach.

KEY TAKEAWAY

Remedies are intended to make the nonbreaching party whole. The two categories of remedies for breach of contract are legal and equitable. In the legal category are damages; in the equitable category are specific performance, injunctions, and restitution. The law does not force a party to perform; he or she always has the power (though not the right) to breach, and may do so if it is economically more advantageous to breach and suffer the consequence than to perform. Remedies, though, are not (usually) intended to punish the breaching party.

EXERCISES

1. Remedies are not supposed to punish the breaching party, generally. In what circumstances might punishment be a remedy, and what is that called?
2. What is the difference between legal and equitable remedies?

3. Why shouldn’t people be forced to perform as they contracted, instead of giving them the power to breach and then be required to pay damages?

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11.9.2: Promisee's Interests Protected by Contract

LEARNING OBJECTIVE

1. Understand that the nonbreaching party to a contract has certain expectations that contract remedies seek to fulfill to make the nonbreaching party whole.

Contract remedies serve to protect three different interests: an expectation interest, a reliance interest, and a restitution interest. A promisee will have one of these and may have two or all three.

An **expectation interest** is the benefit for which the promisee bargained, and the remedy is to put him in a position as good as that which he would have been in had the contract been performed. A **reliance interest** is the loss suffered by relying on the contract and taking actions consistent with the expectation that the other party will abide by it; the remedy is reimbursement that restores the promisee to his position before the contract was made. A **restitution interest** is that which restores to the promisee any benefit he conferred on the promisor. These interests do not dictate the outcome according to a rigid formula; circumstances and the nature of the contract, as usual, will play a large role. But in general, specific performance is a remedy that addresses the expectation interest, monetary damages address all three interests, and, not surprisingly, restitution addresses the restitution interest.

Consider some simple examples. A landowner repudiates an executory contract with a builder to construct a garage on her property for $100,000. The builder had anticipated a $10,000 profit (the garage would have cost him $90,000 to build). What can he expect to recover in a lawsuit against the owner? The court will not order the garage to be built; such an order would be wasteful, since the owner no longer wants it and may not be able to pay for it. Instead, the court will look to the builder's three possible interests. Since the builder has not yet started his work, he has given the owner nothing, and therefore has no restitution interest. Nor has he any reliance interest, since we are assuming that he has not paid out any money for supplies, hired a work crew, or advanced money to subcontractors. But he anticipated a profit, and so he has an expectation interest of $10,000.

Now suppose that the builder had dug out the foundation and poured concrete, at a cost of $15,000. His expectation interest has become $25,000 (the difference between $100,000 and $75,000, the money he will save by not having to finish the job). His reliance interest is $15,000, because this is the amount he has already spent. He may also have a restitution interest, depending on how much the foundation of the house is worth to the owner. (The value could be more or less than the sum of money actually expended to produce the foundation; for example, the builder might have had to pay his subcontractors for a greater share of the job than they had completed, and those sums therefore would not be reflected in the worth of the foundation.)

Normally, the promisee will choose which of the three interests to pursue. As is to be expected, the choice hinges on the circumstances of the case, his feelings, and the amount at stake.

KEY TAKEAWAY

A nonbreaching party might have one or more interests that the law seeks to realize: expectation, reliance, and restitution.

EXERCISES

1. What is the expectation interest? The reliance interest? The restitution interest?
2. How are these concepts useful in understanding contract remedies?

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11.9.3: Legal Remedies- Damages

LEARNING OBJECTIVES

1. Understand what is meant when it is said that damages are a legal remedy (as opposed to an equitable remedy).
2. Understand the names and purposes of the six types of remedies.
3. Know when liquidated damages will be allowed.
4. Recognize the circumstances that might allow punitive damages.

Overview

The promisee, whom we will hereafter refer to as the nonbreaching party, has the right to damages (a money award), if that is required to make her whole, whenever the other party has breached the contract, unless, of course, the contract itself or other circumstances suspend or discharge that right. **Damages** refers to money paid by one side to the other; it is a legal remedy. For historical and political reasons in the development of the English legal system, the courts of law were originally only able to grant monetary relief. If a petitioner wanted something other than money, recourse to a separate system of equity was required. The courtrooms and proceedings for each were separate. That actual separation is long gone, but the distinction is still recognized; a judge may be said to be "sitting in law" or "sitting in equity," or a case may involve requests for both money and some action. We take up the legal remedies of damages first.

Types of Damages

There are six different types of damages: compensatory, incidental, consequential, nominal, liquidated, and (sometimes) punitive.

Compensatory Damages

Damages paid to directly compensate the nonbreaching party for the value of what was not done or performed are **compensatory damages**. Sometimes calculating that value of the promisor's performance is easy—for example, when the nonbreaching party has ascertainable costs and profits, as in the case of the builder who would have earned $10,000 profit on a $100,000 house. When the performance is a service, a useful measure of loss is what it would cost to substitute performance by someone else. But the calculation is frequently difficult, especially when the performance is a service that is not easily duplicated. If Rembrandt breached a contract to paint your portrait, the loss could not be measured simply by inquiring how much Van Gogh would charge to do the same thing. Nevertheless, in theory, whatever net value would ultimately have been conferred on the nonbreaching party is the proper measure of compensatory damages. An author whose publisher breaches its contract to publish the book and who cannot find another publisher is entitled to lost royalties (if ascertainable) plus the value that would have accrued from her enhanced reputation.

Since the nonbreaching party usually has obligations under the contract also, a breach by the other party discharges his duty to perform and may result in savings. Or he may have made substitute arrangements and realized at least a partial profit on the substitution. Or, as in the case of the builder, he may have purchased goods intended for the job that can be used elsewhere. In all these situations, the losses he has avoided—savings, profits, or value of goods—are subtracted from the losses incurred to arrive at the net damages. The nonbreaching party may recover his actual losses, not more. Suppose an employer breaches a contract with a prospective employee who was to begin work for a year at a salary of $35,000. The employee quickly finds other, similar work at a salary of $30,000. Aside from whatever he might have had to spend searching for the job (incidental damages), his compensatory damages are limited to $5,000, the difference between what he would have earned and what he is earning.

Lost volume can be a troublesome problem in calculating damages. This problem arises when the nonbreaching party, a supplier of goods or services, enters a second contract when the buyer repudiates. The question is whether the second contract is a substituted performance or an additional one. If it is substituted, damages may be little or nothing; if additional, the entire expectation interest may be recovered. An automobile dealer contracts to sell a car in his inventory. Shortly before the deal is closed, the buyer calls up and repudiates the contract. The dealer then sells the car to someone else. If the dealer can show that he could have sold an identical car to the second purchaser regardless of what the first purchaser did, then the second sale stands on its own and cannot be used to offset the net profit recoverable from the first purchaser. The factual inquiry in lost volume cases is whether the nonbreaching party would have engaged in the second transaction if the breach had never occurred.

Incidental Damages

In addition to compensatory damages, the nonbreaching party may recover **incidental damages**. Incidental loss includes expenditures that the nonbreaching party incurs in attempting to minimize the loss that flows from the breach. To arrange for substitute goods or services, the nonbreaching party might have to pay a premium or special fees to locate another supplier or source of work.

Consequential Damages

A consequential loss is addressed with **consequential damages**. These are damages incurred by the nonbreaching party without action on his part because of the breach. For example, if Ralph does a poor job of plumbing Betty's bathroom and the toilet leaks, damaging the floor, the downstairs ceiling, and the downstairs rug, Ralph would owe for those loses in consequential damages. Or, again, lost sales stemming from a failure to fix a manufacturer's machine in time or physical and property injury due to a defective machine sold by the promisor would be addressed with consequential damages. Note, however, that one obvious, and often large, expenditure occasioned by a breach—namely, legal expenses in bringing a lawsuit to remedy the particular breach—is not an element of damages, unless the contract explicitly states that it is, and cannot be charged to the defendant. There is one situation, however, in which legal costs can be added to damages: when the breach causes the nonbreaching party to be involved in a lawsuit with someone else. Consequential damages will not be allowed if those damages are not foreseeable. This issue is taken up in Section 16.5 "Limitations on Contract Remedies".

Nominal Damages

In the situation where there has been a breach but the nonbreaching party has really suffered no loss or cannot prove what his loss is, he is entitled to **nominal damages**. Ricardo contracts to buy a new car from a dealer; the dealer breaches the contract. Ricardo finds and buys the same car from another dealer at the same price that the first one was to sell it for. Ricardo has suffered nominal damages: five dollars, perhaps.

Liquidated Damages

Precisely because damages are sometimes difficult to assess, the parties themselves may specify how much should be paid in the event of a breach. Courts will enforce a **liquidated damages** provision as long as the actual amount of damages is difficult to ascertain (in which case proof of it is simply made at trial) and the sum is reasonable in light of the expected or actual harm. If the liquidated sum is unreasonably large, the excess is termed a penalty and is said to be against public policy and unenforceable. Section 16.6.2 "Liquidated Damages", *Watson v. Ingram*, illustrates liquidated damages.

Punitive Damages

Punitive damages are those awarded for the purpose of punishing a defendant in a civil action, in which criminal sanctions are of course unavailable. They are proper in cases in which the defendant has acted willfully and maliciously and are thought to deter others from acting similarly. Since the purpose of contract law is compensation, not punishment, punitive damages have not traditionally been awarded, with one exception—when the breach of contract is also a tort for which punitive damages may be recovered. Punitive damages are permitted in the law of torts (in all but four states) when the behavior is malicious or willful (reckless conduct causing physical harm, deliberate defamation of one's character, a knowingly unlawful taking of someone's property), and some kinds of contract breach are also tortious. For example, when a creditor holding collateral as security under a contract for a loan sells the collateral to a good-faith purchaser for value even though the debtor was not in default, he has breached the contract and committed the tort of conversion; punitive damages may be awarded, assuming the behavior was willful and not merely mistaken.

Punitive damages are not fixed by law. The judge or jury may award at its discretion whatever sum is believed necessary to redress the wrong or deter like conduct in the future. This means that a richer person may be slapped with much heavier punitive damages than a poorer one in the appropriate case. But the judge in all cases may remit (reduce) some or all of a punitive damage award if he or she considers it excessive.

KEY TAKEAWAY

As the purpose of contract remedies is, in general, to make the nonbreaching party whole, the law allows several types of damages (money paid) to reflect the losses suffered by the nonbreaching party. Compensatory damages compensate for the special loss suffered; consequential damages compensate for the foreseeable consequences of the breach; incidental damages compensate for the costs of keeping any more damages from occurring; nominal damages are awarded if the actual amount cannot be shown or there are no actual damages; liquidated damages are agreed to in advance where the actual amount is difficult to ascertain, and they are allowed if not a penalty; and punitive damages may sometimes be allowed if the breaching party's behavior is an egregious tort, an outrage.

EXERCISES

1. What is the difference between a legal remedy and an equitable remedy?
2. What types of remedies are there, and what purpose does each serve?
3. What must be shown if liquidated damages are to be allowed?
4. Under what circumstances may punitive damages be allowed?

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11.9.4: Equitable Remedies

LEARNING OBJECTIVES

1. Know when equitable (as opposed to legal) remedies will be allowed.
2. Understand the different types of equitable remedies: specific performance, injunction, and restitution.

Overview

Really the only explanation for the differences between law and equity is to be found in the history and politics of England dating to the twelfth century, but in practical terms, the distinctions are notable. First, juries are not used in equitable cases. Second, equity relies less on precedent and more on the sense that justice should be served. Third, and of most significance, where what is sought by the nonbreaching party is not money—that is, where there is no adequate legal remedy—equity may afford relief. In equity a person may get a judge to order the breaching party to deliver some actual property, or to stop doing something that he should not do, or to return the consideration the nonbreaching party gave so as to return the parties to the precontract status (specific performance, injunction, and restitution, respectively).

Types of Remedies in Equity

There are three types of equitable remedies: specific performance, injunction, and restitution.

Specific Performance

Specific performance is a judicial order to the promisor that he undertake the performance to which he obligated himself in a contract. Specific performance is an alternative remedy to damages and may be issued at the discretion of the court, subject to a number of exceptions. Emily signs a contract to sell Charlotte a gold samovar, a Russian antique of great sentimental value because it once belonged to Charlotte's mother. Emily then repudiates the contract while still executory. A court may properly grant Charlotte an order of specific performance against Emily.

Once students understand the basic idea of specific performance, they often want to pounce upon it as the solution to almost any breach of contract. It seems reasonable that the nonbreaching party could ask a court to simply require the promisor to do what she promised she would. But specific performance is a very limited remedy: it is *only* available for breach of contract to sell a unique item, that is, a unique item of personal property (the samovar), or a parcel of real estate (all real estate is unique). But if the item is not unique, so that the nonbreaching party can go out and buy another one, then the legal remedy of money damages will solve the problem. And specific performance will never be used to force a person to perform services against his will, which would be involuntary servitude. A person may be forced to stop doing that which he should not do (injunction), but not forced to do what he will not do.

Injunction

An **injunction** is the second type of equitable remedy available in contract (it is also available in tort). It is a court order directing a person to stop doing that which she should not do. For example, if an employer has a valid noncompete contract with an employee, and the employee, in breach of that contract, nevertheless undertakes to compete with his former employer, a court may enjoin (issue an order of injunction), directing the former employee to stop such competition. A promise by a person not to do something —in this example, not to compete—is called a **negative** covenant (a covenant is a promise in a contract, itself a contract). Or if Seller promises to give Buyer the right of first refusal on a parcel of real estate or a unique work of art, but Seller, in breach of a written promise, offers the thing to a third party, a court may enjoin Seller from selling it to the third party. If a person violates an injunction, he may be held in contempt of court and put in jail for a while. *Madison Square Garden v. Carnera Corporation*, Section 16.6.3 "Injunctions and Negative Covenants", is a classic case involving injunctions for breach of contract.

Restitution

The third type of equitable relief is **restitution**. Restitution is a remedy applicable to several different types of cases: those in which the contract was avoided because of incapacity or misrepresentation, those in which the other party breached, and those in which the party seeking restitution breached. As the word implies, *restitution* is a restoring to one party of what he gave to the other. Therefore, only to the extent that the injured party conferred a benefit on the other party may the injured party be awarded

restitution. The point is, a person who breaches a contract should not suffer a punishment, and the nonbreaching party should not be unjustly enriched.

Total Nonperformance by Breaching Party

The nonbreaching party is always entitled to restitution in the event of total breach by nonperformance or repudiation, unless both parties have performed all duties except for payment by the other party of a definite sum of money for the injured party's performance.Restatement (Second) of Contracts, Section 373. Calhoun, a contractor, agrees to build $3,000 worth of fences for only $2,000 and completes the construction. Arlene, the landowner, refuses to pay. Calhoun's only right is to get the $2,000; he does not have a restitution right to $2,500, the market price of his services (or $3,000, the amount by which her property increased in value); he is entitled, instead, only to $2,000, his contract price. Had Arlene repudiated prior to completion, however, Calhoun would then have been entitled to restitution based either on the market price of the work or on the amount by which he enhanced her property. If the one party breaches, the nonbreaching party is generally entitled to restitution of property that can be returned. Arlene gives Calhoun a valuable Ming vase in return for his promise to construct the fences. Upon Calhoun's breach, Arlene is entitled to specific restitution of the vase.

Measuring restitution interest can be problematic. The courts have considerable discretion to award either what it would have cost to hire someone else to do the work that the nonbreaching party performed (generally, the market price of the service) or the value that was added to the property of the party in breach by virtue of the claimant's performance. Calhoun, the contractor, agrees to construct ten fences around Arlene's acreage at the market price of $25,000. After erecting three, Calhoun has performed services that would cost $7,500, market value. Assume that he has increased the value of Arlene's grounds by $8,000. If Arlene repudiated, there are two measures of Calhoun's restitution interest: $8,000, the value by which the property was enhanced, or $7,500, the amount it would have cost Arlene to hire someone else to do the work. Which measure to use depends on who repudiated the contract and for what reason. In some cases, the enhancement of property or wealth measurement could lead to an award vastly exceeding the market price for the service. In such cases, the smaller measure is used. For a doctor performing lifesaving operations on a patient, restitution would recover only the market value of the doctor's services—not the monetary value of the patient's life.

Part Performance and Then Breach

A party who has substantially performed and then breached is entitled to restitution of a benefit conferred on the injured party, if the injured party has refused (even though justifiably) to complete his own performance owing to the other's breach. Since the party in breach is liable to the injured party for damages for loss, this rule comes into play only when the benefit conferred is greater than the amount the nonbreaching party has lost. Arlene agrees to sell her property to Calhoun for $120,000, and Calhoun makes a partial payment of $30,000. He then repudiates. Arlene turns around and sells the property to a third party for $110,000. Calhoun—the breaching party—can get his money back, less the damages Arlene suffered as a result of his breach. He gets $30,000 minus the $10,000 loss Arlene incurred. He gets $20,000 in restitution. Otherwise Arlene would be enriched by Calhoun's breach: she'd get $140,000 in total for real estate worth $120,000. But if he gets $20,000 of his $30,000 back, she receives $110,000 from the third party and $10,000 from Calhoun, so she gets $120,000 total (plus, we hope, incidental damages, at least).

Restitution in Other Cases

Upon repudiation of an oral contract governed by the Statute of Frauds, the nonbreaching party is not entitled to her expectation interest, but she may recover in restitution unless the purpose of the statute would be frustrated. When one party avoids a contract owing to lack of capacity, mistake, misrepresentation, duress, or the like, she is entitled to restitution for benefit conferred on the other party. Restitution is also available if a contract duty is discharged or never arises because (1) performance was impracticable, (2) the purpose of the contract was frustrated, (3) a condition did not occur, or (4) a beneficiary disclaimed his benefit.

KEY TAKEAWAY

Equitable remedies for breach of contract are available when legal remedies won't make the nonbreaching party whole. The equitable remedies are specific performance (an order directing a person to deliver to the buyer the unique thing the seller contracted to sell), injunction (an order directing a person to stop doing that which he should not do), and restitution (the return by

one party of the benefit conferred on him when the contract is not performed, to the extent necessary to avoid imposing a penalty on the breaching party).

EXERCISES

1. Buyer contracts to buy a 1941 four-door Cadillac convertible from Seller for $75,000. Seller, having found a Third Party who will pay $85,000 for the car, refuses to sell to Buyer. What is Buyer's remedy?
2. Assume Third Party had paid the $85,000 and Seller was ordered to sell to Buyer. What is Third Party's remedy?
3. Professor Smith contracts to teach business law at State University for the academic year. After the first term is over, she quits. Can State University get an order of specific performance or an injunction requiring Professor Smith to return for the second term?
4. Now suppose that the reason Professor Smith quit work at State University is because she got a better job at Central University, fifteen miles away. Can State University get an injunction prohibiting her from teaching at Central University?

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11.9.5: Limitations on Contract Remedies

LEARNING OBJECTIVES

1. Understand that there are various rules that limit recovery for the nonbreaching party in a contract case.
2. Know how these concepts serve to limit contract remedies: foreseeability, mitigation of damages, certainty of damages, loss of power of avoidance, election of remedies, and agreement of the parties.

Overview

We have observed that the purpose of remedies in contract law is, where possible, to put the nonbreaching party in as good a position as he would have been in had there been no breach. There are, however, several limitations or restrictions affecting when a person can claim remedies, in both law (damages) and equity. Of course the contract itself may—if not unconscionable—limit remedies. Beyond that, the nonbreaching party must be able to articulate with some degree of certainty what her damages are; the damages must be foreseeable; the nonbreaching party must have made a reasonable effort to mitigate the damages; she must sometime elect to go with one remedy and forgo another; she cannot seek to avoid a contract if she has lost the power to do so. We turn to these points.

Foreseeability

If the damages that flow from a breach of contract lack **foreseeability**, they will not be recoverable. Failures to act, like acts themselves, have consequences. As the old fable has it, "For want of a nail, the kingdom was lost." To put a nonbreaching party in the position he would have been in had the contract been carried out could mean, in some cases, providing compensation for a long chain of events. In many cases, that would be unjust, because a person who does not anticipate a particular event when making a contract will not normally take steps to protect himself (either through limiting language in the contract or through insurance). The law is not so rigid; a loss is not compensable to the nonbreaching party unless the breaching party, at the time the contract was made, understood the loss was foreseeable as a probable result of his breach.

Of course, the loss of the contractual benefit in the event of breach is always foreseeable. A company that signs an employment contract with a prospective employee knows full well that if it breaches, the employee will have a legitimate claim to lost salary. But it might have no reason to know that the employee's holding the job for a certain length of time was a condition of his grandfather's gift of $1 million.

The leading case, perhaps the most studied case, in all the common law is *Hadley v. Baxendale*, decided in England in 1854. Joseph and Jonah Hadley were proprietors of a flour mill in Gloucester. In May 1853, the shaft of the milling engine broke, stopping all milling. An employee went to Pickford and Company, a common carrier, and asked that the shaft be sent as quickly as possible to a Greenwich foundry that would use the shaft as a model to construct a new one. The carrier's agent promised delivery within two days. But through an error, the shaft was shipped by canal rather than by rail and did not arrive in Greenwich for seven days. The Hadleys sued Joseph Baxendale, managing director of Pickford, for the profits they lost because of the delay. In ordering a new trial, the Court of Exchequer ruled that Baxendale was not liable because he had had no notice that the mill was stopped:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.*Hadley v. Baxendale* (1854), 9 Ex. 341, 354, 156 Eng.Rep. 145, 151.

Thus when the party in breach has not known and has had no reason to know that the contract entailed a special risk of loss, the burden must fall on the nonbreaching party. As we have seen, damages attributable to losses that flow from events that do not occur in the ordinary course of events are known as consequential or special damages. The exact amount of a loss need not be foreseeable; it is the nature of the event that distinguishes between claims for ordinary or consequential damages. A repair shop agrees to fix a machine that it knows is intended to be resold. Because it delays, the sale is lost. The repair shop, knowing why timeliness of performance was important, is liable for the lost profit, as long as it was reasonable. It would not be liable for an extraordinary profit that the seller could have made because of circumstances peculiar to the particular sale unless they were disclosed.

The special circumstances need not be recited in the contract. It is enough for the party in breach to have actual knowledge of the loss that would occur through his breach. Moreover, the parol evidence rule (Chapter 13 "Form and Meaning") does not bar introduction of evidence bearing on the party's knowledge before the contract was signed. So the lesson to a promisee is that the reason for the terms he bargains for should be explained to the promisor—although too much explanation could kill a contract. A messenger who is paid five dollars to deliver a letter across town is not likely to undertake the mission if he is told in advance that his failure for any reason to deliver the letter will cost the sender $1 million, liability to be placed on the messenger.

Actual knowledge is not the only criterion, because the standard of foreseeability is objective, not subjective. That means that if the party had reason to know—if a reasonable person would have understood—that a particular loss was probable should he breach, then he is liable for damages. What one has reason to know obviously depends on the circumstances of the case, the parties' prior dealings, and industry custom. A supplier selling to a middleman should know that the commodity will be resold and that delay or default may reduce profits, whereas delay in sale to an end user might not. If it was foreseeable that the breach might cause the nonbreaching party to be sued, the other party is liable for legal fees and a resulting judgment or the cost of a settlement.

Even though the breaching party may have knowledge, the courts will not always award full consequential damages. In the interests of fairness, they may impose limitations if such an award would be manifestly unfair. Such cases usually crop up when the parties have dealt informally and there is a considerable disproportion between the loss caused and the benefit the nonbreaching party had agreed to confer on the party who breached. The messenger may know that a huge sum of money rides on his prompt delivery of a letter across town, but unless he explicitly contracted to bear liability for failure to deliver, it is unlikely that the courts would force him to ante up $1 million when his fee for the service was only five dollars.

EBWS, LLC v. Britly Corp., Section 16.6.1 "Consequential Damages", is a case that represents a modern application of the rule of *Hadley v. Baxendale* on the issue of foreseeability of consequential damages.

Mitigation of Damages

Contract law encourages the nonbreaching party to avoid loss wherever possible; this is called **mitigation of damages**. The concept is a limitation on damages in law. So there can be no recovery if the nonbreaching party had an opportunity to avoid or limit losses and failed to take advantage of it. Such an opportunity exists as long as it does not impose, in the Restatement's words, an "undue risk, burden or humiliation."Restatement (Second) of Contracts, Section 350. The effort to mitigate need not be successful. As long as the nonbreaching party makes a reasonable, good-faith attempt to mitigate his losses, damages are recoverable.

Mitigation crops up in many circumstances. Thus a nonbreaching party who continues to perform after notice that the promisor has breached or will breach may not recover for expenses incurred in continuing to perform. And losses from the use of defective goods delivered in breach of contract are not compensable if the nonbreaching party knew before use that they were defective. Often the nonbreaching party can make substitute arrangements—find a new job or a new employee, buy substitute goods or sell them to another buyer—and his failure to do so will limit the amount of damages he will recover from the party who breaches. Under the general rule, failure to mitigate when possible permits the promisor to deduct from damages the amount of the loss that the nonbreaching party could have avoided. When there is a readily ascertainable market price for goods, damages are equal to the difference between the contract price and the market price.

A substitute transaction is not just any possible arrangement; it must be suitable under the circumstances. Factors to be considered include the similarity, time, and place of performance, and whether the difference between the contracted-for and substitute performances can be measured and compensated. A prospective employee who cannot find substitute work within her field need not mitigate by taking a job in a wholly different one. An advertising salesperson whose employment is repudiated need not mitigate by taking a job as a taxi driver. When the only difference between the original and the substitute performances is price, the nonbreaching party must mitigate, even if the substitute performer is the original promisor.

The nonbreaching party must mitigate in timely fashion, but each case is different. If it is clear that the promisor has unconditionally repudiated before performance is due, the nonbreaching party must begin to mitigate as soon as practicable and should not wait until the day performance is due to look for an alternative.

As long as the nonbreaching party makes a reasonable effort to mitigate, the success of that effort is not an issue in assessing damages. If a film producer's original cameraman breaches the contract, and if the producer had diligently searched for a substitute

cameraman, who cost $150 extra per week and it later came to light that the producer could have hired a cameraman for $100, the company is entitled nevertheless to damages based on the higher figure. *Shirley MacLaine v. Twentieth Century-Fox Corporation*, Section 16.6.4 "Limitation on Damages: Mitigation of Damages", is a well-known case involving mitigation of damages.

Certainty of Damages

A party can recover only that amount of damage in law which can be proved with reasonable certainty. Especially troublesome in this regard are lost profits and loss of goodwill. Alf is convinced that next spring the American public will be receptive to polka-dotted belts with his name monogrammed in front. He arranges for a garment factory to produce 300,000 such belts, but the factory, which takes a large deposit from him in advance, misplaces the order and does not produce the belts in time for the selling season. When Alf discovers the failure, he cannot raise more money to go elsewhere, and his project fails. He cannot recover damages for lost profits because the number is entirely speculative; no one can prove how much he would have made, if anything. He can, instead, seek restitution of the monies advanced. If he had rented a warehouse to store the belts, he would also be able to recover his reliance interest.

Proof of lost profits is not always difficult: a seller can generally demonstrate the profit he would have made on the sale to the buyer who has breached. The problem is more difficult, as Alf's case demonstrates, when it is the seller who has breached. A buyer who contracts for but does not receive raw materials, supplies, and inventory cannot show definitively how much he would have netted from the use he planned to make of them. But he is permitted to prove how much money he has made in the past under similar circumstances, and he may proffer financial and market data, surveys, and expert testimony to support his claim. When proof of profits is difficult or impossible, the courts may grant a nonmonetary award, such as specific performance.

Loss of Power of Avoidance

You will recall that there are several circumstances when a person may avoid a contract: duress, undue influence, misrepresentation (fraudulent, negligent, or innocent), or mistake. But a party may lose the right to avoid, and thus the right to any remedy, in several ways.

Delay

If a party is the victim of fraud, she must act promptly to rescind at common law, or she will lose the right and her remedy will be limited to damages in tort. (This is discussed a bit more in Section 16.5.7 "Election of Remedies".)

Affirmation

An infant who waits too long to disaffirm (again, delay) will have ratified the contract, as will one who—notwithstanding being the victim of duress, undue influence, mistake, or any other grounds for avoidance—continues to operate under the contract with full knowledge of his right to avoid. Of course the disability that gave rise to the power of avoidance must have passed before affirmation works.

Rights of Third Parties

The intervening rights of third parties may terminate the power to avoid. For example, Michelle, a minor, sells her watch to Betty Buyer. Up to and within a reasonable time after reaching majority, Michelle could avoid—disaffirm—the contract. But if, before that time, Betty sells the watch to a third party, Michelle cannot get it back from the third party. Similarly, Salvador Seller sells his car to Bill Buyer, who pays for it with a bad check. If the check bounces, Salvador can rescind the deal—Bill's consideration (the money represented by the check) has failed: Salvador could return the check and get his car back. But if, before the check from Bill bounces, Bill in turn sells the car to Pat Purchaser, Salvador cannot avoid the contract. Pat gets to keep the car. There are some exceptions to this rule.

Agreement of the Parties Limiting Remedies

Certainly it is the general rule that parties are free to enter into any kind of a contract they want, so long as it is not illegal or unconscionable. The inclusion into the contract of a liquidated damages clause—mentioned previously—is one means by which the parties may make an agreement affecting damages. But beyond that, as we saw in Chapter 12 "Legality", it is very common for one side to limit its liability, or for one side to agree that it will pursue only limited remedies against the other in case of breach. Such

agree-to limitations on the availability of remedies are generally OK provided they are conspicuous, bargained-for, and not unconscionable. In consumer transactions, courts are more likely to find a contracted-for limitation of remedies unconscionable than in commercial transactions, and under the Uniform Commercial Code (UCC) there are further restrictions on contractual remedy limitations.

For example, Juan buys ten bags of concrete to make a counter and stand for his expensive new barbecue. The bags have this wording in big print: "Attention. Our sole liability in case this product is defective will be to provide you with a like quantity of nondefective material. We will not be liable for any other damages, direct or indirect, express or implied." That's fine. If the concrete is defective, the concrete top breaks, and Juan's new barbecue is damaged, he will get nothing but some new bags of good concrete. He could have shopped around to find somebody who would deliver concrete with no limitation on liability. As it is, his remedies are limited by the agreement he entered into.

Election of Remedies

At Common Law

Another limitation on remedies—at common law—is the concept of **election of remedies**. The nature of a loss resulting from a contract breach may be such as to entitle one party to a choice among two or more means to redress the grievance, where the choices are mutually exclusive.

At classic common law, a person who was defrauded had an election of remedies: she could, immediately upon discovering the fraud, rescind, or she could retain the item (real estate or personal property) and attempt to remedy the fraudulently defective performance by suing for damages, but not both. Buyer purchases real estate from Seller for $300,000 and shortly discovers that Seller fraudulently misrepresented the availability of water. Buyer spends $60,000 trying to drill wells. Finally he gives up and sues Seller for fraud, seeking $360,000. Traditionally at common law, he would not get it. He should have rescinded upon discovery of the fraud. Now he can only get $60,000 in damages in tort.*Merritt v. Craig*, 746 A.2d 923 (Md. 2000). The purpose of the election of remedies doctrine is to prevent the victim of fraud from getting a double recovery, but it has come under increasing criticism. Here is one court's observation: "A host of commentators support elimination of the election of remedies doctrine. A common theme is that the doctrine substitutes labels and formalism for inquiry into whether double recovery results in fact. The rigid doctrine goes to the other extreme, actually resulting in the under compensation of fraud victims and the protection of undeserving wrongdoers."*Head & Seemann, Inc. v. Gregg*, 311 N.W.2d 667 (Wis. App. 1981).

Under the UCC

The doctrine of election of remedy has been rejected by the UCC, which means that the remedies are cumulative in nature. According to Section 2-703(1): "Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case." UCC, Section 2-721, provides that neither demand for rescission of the contract in the case of misrepresentation or fraud, nor the return or rejection of goods, bars a claim for damages or any other remedy permitted under the UCC for nonfraudulent breach (we will examine remedies for breach of sales contracts in Chapter 18 "Title and Risk of Loss").

Tort versus Contract

Frequently a contract breach may also amount to tortious conduct. A physician warrants her treatment as perfectly safe but performs the operation negligently, scarring the patient for life. The patient could sue for malpractice (tort) or for breach of warranty (contract). The choice involves at least four considerations:

1. Statute of limitations. Most statutes of limitations prescribe longer periods for contract than for tort actions.
2. Allowable damages. Punitive damages are more often permitted in tort actions, and certain kinds of injuries are compensable in tort but not in contract suits—for example, pain and suffering.
3. Expert testimony. In most cases, the use of experts would be the same in either tort or contract suits, but in certain contract cases, the expert witness could be dispensed with, as, for example, in a contract case charging that the physician abandoned the patient.
4. Insurance coverage. Most policies do not cover intentional torts, so a contract theory that avoids the element of willfulness would provide the plaintiff with a surer chance of recovering money damages.

Legal versus Extralegal Remedies

A party entitled to a legal remedy is not required to pursue it. Lawsuits are disruptive not merely to the individuals involved in the particular dispute but also to the ongoing relationships that may have grown up around the parties, especially if they are corporations or other business enterprises. Buyers must usually continue to rely on their suppliers, and sellers on their buyers. Not surprisingly, therefore, many businesspeople refuse to file suits even though they could, preferring to settle their disputes privately or even to ignore claims that they might easily press. Indeed, the decision whether or not to sue is not one for the lawyer but for the client, who must analyze a number of pros and cons, many of them not legal ones at all.

KEY TAKEAWAY

There are several limitations on the right of an aggrieved party to get contract remedies for a breach besides any limitations fairly agreed to by the parties. The damages suffered by the nonbreaching party must be reasonably foreseeable. The nonbreaching party must make a reasonable effort to mitigate damages, or the amount awarded will be reduced by the damages that could have been avoided. The party seeking damages must be able to explain within reason how much loss he has suffered as a result of the breach. If he cannot articulate with any degree of certainty—if the damages are really speculative—he will be entitled to nominal damages and that's all. There are circumstances in which a party who could have got out of a contractual obligation—avoided it—loses the power to do so, and her remedy of avoidance is lost. Not infrequently, a person will enter into a contract for services or goods that contains a limitation on her right to damages in case the other side breaches. That's all right unless the limitation is unconscionable. Sometimes parties are required to make an election of remedies: to choose among two or more possible bases of recovery. If the remedies are really mutually exclusive and one is chosen, the aggrieved party loses the right to pursue the others. And of course a person is always free not to pursue any remedy at all for breach of contract; that may be strategically or economically smart in some circumstances.

EXERCISES

1. When one party to a contract breaches, what duty, if any, is then imposed on the other party?
2. A chef who has never owned her own restaurant sues a contractor who failed to finish building the chef's first restaurant on time. She presents evidence of the profits made by similar restaurants that have been in business for some time. Is this good evidence of the damages she has suffered by the delay? To what damages is she entitled?
3. Rebecca, seventeen years and ten months old, buys a party dress for $300. She wears it to the junior prom but determines it doesn't look good on her. She puts it in her closet and forgets about it until six months later, when she decides to return it to the store. Is she now entitled to the remedy of rescission?
4. What is the difference between *rescission* and *restitution*?
5. Why are parties sometimes required to make an election of remedies?

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11.9.6: Cases

Consequential Damages

EBWS, LLC v. Britly Corp.

928 A.2d 497 (Vt. 2007)

Reiber, C.J.

The Ransom family owns Rock Bottom Farm in Strafford, Vermont, where Earl Ransom owns a dairy herd and operates an organic dairy farm. In 2000, the Ransoms decided to build a creamery on-site to process their milk and formed EBWS, LLC to operate the dairy-processing plant and to market the plant's products. In July 2000, Earl Ransom, on behalf of EBWS, met with Britly's president to discuss building the creamery.…In January 2001, EBWS and Britly entered into a contract requiring Britly to construct a creamery building for EBWS in exchange for $160,318.…The creamery was substantially completed by April 15, 2001, and EBWS moved in soon afterward. On June 5, 2001, EBWS notified Britly of alleged defects in construction. [EBWS continued to use the creamery pending the necessity to vacate it for three weeks when repairs were commenced].

On September 12, 2001, EBWS filed suit against Britly for damages resulting from defective design and construction.…

Following a three-day trial, the jury found Britly had breached the contract and its express warranty, and awarded EBWS: (1) $38,020 in direct damages, and (2) $35,711 in consequential damages.…

…The jury's award to EBWS included compensation for both direct and consequential damages that EBWS claimed it would incur while the facility closed for repairs. Direct damages [i.e., compensatory damages] are for "losses that naturally and usually flow from the breach itself," and it is not necessary that the parties actually considered these damages. [Citation]. In comparison, special or consequential damages "must pass the tests of causation, certainty and foreseeability, and, in addition, be reasonably supposed to have been in the contemplation of both parties at the time they made the contract."

…The court ruled that EBWS could not recover for lost profits because it was not a going concern at the time the contract was entered into, and profits were too speculative. The court concluded, however, that EBWS could submit evidence of other business losses, including future payment for unused milk and staff wages.…

At trial, Huyffer, the CEO of EBWS, testified that during a repairs closure the creamery would be required to purchase milk from adjacent Rock Bottom Farm, even though it could not process this milk. She admitted that such a requirement was self-imposed as there was no written output contract between EBWS and the farm to buy milk. In addition, Huyffer testified that EBWS would pay its employees during the closure even though EBWS has no written contract to pay its employees when they are not working. The trial court allowed these elements of damages to be submitted to the jury, and the jury awarded EBWS consequential damages for unused milk and staff wages.

On appeal, Britly contends that because there is no contractual or legal obligation for EBWS to purchase milk or pay its employees, these are not foreseeable damages. EBWS counters that it is common knowledge that cows continue to produce milk, even if the processing plant is not working, and thus it is foreseeable that this loss would occur. We conclude that these damages are not the foreseeable result of Britly's breach of the construction contract and reverse the award.…

[W]e conclude that…it is not reasonable to expect Britly to foresee that its failure to perform under the contract would result in this type of damages. While we are sympathetic to EBWS's contention that the cows continue to produce milk, even when the plant is closed down, this fact alone is not enough to demonstrate that buying and dumping milk is a foreseeable result of Britly's breach of the construction contract. Here, the milk was produced by a separate and distinct entity, Rock Bottom Farm, which sold the milk to EBWS.…

Similarly, EBWS maintained no employment agreements with its employees obligating it to pay wages during periods of closure for repairs, dips in market demand, or for any other reason. Any losses EBWS might suffer in the future because it chooses to pay its employees during a plant closure for repairs would be a voluntary expense and not in Britly's contemplation at the time it entered the construction contract. It is not reasonable to expect Britly to foresee losses incurred as a result of agreements that are informal in nature and carry no legal obligation on EBWS to perform. "[P]arties are not presumed to know the condition of each other's affairs nor to take into account contracts with a third party that is not communicated." [Citation] While it is true that EBWS

may have business reasons to pay its employees even without a contractual obligation, for example, to ensure employee loyalty, no evidence was introduced at trial by EBWS to support a sound rationale for such considerations. Under these circumstances, this business decision is beyond the scope of what Britly could have reasonably foreseen as damages for its breach of contract.…

In addition, the actual costs of the wages and milk are uncertain.…[T]he the milk and wages here are future expenses, for which no legal obligation was assumed by EBWS, and which are separate from the terms of the parties' contract. We note that at the time of the construction contract EBWS had not yet begun to operate as a creamery and had no history of buying milk or paying employees. See [Citation] (explaining that profits for a new business are uncertain and speculative and not recoverable). Thus, both the cost of the milk and the number and amount of wages of future employees that EBWS might pay in the event of a plant closure for repairs are uncertain.

Award for consequential damages is reversed.…

CASE QUESTIONS

1. Why, according to EBWS's CEO, would EBWS be required to purchase milk from adjacent Rock Bottom Farm, even though it could not process this milk?
2. Surely it is well known in Vermont dairy country that dairy farmers can't simply stop milking cows when no processing plant is available to take the milk—the cows will soon stop producing. Why was EBWS then not entitled to those damages which it will certainly suffer when the creamery is down for repairs?
3. Britly (the contractor) must have known EBWS had employees that would be idled when the creamery shut down for repairs. Why was it not liable for their lost wages?
4. What could EBWS have done at the time of contracting to protect itself against the damages it would incur in the event the creamery suffered downtime due to faulty construction?

Liquidated Damages

Watson v. Ingram

881 P.2d 247 (Wash. 1994)

Johnson, J.

…In the summer of 1990, Wayne Watson offered to buy James Ingram's Bellingham home for $355,000, with a $15,000 [about $24,000 in 2010 dollars] earnest money deposit.…

Under the agreement, the entire amount of the purchase price was due in cash on or before December 3, 1990.…The agreement required Watson to pay a $15,000 earnest money deposit into escrow at Kelstrup Realty, and provided that "[i]n the event of default by Buyer, earnest money shall be forfeited to Seller as liquidated damages, unless Seller elects to seek actual damages or specific performance. Lastly, the agreement contained a provision entitled "BUYER'S REPRESENTATIONS," which stated, "Buyer represents that buyer has sufficient funds available to close this sale in accordance with this agreement, and is not relying on any contingent source of funds unless otherwise set forth in this agreement".…

On November 10, 1990, Watson sent a written proposal to Ingram seeking to modify the original agreement. The proposed modification would have allowed Watson to defer paying $54,000 of the $355,000 sale price for between 6 and 12 months after the scheduled December closing date. In exchange, Ingram would receive a second lien position on certain real estate Watson owned.

According to Ingram, the November 10 proposal was the first time he realized Watson did not have financing readily available for the purchase of the house. Ingram notified Watson on November 12, 1990, that he would not agree to modify the original agreement and intended to strictly enforce its terms. Ingram was involved in a child custody suit in California and wanted to move to that state as soon as possible.…[Further efforts by Ingram to sell to third parties and by Watson to get an extension from Ingram failed.]

In September 1991, Ingram finally sold the house to a third party for $355,000, the same price that Watson had agreed to pay in December 1990.

Ingram and Watson each sought to recover Watson's $15,000 earnest money held in escrow. On December 4, 1990, Ingram wrote to Kelstrup Realty, indicating he was entitled to the $15,000 earnest money in escrow because Watson had defaulted. In January

1991, Watson filed this action to recover the earnest money, alleging it amounted to a penalty and Ingram had suffered no actual damages.…

The trial court found the earnest money "was clearly intended by both parties to be non-refundable" if Watson defaulted and determined $15,000 was "a reasonable forecast by [Ingram and Watson] of damages that would be incurred by [Ingram] if [Watson] failed to complete the purchase". The court entered judgment in favor of Ingram for the amount of the earnest money plus interest. The court also awarded Ingram his attorney fees pursuant to the parties' agreement. The Court of Appeals, Division One, affirmed. Watson now appeals to this court.

This case presents a single issue for review: whether the parties' contract provision requiring Watson to forfeit a $15,000 nonrefundable earnest money deposit is enforceable as liquidated damages. Liquidated damages clauses are favored in Washington, and courts will uphold them if the sums involved do not amount to a penalty or are otherwise unlawful. [Citation] To determine whether liquidated damages clauses are enforceable, Washington courts have applied a 2-part test from the Restatement of Contracts.…Liquidated damages clauses are upheld if the following two factors are satisfied:

First, the amount fixed must be a reasonable forecast of just compensation for the harm that is caused by the breach. Second, the harm must be such that it is incapable or very difficult of ascertainment.

The question before this court is whether this test is to be applied as of the time of contract formation (prospectively) or as of the time of trial (retrospectively). We have previously held, the "[r]easonableness of the forecast will be judged as of the time the contract was entered". [Citations]

In contrast, a prior Division One opinion relied upon by Petitioner held the reasonableness of the estimate of damages and the difficulty of ascertainment of harm should be measured as of the time of trial, and earnest money agreements should not be enforceable as liquidated damages if the nonbreaching party does not suffer actual damage. [Citations]

We…adopt the date of contract formation as the proper timeframe for evaluating the Restatement test. The prospective approach concentrates on whether the liquidated sum represents a reasonable prediction of the harm to the seller if the buyer breaches the agreement, and ignores actual damages except as evidence of the reasonableness of the estimate of potential damage.

We believe this approach better fulfills the underlying purposes of liquidated damages clauses and gives greater weight to the parties' expectations. Liquidated damages permit parties to allocate business and litigation risks. Even if the estimates of damages are not exact, parties can allocate and quantify those risks and can negotiate adjustments to the contract price in light of the allocated risks. Under the prospective approach, courts will enforce the parties' allocation of risk so long as the forecasts appear reasonable when made. [Citations]

In addition to permitting parties to allocate risks, liquidated damages provisions lend certainty to the parties' agreements and permit parties to resolve disputes efficiently in the event of a breach. Rather than litigating the amount of actual damages, the nonbreaching party must only establish the reasonableness of the agreement. The prospective approach permits parties to rely on their stipulated amounts without having to precisely establish damages at trial. In contrast, if the reasonableness of the amount is judged retrospectively, against the damage actually suffered, the "parties must fully litigate (at great expense and delay) that which they sought not to litigate." [Citation].

Petitioner argues the prospective approach treats buyers unfairly because it permits sellers to retain earnest money deposits even when the seller suffers no actual damage, and this violates the principle that contract damages should be compensatory only. He further contends that by evaluating parties' liquidated damages agreements against actual damages established at trial, courts can most effectively determine whether such agreements were reasonable and fair.

We disagree. As this court has previously explained, "[w]e are loath to interfere with the rights of parties to contract as they please between themselves [Citations] It is not the role of the court to enforce contracts so as to produce the most equitable result. The parties themselves know best what motivations and considerations influenced their bargaining, and, while, "[t]he bargain may be an unfortunate one for the delinquent party,…it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence…" [Citations]

The retrospective approach fails to give proper weight to the parties' negotiations. At the time of contract formation, unpredictable market fluctuations and variations in possible breaches make it nearly impossible for contracting parties to predict "precisely or within a narrow range the amount of damages that would flow from breach." [Citations]. However, against this backdrop of

uncertainty, the negotiated liquidated damages sum represents the parties' best estimate of the value of the breach and permits the parties to allocate and incorporate these risks in their negotiations. Under the prospective approach, a court will uphold the parties' agreed upon liquidated sum so long as the amount represents a reasonable attempt to compensate the nonbreaching party. On the other hand, if the reasonableness of a liquidated damages provision is evaluated under a retrospective approach, the parties cannot confidently rely on their agreement because the liquidated sum will not be enforced if, at trial, it is not a close approximation of the damage suffered or if no actual damages are proved.…

Having adopted the date of contract formation as the proper timeframe for evaluating the Restatement test, the Restatement's second requirement loses independent significance. The central inquiry is whether the specified liquidated damages were reasonable at the time of contract formation.…

We also agree with the Court of Appeals that in the context of real estate agreements, a requirement that damages be difficult to prove at trial would undermine the very purposes of the liquidated damage provision: "certainty, assurance that the contract will be performed, and avoidance of litigation". [Citation] It would "encourage litigation in virtually every case in which the sale did not close, regardless of whether the earnest money deposit was a reasonable estimate of the seller's damages." [Citation]

In sum, so long as the agreed upon earnest money agreement, viewed prospectively, is a reasonable prediction of potential damage suffered by the seller, the agreement should be enforced "without regard to the retrospective calculation of actual damages or the ease with which they may be proved". The prospective difficulty of estimating potential damage is a factor to be used in assessing the reasonableness of the earnest money agreement…

The decision of the Court of Appeals is affirmed.

CASE QUESTIONS

1. What does the court here mean when it says that liquidated damages clauses allow the parties to "allocate and incorporate the risks [of the transaction] in their negotiations"?
2. Why is it relevant that the plaintiff Ingram was engaged in a child-custody dispute and wanted to move to California as soon as possible?
3. What, in plain language, is the issue here?
4. How does the court's resolution of the issue seem to the court the better analysis?
5. Why did the plaintiff get to keep the $15,000 when he really suffered no damages?
6. Express the controlling rule of law out of this case.

Injunctions and Negative Covenants

Madison Square Garden Corporation v. Carnera

52 F.2d 47 (2d Cir. Ct. App. 1931)

Chase, J.

On January 13, 1931, the plaintiff and defendant by their duly authorized agents entered into the following agreement in writing:

1. Carnera agrees that he will render services as a boxer in his next contest (which contest, hereinafter called the 'First Contest.'…

9. Carnera shall not, pending the holding of the First Contest, render services as a boxer in any major boxing contest, without the written permission of the Garden in each case had and obtained. A major contest is understood to be one with Sharkey, Baer, Campolo, Godfrey, or like grade heavyweights, or heavyweights who shall have beaten any of the above subsequent to the date hereof. If in any boxing contest engaged in by Carnera prior to the holding of the First Contest, he shall lose the same, the Garden shall at its option, to be exercised by a two weeks' notice to Carnera in writing, be without further liability under the terms of this agreement to Carnera. Carnera shall not render services during the continuance of the option referred to in paragraph 8 hereof for any person, firm or corporation other than the Garden. Carnera shall, however, at all times be permitted to engage in sparring exhibitions in which no decision is rendered and in which the heavy weight championship title is not at stake, and in which Carnera boxes not more than four rounds with any one opponent.'…

Thereafter the defendant, without the permission of the plaintiff, written or otherwise, made a contract to engage in a boxing contest with the Sharkey mentioned in paragraph 9 of the agreement above quoted, and by the terms thereof the contest was to take

place before the first contest mentioned in the defendant's contract with the plaintiff was to be held.

The plaintiff then brought this suit to restrain the defendant from carrying out his contract to box Sharkey, and obtained the preliminary injunction order, from which this appeal was taken. Jurisdiction is based on diversity of citizenship and the required amount is involved.

The District Court has found on affidavits which adequately show it that the defendant's services are unique and extraordinary. A negative covenant in a contract for such personal services is enforceable by injunction where the damages for a breach are incapable of ascertainment. [Citations]

The defendant points to what is claimed to be lack of consideration for his negative promise, in that the contract is inequitable and contains no agreement to employ him. It is true that there is no promise in so many words to employ the defendant to box in a contest with Stribling or Schmeling, but the agreement read as a whole binds the plaintiff to do just that, provided either Stribling or Schmeling becomes the contestant as the result of the match between them and can be induced to box the defendant. The defendant has agreed to 'render services as a boxer' for the plaintiff exclusively, and the plaintiff has agreed to pay him a definite percentage of the gate receipts as his compensation for so doing. The promise to employ the defendant to enable him to earn the compensation agreed upon is implied to the same force and effect as though expressly stated. [Citations] The fact that the plaintiff's implied promise is conditioned, with respect to the contest with the winner of the Stribling-Schmeling match, upon the consent of that performer, does not show any failure of consideration for the defendant's promise, [Citation].

As we have seen, the contract is valid and enforceable. It contains a restrictive covenant which may be given effect. Whether a preliminary injunction shall be issued under such circumstances rests in the sound discretion of the court. [Citation] The District Court, in its discretion, did issue the preliminary injunction.…

Order affirmed.

CASE QUESTIONS

1. Why did the plaintiff not want the defendant to engage in any boxing matches until and except the ones arranged by the plaintiff?
2. What assertion did the defendant make as to why his promise was not enforceable? Why wasn't that argument accepted by the court?
3. If the defendant had refused to engage in a boxing match arranged by the plaintiff, would a court force him to do what he had promised?

Limitation on Damages: Mitigation of Damages

Shirley MacLaine Parker v. Twentieth Century-Fox Film Corporation

474 P.2d 689 (Cal. 1970)

Burke, Justice.

Defendant Twentieth Century-Fox Film Corporation appeals from a summary judgment granting to plaintiff the recovery of agreed compensation under a written contract for her services as an actress in a motion picture. As will appear, we have concluded that the trial court correctly ruled in plaintiff's favor and that the judgment should be affirmed.

Plaintiff is well known as an actress.…Under the contract, dated August 6, 1965, plaintiff was to play the female lead in defendant's contemplated production of a motion picture entitled "Bloomer Girl." The contract provided that defendant would pay plaintiff a minimum "guaranteed compensation" of $53,571.42 per week for 14 weeks commencing May 23, 1966, for a total of $750,000 [about $5,048,000 in 2010 dollars]. Prior to May 1966 defendant decided not to produce the picture and by a letter dated April 4, 1966, it notified plaintiff of that decision and that it would not "comply with our obligations to you under" the written contract.

By the same letter and with the professed purpose "to avoid any damage to you," defendant instead offered to employ plaintiff as the leading actress in another film tentatively entitled "Big Country, Big Man" (hereinafter, "Big Country"). The compensation offered was identical, as were 31 of the 34 numbered provisions or articles of the original contract. Unlike "Bloomer Girl," however, which was to have been a musical production, "Big Country" was a dramatic "western type" movie. "Bloomer Girl" was

to have been filmed in California; “Big Country” was to be produced in Australia. Also, certain terms in the proffered contract varied from those of the original. Plaintiff was given one week within which to accept; she did not and the offer lapsed. Plaintiff then commenced this action seeking recovery of the agreed guaranteed compensation.

The complaint sets forth two causes of action. The first is for money due under the contract; the second, based upon the same allegations as the first, is for damages resulting from defendant’s breach of contract. Defendant in its answer admits the existence and validity of the contract, that plaintiff complied with all the conditions, covenants and promises and stood ready to complete the performance, and that defendant breached and “anticipatorily repudiated” the contract. It denies, however, that any money is due to plaintiff either under the contract or as a result of its breach, and pleads as an affirmative defense to both causes of action plaintiff’s allegedly deliberate failure to mitigate damages, asserting that she unreasonably refused to accept its offer of the leading role in “Big Country.”

Plaintiff moved for summary judgment…[T]he motion was granted…for $750,000 plus interest…in plaintiff’s favor. This appeal by defendant followed.…

The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. [Citation] However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee’s rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages. [Citations]

In the present case defendant has raised no issue of reasonableness of efforts by plaintiff to obtain other employment; the sole issue is whether plaintiff’s refusal of defendant’s substitute offer of “Big Country” may be used in mitigation. Nor, if the “Big Country” offer was of employment different or inferior when compared with the original “Bloomer Girl” employment, is there an issue as to whether or not plaintiff acted reasonably in refusing the substitute offer. Despite defendant’s arguments to the contrary, no case cited or which our research has discovered holds or suggests that reasonableness is an element of a wrongfully discharged employee’s option to reject, or fail to seek, different or inferior employment lest the possible earnings therefrom be charged against him in mitigation of damages.

Applying the foregoing rules to the record in the present case, with all intendments in favor of the party opposing the summary judgment motion—here, defendant—it is clear that the trial court correctly ruled that plaintiff’s failure to accept defendant’s tendered substitute employment could not be applied in mitigation of damages because the offer of the “Big Country” lead was of employment both different and inferior, and that no factual dispute was presented on that issue. The mere circumstance that “Bloomer Girl” was to be a musical review calling upon plaintiff’s talents as a dancer as well as an actress, and was to be produced in the City of Los Angeles, whereas “Big Country” was a straight dramatic role in a “Western Type” story taking place in an opal mine in Australia, demonstrates the difference in kind between the two employments; the female lead as a dramatic actress in a western style motion picture can by no stretch of imagination be considered the equivalent of or substantially similar to the lead in a song-and-dance production.

Additionally, the substitute “Big Country” offer proposed to eliminate or impair the director and screenplay approvals accorded to plaintiff under the original “Bloomer Girl” contract, and thus constituted an offer of inferior employment. No expertise or judicial notice is required in order to hold that the deprivation or infringement of an employee’s rights held under an original employment contract converts the available “other employment” relied upon by the employer to mitigate damages, into inferior employment which the employee need not seek or accept. [Citation]

In view of the determination that defendant failed to present any facts showing the existence of a factual issue with respect to its sole defense—plaintiff’s rejection of its substitute employment offer in mitigation of damages—we need not consider plaintiff’s further contention that for various reasons, including the provisions of the original contract set forth in footnote 1, Ante, plaintiff was excused from attempting to mitigate damages.

The judgment is affirmed.

CASE QUESTIONS

1. Why did Ms. MacLaine refuse to accept the employment opportunity offered by the defendant?
2. Why did the defendant think it should not be liable for any damages as a result of its admitted breach of the original contract?
3. Who has the burden of proof on mitigation issues—who has to show that no mitigation occurred?
4. Express the controlling rule of law out of this case.

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11.9.7: Summary and Exercises

Summary

Contract remedies serve to protect three different interests: an expectation interest (the benefit bargained for), a reliance interest (loss suffered by relying on the contract), and a restitution interest (benefit conferred on the promisor). In broad terms, specific performance addresses the expectation interest, monetary damages address all three, and restitution addresses the restitution interest.

The two general categories of remedies are legal and equitable. In the former category are compensatory, consequential, incidental, nominal, liquated, and (rarely) punitive damages. In the latter category—if legal remedies are inadequate—are specific performance, injunction, and restitution.

There are some limitations or restrictions on the availability of damages: they must pass the tests of foreseeability and certainty. They must be reasonably mitigated, if possible. And liquidated damages must be reasonable—not a penalty. In some situations, a person can lose the remedy of rescission—the power to avoid a contract—when the rights of third parties intervene. In some cases a person is required to make an election of remedies: to choose one remedy among several, and when the one is chosen, the others are not available any more.

EXERCISES

1. Owner of an auto repair shop hires Contractor to remodel his shop but does not mention that two days after the scheduled completion date, Owner is to receive five small US Army personnel carrier trucks for service, with a three-week deadline to finish the job and turn the trucks over to the army. The contract between Owner and the army has a liquidated damages clause calling for $300 a day for every day trucks are not operable after the deadline. Contractor is five days late in finishing the remodel. Can Owner claim the $1,500 as damages against Contractor as a consequence of the latter's tardy completion of the contract? Explain.
2. Inventor devised an electronic billiard table that looked like a regular billiard table, but when balls dropped into the pocket, various electronic lights and scorekeeping devices activated. Inventor contracted with Contractor to manufacture ten prototypes and paid him $50,000 in advance, on a total owing of $100,000 ($10,000 for each completed table). After the tables were built to accommodate electronic fittings, Inventor repudiated the contract. Contractor broke the ten tables up, salvaged $1,000 of wood for other billiard tables, and used the rest for firewood. The ten intact tables, without electronics, could have been sold for $500 each ($5,000 total). Contractor then sued Inventor for the profit Contractor would have made had Inventor not breached. To what, if anything, is Contractor entitled by way of damages and why?
3. Calvin, a promising young basketball and baseball player, signed a multiyear contract with a professional basketball team after graduating from college. After playing basketball for one year, he decided he would rather play baseball and breached his contract with the basketball team. What remedy could the team seek?
4. Theresa leased a one-bedroom apartment from Landlady for one year at $500 per month. After three months, she vacated the apartment. A family of five wanted to rent the apartment, but Landlady refused. Three months later—six months into what would have been Theresa's term—Landlady managed to rent the apartment to Tenant for $400 per month. How much does Theresa owe, and why?
5. Plaintiff, a grocery store, contracted with Defendant, a burglar alarm company, for Defendant to send guards to Plaintiff's premises and to notify the local police if the alarm was activated. The contract had this language: "It is agreed that the Contractor is not an insurer, that the payments here are based solely on the value of the service in the maintenance of the system described, that it is impracticable and extremely difficult to fix the actual damages, if any, which may proximately result from a failure to perform its services, and in case of failure to perform such services and a resulting loss, its liability shall be limited to $500 as liquidated damages, and not as a penalty, and this liability shall be exclusive."

   A burglary took place and the alarm was activated, but Defendant failed to respond promptly. The burglars left with $330,000. Is the liquidated damages clause—the limitation on Plaintiff's right to recover—valid?
6. The decedent, father of the infant Plaintiff, was killed in a train accident. Testimony showed he was a good and reliable man. Through a representative, the decedent's surviving child, age five, recovered judgment against the railroad (Defendant). Defendant objected to expert testimony that inflation would probably continue at a minimum annual rate of 5 percent for the

next thirteen years (until the boy attained his majority), which was used to calculate the loss in support money caused by the father's death. The calculations, Defendant said, were unreasonably speculative and uncertain, and damages must be proven with reasonable certainty. Is the testimony valid?

7. Plaintiff produced and directed a movie for Defendant, but contrary to their agreement, Plaintiff was not given screen credit in the edited film (his name was not shown). The film was screened successfully for nearly four years. Plaintiff then sued (1) for damages for loss of valuable publicity or advertising because his screen credits were omitted for the years and (2) for an injunction against future injuries. The jury awarded Plaintiff $25,000 on the first count. On the second count, the court held Plaintiff should be able to "modify the prints in his personal possession to include his credits." But Plaintiff appealed, claiming that Defendant still had many unmodified prints in its possession and that showing those films would cause future damages. What remedy is available to Plaintiff?*Tamarind Lithography Workshop v. Sanders*, 193 Cal. Rptr. 409 (Calif. Ct. App., 1983).
8. In 1929 Kerr Steamship Company, Inc. (Plaintiff), delivered to Defendant, the Radio Corporation of America (RCA), a fairly long telegram—in code—to be transmitted to Manila, Philippine Islands, with instructions about loading one of Kerr's ships. By mistake, the telegraph was mislaid and not delivered. As a result of the failure to transmit it, the cargo was not loaded and the freight was lost in an amount of $6,675.29 [about $84,000 in 2010 dollars], profit that would have been earned if the message had been carried. Plaintiff said that because the telegram was long and because the sender was a ship company, RCA personnel should have known it was important information dealing with shipping and therefore RCA should be liable for the consequential damages flowing from the failure to send it. Is RCA liable?
9. Defendant offered to buy a house from Plaintiff. She represented, verbally and in writing, that she had $15,000 to $20,000 of equity in another house and would pay this amount to Plaintiff after selling it. She knew, however, that she had no such equity. Relying on these intentionally fraudulent representations, Plaintiff accepted Defendant's offer to buy, and the parties entered into a land contract. After taking occupancy, Defendant failed to make any of the contract payments. Plaintiff's investigation then revealed the fraud. Based on the fraud, Plaintiff sought rescission, ejectment, and recovery for five months of lost use of the property and out-of-pocket expenses. Defendant claimed that under the election of remedies doctrine, Plaintiff seller could not both rescind the contract and get damages for its breach. How should the court rule?
10. Buyers contracted to purchase a house being constructed by Contractor. The contract contained this clause: "Contractor shall pay to the owners or deduct from the total contract price $100.00 per day as liquidated damages for each day after said date that the construction is not completed and accepted by the Owners and Owners shall not arbitrarily withhold acceptance." Testimony established the rental value of the home at $400–$415 per month. Is the clause enforceable?

SELF-TEST QUESTIONS

1. Contract remedies protect
    1. a restitution interest
    2. a reliance interest
    3. an expectation interest
    4. all of the above
2. A restitution interest is
    1. the benefit for which the promisee bargained
    2. the loss suffered by relying on the contract
    3. that which restores any benefit one party conferred on the other
    4. none of the above
3. When breach of contract caused no monetary loss, the plaintiff is entitled to
    1. special damages
    2. nominal damages
    3. consequential damages
    4. no damages
4. Damages attributable to losses that flow from events that do not occur in the ordinary course of events are
    1. incidental damages
    2. liquidated damages
    3. consequential damages

4. punitive damages

5. Restitution is available
    1. when the contract was avoided because of incapacity
    2. when the other party breached
    3. when the party seeking restitution breached
    4. all of the above

SELF-TEST AnswerS

1. d
2. c
3. b
4. c
5. d

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SECTION OVERVIEW

11.10: Introduction to Sales and Leases

Learning Objectives

After reading this chapter, you should understand the following:

1. Why the law of commercial transactions is separate from the common law
2. What is meant by “commercial transactions” and how the Uniform Commercial Code (UCC) deals with them in general
3. The scope of Article 2, Article 2A, and the Convention on Contracts for the International Sale of Goods
4. What obligations similar to the common law’s are imposed on parties to a UCC contract, and what obligations different from the common law’s are imposed
5. The difference between a consumer lease and a finance lease

11.10.1: Commercial Transactions- the Uniform Commercial Code

11.10.2: Introduction to Sales and Lease Law, and the Convention on Contracts for the International Sale of Goods

11.10.3: Sales Law Compared with Common-Law Contracts and the CISG

11.10.4: General Obligations under UCC Article 2

11.10.5: Cases

11.10.6: Summary and Exercises

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11.10.1: Commercial Transactions- the Uniform Commercial Code

LEARNING OBJECTIVES

1. Understand why there is a separate body of law governing commercial transactions.
2. Be aware of the scope of the Uniform Commercial Code.
3. Have a sense of this text's presentation of the law of commercial transactions.

History of the UCC

In Chapter 8 "Introduction to Contract Law" we introduced the Uniform Commercial Code. As we noted, the UCC has become a national law, adopted in every state—although Louisiana has not enacted Article 2, and differences in the law exist from state to state. Of all the uniform laws related to commercial transactions, the UCC is by far the most successful, and its history goes back to feudal times.

In a mostly agricultural, self-sufficient society there is little need for trade, and almost all law deals with things related to land (real estate): its sale, lease, and devising (transmission of ownership by inheritance); services performed on the land; and damages to the land or to things related to it or to its productive capacity (torts). Such trade as existed in England before the late fourteenth century was dominated by foreigners. But after the pandemic of the Black Death in 1348–49 (when something like 30 percent to 40 percent of the English population died), the self-sufficient feudal manors began to break down. There was a shortage of labor. People could move off the manors to find better work, and no longer tied immediately to the old estates, they migrated to towns. Urban centers—cities—began to develop. Urbanization inevitably reached the point where citizens' needs could not be met locally. Enterprising people recognized that some places had a surplus of a product and that other places were in need of that surplus and had a surplus of their own to exchange for it. So then, by necessity, people developed the means to transport the surpluses. Enter ships, roads, some medium of exchange, standardized weights and measures, accountants, lawyers, and rules governing merchandising. And enter merchants.

The power of merchants was expressed through franchises obtained from the government which entitled merchants to create their own rules of law and to enforce these rules through their own courts. Franchises to hold fairs [retail exchanges] were temporary; but the franchises of the staple cities, empowered to deal in certain basic commodities [and to have mercantile courts], were permanent.…Many trading towns had their own adaptations of commercial law.… The seventeenth century movement toward national governments resulted in a decline of separate mercantile franchises and their courts. The staple towns…had outlived their usefulness. When the law merchant became incorporated into a national system of laws enforced by national courts of general jurisdiction, the local codes were finally extinguished. But national systems of law necessarily depended upon the older codes for their stock of ideas and on the changing customs of merchants for new developments.Frederick G. Kempin Jr., *Historical Introduction to Anglo-American Law* (Eagan, MN: West, 1973), 217–18, 219–20, 221.

When the American colonies declared independence from Britain, they continued to use British law, including the laws related to commercial transactions. By the early twentieth century, the states had inconsistent rules, making interstate commerce difficult and problematic. Several uniform laws affecting commercial transactions were floated in the late nineteenth century, but few were widely adopted. In 1942, the American Law Institute (ALI)American Law Insitute, "ALI Overview," accessed March 1, 2011, http://www.ali.org/index.cfm?fuseaction=about.overview. hired staff to begin work on a rationalized, simplified, and harmonized national body of modern commercial law. The ALI's first draft of the UCC was completed in 1951.The UCC was adopted by Pennsylvania two years later, and other states followed in the 1950s and 1960s.

In the 1980s and 1990s, the leasing of personal property became a significant factor in commercial transactions, and although the UCC had some sections that were applicable to leases, the law regarding the sale of goods was inadequate to address leases. Article 2A governing the leasing of goods was approved by the ALI in 1987. It essentially repeats Article 2 but applies to leases instead of sales. In 2001, amendments to Article 1—which applies to the entire UCC—were proposed and subsequently have been adopted by over half the states. No state has yet adopted the modernizing amendments to Article 2 and 2A that the ALI proposed in 2003.

That's the short history of why the body of commercial transaction law is separate from the common law.

Scope of the UCC and This Text's Presentation of the UCC

The UCC embraces the law of commercial transactions, a term of some ambiguity. A commercial transaction may seem to be a series of separate transactions; it may include, for example, the making of a contract for the sale of goods, the signing of a check, the endorsement of the check, the shipment of goods under a bill of lading, and so on. However, the UCC presupposes that each of these transactions is a facet of one single transaction: the lease or sale of, and payment for, goods. The code deals with phases of this transaction from start to finish. These phases are organized according to the following articles:

- Sales (Article 2)
- Leases (Article 2A)
- Commercial Paper (Article 3)
- Bank Deposits and Collections (Article 4)
- Funds Transfers (Article 4A)
- Letters of Credit (Article 5)
- Bulk Transfers (Article 6)
- Warehouse Receipts, Bills of Lading, and Other Documents of Title (Article 7)
- Investment Securities (Article 8)
- Secured Transactions; Sales of Accounts and Chattel Paper (Article 9)

Although the UCC comprehensively covers commercial transactions, it does not deal with every aspect of commercial law. Among the subjects not covered are the sale of real property, mortgages, insurance contracts, suretyship transactions (unless the surety is party to a negotiable instrument), and bankruptcy. Moreover, common-law principles of contract law that were examined in previous chapters continue to apply to many transactions covered in a particular way by the UCC. These principles include capacity to contract, misrepresentation, coercion, and mistake. Many federal laws supersede the UCC; these include the Bills of Lading Act, the Consumer Credit Protection Act, the warranty provisions of the Magnuson-Moss Act, and other regulatory statutes.

We follow the general outlines of the UCC in this chapter and in Chapter 18 "Title and Risk of Loss" and Chapter 19 "Performance and Remedies". In this chapter, we cover the law governing sales (Article 2) and make some reference to leases (Article 2A), though space constraints preclude an exhaustive analysis of leases. The use of documents of title to ship and store goods is closely related to sales, and so we cover documents of title (Article 7) as well as the law of bailments in Chapter 21 "Bailments and the Storage, Shipment, and Leasing of Goods".

In Chapter 22 "Secured Transactions and Suretyship" we turn to acceptance of security by the seller or lender for financing the balance of the payment due. Key to this area is the law of secured transactions (Article 9).

We now turn our attention to the sale—the first facet, and the cornerstone, of the commercial transaction.

KEY TAKEAWAY

In the development of the English legal system, commercial transactions were originally of such little importance that the rules governing them were left to the merchants themselves. They had their own courts and adopted their own rules based on their customary usage. By the 1700s, the separate courts had been absorbed into the English common law, but the distinct rules applicable to commercial transactions remained and have carried over to the modern UCC. The UCC treats commercial transactions in phases, and this text basically traces those phases.

EXERCISES

1. Why were medieval merchants compelled to develop their own rules about commercial transactions?
2. Why was the UCC developed, and when was the period of its initial adoption by states?

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11.10.2: Introduction to Sales and Lease Law, and the Convention on Contracts for the International Sale of Goods

LEARNING OBJECTIVES

1. Understand that the law of sales not only incorporates many aspects of common-law contract but also addresses some distinct issues that do not occur in contracts for the sale of real estate or services.
2. Understand the scope of Article 2 and the definitions of *sale* and *goods*.
3. Learn how courts deal with hybrid situations: mixtures of the sale of goods and of real estate, mixtures of goods and services.
4. Recognize the scope of Article 2A and the definitions of *lease*, *consumer lease*, and *finance lease*.
5. Learn about the Convention on Contracts for the International Sale of Goods and why it is relevant to our discussion of Article 2.

Scope of Articles 2 and 2A and Definitions

In dealing with any statute, it is of course very important to understand the statute's scope or coverage.

Article 2 does not govern all commercial transactions, only sales. It does not cover all sales, only the sale of goods. Article 2A governs leases, but only of personal property (goods), not real estate. The Convention on Contracts for the International Sale of Goods (CISG)—kind of an international Article 2—"applies to contracts of sale of goods between parties whose places of business are in different States [i.e., countries]" (CISG, Article 1). So we need to consider the definitions of *sale*, *goods*, and *lease*.

Definition of *Sale*

A **sale** "consists in the passing of title from the seller to the buyer for a price."Uniform Commercial Code, Section 2-106.

Sales are distinguished from gifts, bailments, leases, and secured transactions. Article 2 sales should be distinguished from gifts, bailments, leases, and secured transactions. A **gift** is the transfer of title without consideration, and a "contract" for a gift of goods is unenforceable under the Uniform Commercial Code (UCC) or otherwise (with some exceptions). A **bailment** is the transfer of possession but not title or use; parking your car in a commercial garage often creates a bailment with the garage owner. A lease (see the formal definition later in this chapter) is a fixed-term arrangement for possession and use of something—computer equipment, for example—and does not transfer title. In a **secured transaction**, the owner-debtor gives a security interest in collateral to a creditor that allows the creditor to repossess the collateral if the owner defaults.

Definition of *Goods*

Even if the transaction is considered a sale, the question still remains whether the contract concerns the sale of goods. Article 2 applies only to goods; sales of real estate and services are governed by non-UCC law. Section 2-105(1) of the UCC defines **goods** as "all things…which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid." Money can be considered goods subject to Article 2 if it is the object of the contract—for example, foreign currency.

In certain cases, the courts have difficulty applying this definition because the item in question can also be viewed as realty or service. Most borderline cases raise one of two general questions:

1. Is the contract for the sale of the real estate, or is it for the sale of goods?
2. Is the contract for the sale of goods, or is it for services?

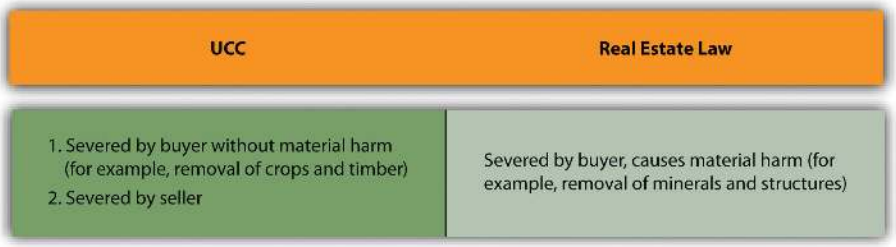
Real Estate versus Goods

The dilemma is this: A landowner enters into a contract to sell crops, timber, minerals, oil, or gas. If the items have already been detached from the land—for example, timber has been cut and the seller agrees to sell logs—they are goods, and the UCC governs the sale. But what if, at the time the contract is made, the items are still part of the land? Is a contract for the sale of uncut timber governed by the UCC or by real estate law?

The UCC governs under either of two circumstances: (1) if the contract calls for the seller to sever the items or (2) if the contract calls for the buyer to sever the items and if the goods can be severed without material harm to the real estate.Uniform Commercial Code, Section 2-107. The second provision specifically includes growing crops and timber. By contrast, the law of real property

governs if the buyer's severance of the items will materially harm the real estate; for example, the removal of minerals, oil, gas, and structures by the buyer will cause the law of real property to govern. (See Figure 17.1 "Governing Law".)

Figure 17.1 Governing Law



Goods versus Services

Distinguishing goods from services is the other major difficulty that arises in determining the nature of the object of a sales contract. The problem: how can goods and services be separated in contracts calling for the seller to deliver a combination of goods and services? That issue is examined in Section 17.5.1 "Mixed Goods and Services Contracts: The "Predominant Factor" Test" (*Pittsley v. Houser*), where the court applied the common "predominant factor" (also sometimes "predominate purpose" or "predominant thrust") test—that is, it asked whether the transaction was predominantly a contract for goods or for services. However, the results of this analysis are not always consistent. Compare *Epstein v. Giannattasio*, in which the court held that no sale of goods had been made because the plaintiff received a treatment in which the cosmetics were only incidentally used, with *Newmark v. Gimble's, Inc.*, in which the court said "[i]f the permanent wave lotion were sold…for home consumption… unquestionably an implied warranty of fitness for that purpose would have been an integral incident of the sale."*Epstein v. Giannattasio* 197 A.2d 342 (Conn. 1963); *Newmark v. Gimble's, Inc.*, 258 A.2d 697 (N.J. 1969). The New Jersey court rejected the defendant's argument that by actually applying the lotion to the patron's head, the salon lessened the liability it otherwise would have had if it had simply sold her the lotion.

In two areas, state legislatures have taken the goods-versus-services issue out of the courts' hands and resolved the issue through legislation. Food sold in restaurants is a sale of goods, whether it is to be consumed on or off the premises. Blood transfusions (really the sale of blood) in hospitals have been legislatively declared a service, not a sale of goods, in more than forty states, thus relieving the suppliers and hospitals of an onerous burden for liability from selling blood tainted with the undetectable hepatitis virus.

Definition of *Lease*

Section 2A-103(j) of the UCC defines a **lease** as "a transfer of the right to possession and use of goods for a term in return for consideration." The **lessor** is the one who transfers the right to possession to the **lessee**. If Alice rents a party canopy from Equipment Supply, Equipment Supply is the lessor and Alice is the lessee.

Two Types of Leases

The UCC recognizes two kinds of leases: consumer leases and finance leases. A **consumer lease** is used when a lessor leases goods to "an individual…primarily for personal, family, or household purposes," where total lease payments are less than $25,000.Uniform Commercial Code, Section 2A-103(e). The UCC grants some special protections to consumer lessees. A **finance lease** is used when a lessor "acquires the goods or the right to [them]" and leases them to the lessee.Uniform Commercial Code, Section 2A-103(g). The person from whom the lessor acquires the goods is a supplier, and the lessor is simply financing the deal. Jack wants to lease a boom lift (personnel aerial lift, also known as a cherry picker) for a commercial roof renovation. First Bank agrees to buy (or itself lease) the machine from Equipment Supply and in turn lease it to Jack. First Bank is the lessor, Jack is the lessee, and Equipment Supply is the supplier.

International Sales of Goods

The UCC is, of course, American law, adopted by the states of the United States. The reason it has been adopted is because of the inconvenience of doing interstate business when each state had a different law for the sale of goods. The same problem presents

itself in international transactions. As a result, the United Nations Commission on International Trade Law developed an international equivalent of the UCC, the Convention on Contracts for the International Sale of Goods (CISG), first mentioned in Chapter 8 "Introduction to Contract Law". It was promulgated in Vienna in 1980. As of July 2010, the convention (a type of treaty) has been adopted by seventy-six countries, including the United States and all its major trading partners except the United Kingdom. One commentator opined on why the United Kingdom is an odd country out: it is "perhaps because of pride in its longstanding common law legal imperialism or in its long-treasured feeling of the superiority of English law to anything else that could even challenge it."A. F. M. Maniruzzaman, quoted by Albert H. Kritzer, Pace Law School Institute of International Commercial Law, *CISG: Table of Contracting States*, accessed March 1, 2011, http://www.cisg.law.pace.edu/cisg/countries/cntries.html.

The CISG is interesting for two reasons. First, assuming globalization continues, the CISG will become increasingly important around the world as the law governing international sale contracts. Its preamble states, "The adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems [will] contribute to the removal of legal barriers in international trade and promote the development of international trade." Second, it is interesting to compare the legal culture informing the common law to that informing the CISG, which is not of the English common-law tradition. Throughout our discussion of Article 2, we will make reference to the CISG, the complete text of which is available online.Pace Law School, "United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG]" *CISG Database*, accessed March 1, 2011, http://www.cisg.law.pace.edu/cisg/text/treaty.html. References to the CISG are in bold.

As to the CISG's scope, CISG Article 1 provides that it "applies to contracts of sale of goods between parties whose places of business are in different States [i.e., countries]; it "governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract," and has nothing to do "with the validity of the contract or of any of its provisions or of any usage" (Article 4). It excludes sales (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity (Article 2).

Parties are free to exclude the application of the Convention or, with a limited exception, vary the effect of any of its provisions (Article 6).

KEY TAKEAWAY

Article 2 of the UCC deals with the sale of goods. *Sale* and *goods* have defined meanings. Article 2A of the UCC deals with the leasing of goods. *Lease* has a defined meaning, and the UCC recognizes two types of leases: consumer leases and finance leases. Similar in purpose to the UCC of the United States is the Convention on Contracts for the International Sale of Goods, which has been widely adopted around the world.

EXERCISES

1. Why is there a separate body of statutory law governing contracts for the sale of goods as opposed to the common law, which governs contracts affecting real estate and services?
2. What is a consumer lease? A finance lease?
3. What is the Convention on Contracts for the International Sale of Goods?

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11.10.3: Sales Law Compared with Common-Law Contracts and the CISG

LEARNING OBJECTIVE

1. Recognize the differences and similarities among the Uniform Commercial Code (UCC), common-law contracts, and the CISG as related to the following contract issues:
   - Offer and acceptance
   - Revocability
   - Consideration
   - The requirement of a writing and contractual interpretation (form and meaning)

Sales law deals with the sale of goods. Sales law is a special type of contract law, but the common law informs much of Article 2 of the UCC—with some differences, however. Some of the similarities and differences were discussed in previous chapters that covered common-law contracts, but a review here is appropriate, and we can refer briefly to the CISG's treatment of similar issues.

Mutual Assent: Offer and Acceptance

Definiteness of the Offer

The common law requires more definiteness than the UCC. Under the UCC, a contractual obligation may arise even if the agreement has **open terms**. Under Section 2-204(3), such an agreement for sale is not voidable for indefiniteness, as in the common law, if the parties have intended to make a contract and the court can find a reasonably certain basis for giving an appropriate remedy. Perhaps the most important example is the open price term.

The open price term is covered in detail in Section 2-305. At common law, a contract that fails to specify price or a means of accurately ascertaining price will almost always fail. This is not so under the UCC provision regarding open price terms. If the contract says nothing about price, or if it permits the parties to agree on price but they fail to agree, or if it delegates the power to fix price to a third person who fails to do so, then Section 2-305(1) "plugs" the open term and decrees that the price to be awarded is a "reasonable price at the time for delivery." When one party is permitted to fix the price, Section 2-305(2) requires that it be fixed in good faith. However, if the parties *intend* not to be bound unless the price is first fixed or agreed on, and it is not fixed or agreed on, then no contract results.Uniform Commercial Code, Section 2-305(4).

Another illustration of the open term is in regard to particulars of performance. Section 2-311(1) provides that a contract for sale of goods is not invalid just because it leaves to one of the parties the power to specify a particular means of performing. However, "any such specification must be made in good faith and within limits set by commercial reasonableness." (Performance will be covered in greater detail in Chapter 18 "Title and Risk of Loss".)

The CISG (Article 14) provides the following: **"A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price."**

Acceptance Varying from Offer: Battle of the Forms

The concepts of offer and acceptance are basic to any agreement, but the UCC makes a change from the common law in its treatment of an acceptance that varies from the offer (this was discussed in Chapter 8 "Introduction to Contract Law"). At common law, where the "mirror image rule" reigns, if the acceptance differs from the offer, no contract results. If that were the rule for sales contracts, with the pervasive use of form contracts—where each side's form tends to favor that side—it would be very problematic.

Section 2-207 of the UCC attempts to resolve this "battle of the forms" by providing that additional terms or conditions in an acceptance operate as such unless the acceptance is conditioned on the offeror's consent to the new or different terms. The new terms are construed as offers but are automatically incorporated in any contract between merchants for the sale of goods unless "(a) the offer expressly limits acceptance to the terms of the offer; (b) [the terms] materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received." In any case, Section 2-207 goes on like this: "Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of

those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."This section of the UCC is one of the most confusing and fiercely litigated sections; Professor Grant Gilmore once called it a "miserable, bungled, patched-up job" and "arguably the greatest statutory mess of all time." Mark E. Roszkowski, "Symposium on Revised Article 2 of the Uniform Commercial Code—Section-by-Section Analysis," *SMU Law Review* 54 (Spring 2001): 927, 932, quoting Professor Grant Gilmore to Professor Robert Summers, Cornell University School of Law, September 10, 1980, in *Teaching Materials on Commercial and Consumer Law*, ed. Richard E. Speidel, Robert S Summers, and James J White, 3rd ed. (St. Paul, MN: West. 1981), pp. 54–55. In 2003 the UCC revisioners presented an amendment to this section in an attempt to fix Section 2-207, but no state has adopted this section's revision. See Commercial Law, "UCC Legislative Update," March 2, 2010, accessed March 1, 2011, http://ucclaw.blogspot.com/2010/03/ucc-legislative-update.html.

As to international contracts, the CISG says this about an acceptance that varies from the offer (Article 19), and it's pretty much the same as the UCC:

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Revocation of Offer

Under both common law and the UCC, an offer can be revoked at any time prior to acceptance unless the offeror has given the offeree an option (supported by consideration); under the UCC, an offer can be revoked at any time prior to acceptance unless a merchant gives a "**firm offer**" (for which no consideration is needed). The CISG (Article 17) provides that an offer is revocable before it is accepted unless, however, "it indicates…that it is irrevocable" or if the offeree reasonably relied on its irrevocability.

Reality of Consent

There is no particular difference between the common law and the UCC on issues of duress, misrepresentation, undue influence, or mistake. As for international sales contracts, the CISG provides (Article 4(a)) that it "governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract and is not concerned with the validity of the contract or of any of its provisions."

Consideration

The UCC

The UCC requires no consideration for modification of a sales contract made in good faith; at common law, consideration is required to modify a contract.Uniform Commercial Code, Section 2-209(1). The UCC requires no consideration if one party wants to forgive another's breach by written waiver or renunciation signed and delivered by the aggrieved party; under common law, consideration is required to discharge a breaching party.Uniform Commercial Code, Section 1–107. The UCC requires no consideration for a "firm offer"—a writing signed by a merchant promising to hold an offer open for some period of time; at common law an option requires consideration. (Note, however, the person can give an option under either common law or the code.)

Under the CISG (Article 29), "A contract may be modified or terminated by the mere agreement of the parties." No consideration is needed.

Requirement of a Writing

The common law has a Statute of Frauds, and so does the UCC. It requires a writing to enforce a contract for the sale of goods worth $500 or more, with some exceptions, as discussed in Chapter 13 "Form and Meaning".Proposed amendments by UCC revisioners presented in 2003 would have raised the amount of money—to take into account inflation since the mid-fifties—to $5,000, but no state has yet adopted this amendment; Uniform Commercial Code, Section 2-201.

The CISG provides (Article 11), "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." But Article 29 provides, "A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement."

Parol Evidence

Section 2-202 of the UCC provides pretty much the same as the common law: if the parties have a writing intended to be their final agreement, it "may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." However, it may be explained by "course of dealing or usage of trade or by course of performance" and "by evidence of consistent additional terms."

The CISG provides (Article 8) the following: "In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

KEY TAKEAWAY

The UCC modernizes and simplifies some common-law strictures. Under the UCC, the mirror image rule is abolished: an acceptance may sometimes differ from the offer, and the UCC can "plug" open terms in many cases. No consideration is required under the UCC to modify or terminate a contract or for a merchant's "firm offer," which makes the offer irrevocable according to its terms. The UCC has a Statute of Frauds analogous to the common law, and its parol evidence rule is similar as well. The CISG compares fairly closely to the UCC.

EXERCISES

1. Why does the UCC change the common-law mirror image rule, and how?
2. What is meant by "open terms," and how does the UCC handle them?
3. The requirement for consideration is relaxed under the UCC compared with common law. In what circumstances is no consideration necessary under the UCC?
4. On issues so far discussed, is the CISG more aligned with the common law or with the UCC? Explain your answer.

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11.10.4: General Obligations under UCC Article 2

LEARNING OBJECTIVES

1. Know that the Uniform Commercial Code (UCC) imposes a general obligation to act in good faith and that it makes unconscionable contracts or parts of a contract unenforceable.
2. Recognize that though the UCC applies to all sales contracts, merchants have special obligations.
3. See that the UCC is the "default position"—that within limits, parties are free to put anything they want to in their contract.

Article 2 of the UCC of course has rules governing the obligations of parties specifically as to the offer, acceptance, performance of sales contracts, and so on. But it also imposes some general obligations on the parties. Two are called out here: one deals with unfair contract terms, and the second with obligations imposed on merchants.

Obligation of Good-Faith Dealings in General

Under the UCC

Section 1-203 of the UCC provides, "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." *Good faith* is defined at Section 2-103(j) as "honesty in fact and the observance of reasonable commercial standards of fair dealing." This is pretty much the same as what is held by common law, which "imposes a duty of good faith and fair dealing upon the parties in performing and enforcing the contract."Restatement (Second) of Contracts, Section 205.

The UCC's good faith in "performance or enforcement" of the contract is one thing, but what if the terms of the contract itself are unfair? Under Section 2-302(1), the courts may tinker with a contract if they determine that it is particularly unfair. The provision reads as follows: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

The court thus has considerable flexibility. It may refuse to enforce the entire contract, strike a particular clause or set of clauses, or limit the application of a particular clause or set of clauses.

And what does "unconscionable" mean? The UCC provides little guidance on this crucial question. According to Section 2-302(1), the test is "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.…The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power."

The definition is somewhat circular. For the most part, judges have had to develop the concept with little help from the statutory language. Unconscionability is much like US Supreme Court Justice Potter Stewart's famous statement about obscenity: "I can't define it, but I know it when I see it." In the leading case, *Williams v. Walker-Thomas Furniture Co.* (Section 12.5.3 "Unconscionability", set out in Chapter 12 "Legality"), Judge J. Skelly Wright attempted to develop a framework for analysis. He refined the meaning of unconscionability by focusing on "absence of meaningful choice" (often referred to as **procedural unconscionability**) and on terms that are "unreasonably favorable" (commonly referred to as **substantive unconscionability**). An example of procedural unconscionability is the salesperson who says, "Don't worry about all that little type on the back of this form." Substantive unconscionability is the harsh term—the provision that permits the "taking of a pound of flesh" if the contract is not honored.

Despite its fuzziness, the concept of unconscionability has had a dramatic impact on American law. In many cases, in fact, the traditional notion of *caveat emptor* (Latin for "buyer beware") has changed to *caveat venditor* ("let the seller beware"). So important is this provision that courts in recent years have applied the doctrine in cases not involving the sale of goods.

Under the CISG, Article 7: "Regard is to be had…to the observance of good faith in international trade."

Obligations Owed by Merchants

“Merchant” Sellers

Although the UCC applies to all sales of goods (even when you sell your used car to your neighbor), merchants often have special obligations or are governed by special rules.

As between Merchants

The UCC assumes that merchants should be held to particular standards because they are more experienced and have or should have special knowledge. Rules applicable to professionals ought not apply to the casual or inexperienced buyer or seller. For example, we noted previously that the UCC relaxes the mirror image rule and provides that as “between merchants” additional terms in an acceptance become part of the contract, and we have discussed the “ten-day-reply doctrine” that says that, again “as between merchants,” a writing signed and sent to the other binds the recipient as an exception to the Statute of Frauds.Uniform Commercial Code, Sections 2-205 and 2A–205. There are other sections of the UCC applicable “as between merchants,” too.

Article 1 of the CISG abolishes any distinction between merchants and nonmerchants: “Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.”

Merchant to Nonmerchant

In addition to duties imposed between merchants, the UCC imposes certain duties on a merchant when she sells to a nonmerchant. A merchant who sells her merchandise makes an important **implied warranty of merchantability**. That is, she promises that goods sold will be fit for the purpose for which such goods are normally intended. A nonmerchant makes no such promise, nor does a merchant who is not selling merchandise—for example, a supermarket selling a display case is not a “merchant” in display cases.

In *Sheeskin v. Giant Foods, Inc.*, the problem of whether a merchant made an implied warranty of merchantability was nicely presented. Mr. Seigel, the plaintiff, was carrying a six-pack carton of Coca-Cola from a display bin to his shopping cart when one or more of the bottles exploded. He lost his footing and was injured. When he sued the supermarket and the bottler for breach of the implied warranty of fitness, the defendants denied there had been a sale: he never paid for the soda pop, thus no sale by a merchant and thus no warranty. The court said that Mr. Seigel’s act of reaching for the soda to put it in his cart was a “reasonable manner of acceptance” (quoting UCC, Section 2-206(1)).*Sheeskin v. Giant Food, Inc.*, 318 A.2d 874 (Md. Ct. App. 1974).

Who Is a Merchant?

Section 2-104(1) of the UCC defines a merchant as one “who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.” A phrase that recurs throughout Article 2—“between merchants”—refers to any transaction in which both parties are chargeable with the knowledge or skill of merchants.Uniform Commercial Code, Section 2-104(3). Not every businessperson is a merchant with respect to every possible transaction. But a person or institution normally not considered a merchant can be one under Article 2 if he employs an agent or broker who holds himself out as having such knowledge or skill. (Thus a university with a purchasing office can be a merchant with respect to transactions handled by that department.)

Determining whether a particular person operating a business is a merchant under Article 2-104 is a common problem for the courts. *Goldkist, Inc. v. Brownlee*, Section 17.5.2 "“Merchants” under the UCC", shows that making the determination is difficult and contentious, with significant public policy implications.

Obligations May Be Determined by Parties

Under the UCC

Under the UCC, the parties to a contract are free to put into their contract pretty much anything they want. Article 1-102 states that “the effect of provisions of this Act may be varied by agreement…except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measure if such standards are not manifestly unreasonable.” Thus the UCC is the “default” position: if the parties want the contract to operate in a specific way, they can provide for that. If they don’t put anything in their agreement about some aspect of their contract’s operation, the UCC applies. For example, if they do

not state where “delivery” will occur, the UCC provides that term. (Section 2-308 says it would be at the “seller’s place of business or if he has none, his residence.”)

Article 6 of the CISG similarly gives the parties freedom to contract. It provides, “The parties may exclude the application of this Convention or…vary the effect of any of its provisions.”

KEY TAKEAWAY

The UCC imposes some general obligations on parties to a sales contract. They must act in good faith, and unconscionable contracts or terms thereof will not be enforced. The UCC applies to any sale of goods, but sometimes special obligations are imposed on merchants. While the UCC imposes various general (and more specific) obligations on the parties, they are free, within limits, to make up their own contract terms and obligations; if they do not, the UCC applies. The CISG tends to follow the basic thrust of the UCC.

EXERCISES

1. What does the UCC say about the standard duty parties to a contract owe each other?
2. Why are merchants treated specially by the UCC in some circumstances?
3. Give an example of a merchant-to-merchant duty imposed by the UCC and of a merchant-to-nonmerchant duty.
4. What does it mean to say the UCC is the “default” contract term?

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11.10.5: Cases

Mixed Goods and Services Contracts: The “Predominant Factor” Test

Pittsley v. Houser

875 P.2d 232 (Idaho App. 1994)

Swanstrom, J.

In September of 1988, Jane Pittsley contracted with Hilton Contract Carpet Co. (Hilton) for the installation of carpet in her home. The total contract price was $4,402 [about $7,900 in 2010 dollars]. Hilton paid the installers $700 to put the carpet in Pittsley’s home. Following installation, Pittsley complained to Hilton that some seams were visible, that gaps appeared, that the carpet did not lay flat in all areas, and that it failed to reach the wall in certain locations. Although Hilton made various attempts to fix the installation, by attempting to stretch the carpet and other methods, Pittsley was not satisfied with the work. Eventually, Pittsley refused any further efforts to fix the carpet. Pittsley initially paid Hilton $3,500 on the contract, but refused to pay the remaining balance of $902.

Pittsley later filed suit, seeking rescission of the contract, return of the $3,500 and incidental damages. Hilton answered and counterclaimed for the balance remaining on the contract. The matter was heard by a magistrate sitting without a jury. The magistrate found that there were defects in the installation and that the carpet had been installed in an unworkmanlike manner. The magistrate also found that there was a lack of evidence on damages. The trial was continued to allow the parties to procure evidence on the amount of damages incurred by Pittsley. Following this continuance, Pittsley did not introduce any further evidence of damages, though witnesses for Hilton estimated repair costs at $250.

Although Pittsley had asked for rescission of the contract and a refund of her money, the magistrate determined that rescission, as an equitable remedy, was only available when one party committed a breach so material that it destroyed the entire purpose of the contract. Because the only estimate of damages was for $250, the magistrate ruled rescission would not be a proper remedy. Instead, the magistrate awarded Pittsley $250 damages plus $150 she expended in moving furniture prior to Hilton’s attempt to repair the carpet. On the counterclaim, the magistrate awarded Hilton the $902 remaining on the contract. Additionally, both parties had requested attorney fees in the action. The magistrate determined that both parties had prevailed and therefore awarded both parties their attorney fees.

Following this decision, Pittsley appealed to the district court, claiming that the transaction involved was governed by the Idaho Uniform Commercial Code (UCC), [Citation]. Pittsley argued that if the UCC had been properly applied, a different result would have been reached. The district court agreed with Pittsley’s argument, reversing and remanding the case to the magistrate to make additional findings of fact and to apply the UCC to the transaction.…

Hilton now appeals the decision of the district court. Hilton claims that Pittsley failed to allege or argue the UCC in either her pleadings or at trial. Even if application of the UCC was properly raised, Hilton argues that there were no defects in the goods that were the subject of the transaction, only in the installation, making application of the UCC inappropriate.…

The single question upon which this appeal depends is whether the UCC is applicable to the subject transaction. If the underlying transaction involved the sale of “goods,” then the UCC would apply. If the transaction did not involve goods, but rather was for services, then application of the UCC would be erroneous.

Idaho Code § 28–2-105(1) defines “goods” as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale.…” Although there is little dispute that carpets are “goods,” the transaction in this case also involved installation, a service. Such hybrid transactions, involving both goods and services, raise difficult questions about the applicability of the UCC. Two lines of authority have emerged to deal with such situations.

The first line of authority, and the majority position, utilizes the “predominant factor” test. The Ninth Circuit, applying the Idaho Uniform Commercial Code to the subject transaction, restated the predominant factor test as:

The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

[Citations]. This test essentially involves consideration of the contract in its entirety, applying the UCC to the entire contract or not at all.

The second line of authority, which Hilton urges us to adopt, allows the contract to be severed into different parts, applying the UCC to the goods involved in the contract, but not to the non-goods involved, including services as well as other non-goods assets and property. Thus, an action focusing on defects or problems with the goods themselves would be covered by the UCC, while a suit based on the service provided or some other non-goods aspect would not be covered by the UCC.…

We believe the predominant factor test is the more prudent rule. Severing contracts into various parts, attempting to label each as goods or non-goods and applying different law to each separate part clearly contravenes the UCC's declared purpose "to simplify, clarify and modernize the law governing commercial transactions." I.C. § 28–1–102(2)(a). As the Supreme Court of Tennessee suggested in [Citation], such a rule would, in many contexts, present "difficult and in some instances insurmountable problems of proof in segregating assets and determining their respective values at the time of the original contract and at the time of resale, in order to apply two different measures of damages."

Applying the predominant factor test to the case before us, we conclude that the UCC was applicable to the subject transaction. The record indicates that the contract between the parties called for "175 yds Masterpiece # 2122-Installed" for a price of $4319.50. There was an additional charge for removing the existing carpet. The record indicates that Hilton paid the installers $700 for the work done in laying Pittsley's carpet. It appears that Pittsley entered into this contract for the purpose of obtaining carpet of a certain quality and color. It does not appear that the installation, either who would provide it or the nature of the work, was a factor in inducing Pittsley to choose Hilton as the carpet supplier. On these facts, we conclude that the sale of the carpet was the predominant factor in the contract, with the installation being merely incidental to the purchase. Therefore, in failing to consider the UCC, the magistrate did not apply the correct legal principles to the facts as found. We must therefore vacate the judgment and remand for further findings of fact and application of the UCC to the subject transaction.

CASE QUESTIONS

1. You may recall in Chapter 15 "Discharge of Obligations" the discussion of the "substantial performance" doctrine. It says that if a common-law contract is not completely, but still "substantially," performed, the nonbreaching party still owes something on the contract. And it was noted there that under the UCC, there is no such doctrine. Instead, the "perfect tender" rule applies: the goods delivered by the seller must be exactly right. Does the distinction between the substantial performance doctrine and the perfect tender rule shed light on what difference applying the common law or the UCC would make in this case?
2. If Pittsley won on remand, what would she get?
3. In discussing the predominant factor test, the court here quotes from the Ninth Circuit, a *federal* court of appeals. What is a federal court doing making rules for a state court?

"Merchants" under the UCC

Goldkist, Inc. v. Brownlee

355 S.E.2d 773 (Ga. App. 1987)

Beasley, J.

The question is whether the two defendant farmers, who as a partnership both grew and sold their crops, were established by the undisputed facts as not being "merchants" as a matter of law, according to the definition in [Georgia UCC 2-104(1)].…

Appellees admit that their crops are "goods" as defined in [2-105]. The record establishes the following facts. The partnership had been operating the row crop farming business for 14 years, producing peanuts, soybeans, corn, milo, and wheat on 1,350 acres, and selling the crops.

It is also established without dispute that Barney Brownlee, whose deposition was taken, was familiar with the marketing procedure of "booking" crops, which sometimes occurred over the phone between the farmer and the buyer, rather than in person, and a written contract would be signed later. He periodically called plaintiff's agent to check the price, which fluctuated. If the price met his approval, he sold soybeans. At this time the partnership still had some of its 1982 crop in storage, and the price was rising slowly. Mr. Brownlee received a written confirmation in the mail concerning a sale of soybeans and did not contact plaintiff to contest it but simply did nothing. In addition to the agricultural business, Brownlee operated a gasoline service station.…

In dispute are the facts with respect to whether or not an oral contract was made between Barney Brownlee for the partnership and agent Harrell for the buyer in a July 22 telephone conversation. The plaintiff's evidence was that it occurred and that it was discussed soon thereafter with Brownlee at the service station on two different occasions, when he acknowledged it, albeit reluctantly, because the market price of soybeans had risen. Mr. Brownlee denies booking the soybeans and denies the nature of the conversations at his service station with Harrell and the buyer's manager.…

Whether or not the farmers in this case are "merchants" as a matter of law, which is not before us, the evidence does not demand a conclusion that they are outside of that category which is excepted from the requirement of a signed writing to bind a buyer and seller of goods.…To allow a farmer who deals in crops of the kind at issue, or who otherwise comes within the definition of "merchant" in [UCC] 2-104(1), to renege on a confirmed oral booking for the sale of crops, would result in a fraud on the buyer. The farmer could abide by the booking if the price thereafter declined but reject it if the price rose; the buyer, on the other hand, would be forced to sell the crop following the booking at its peril, or wait until the farmer decides whether to honor the booking or not.

Defendants' narrow construction of "merchant" would, given the booking procedure used for the sale of farm products, thus guarantee to the farmers the best of both possible worlds (fulfill booking if price goes down after booking and reject it if price improves) and to the buyers the worst of both possible worlds. On the other hand, construing "merchants" in [UCC] 2-104(1) as not excluding as a matter of law farmers such as the ones in this case, protects them equally as well as the buyer. If the market price declines after the booking, they are assured of the higher booking price; the buyer cannot renege, as [UCC]2-201(2) would apply.

In giving this construction to the statute, we are persuaded by [Citation], supra, and the analyses provided in the following cases from other states: [Citations]. By the same token, we reject the narrow construction given in other states' cases: [Citations]. We believe this is the proper construction to give the two statutes, [UCC 2-104(1) and 2-201(2)], as taken together they are thus further branches stemming from the centuries-old simple legal idea *pacta servanda sunt*—agreements are to be kept. So construed, they evince the legislative intent to enforce the accepted practices of the marketplace among those who frequent it.

Judgment reversed. [Four justices concurred with Justice Beasley].

Benham, J., dissenting.

Because I cannot agree with the majority's conclusion that appellees are merchants, I must respectfully dissent.

…The validity of [plaintiff's] argument, that sending a confirmation within a reasonable time makes enforceable a contract even though the statute of frauds has not been satisfied, rests upon a showing that the contract was "[b]etween merchants." "Between merchants" is statutorily defined in the Uniform Commercial Code as meaning "any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants" [2-104(3)]. "'Merchant' means a person [1] who deals in goods of the kind or [2] otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or [3] to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill" [Citation]. Whether [plaintiff] is a merchant is not questioned here; the question is whether, under the facts in the record, [defendant]/farmers are merchants.…

The Official Comment to § 2-104 of the U.C.C. (codified in Georgia)…states: "This Article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer…This section lays the foundation of this policy by defining those who are to be regarded as professionals or 'merchants' and by stating when a transaction is deemed to be 'between merchants.' The term 'merchant' as defined here roots in the 'law merchant' concept of a professional in business." As noted by the Supreme Court of Kansas in [Citation] (1976): "The concept of professionalism is heavy in determining who is a merchant under the statute. The writers of the official UCC comment virtually equate professionals with merchants—the casual or inexperienced buyer or seller is not to be held to the standard set for the professional in business. The defined term 'between merchants,' used in the exception proviso to the statute of frauds, contemplates the knowledge and skill of professionals on each side of the transaction." The Supreme Court of Iowa [concurs in cases cited]. Where, as here, the undisputed evidence is that the farmer's sole experience in the marketplace consists of selling the crops he has grown, the courts of several of our sister states have concluded that the farmer is not a merchant. [Citations]. Just because appellee Barney Brownlee kept "conversant with the current price of [soybeans] and planned to market it to his advantage does not necessarily make him a 'merchant.' It is but natural for anyone who desires to sell anything he owns to negotiate and get the best price obtainable. If this

would make one a 'merchant,' then practically anyone who sold anything would be deemed a merchant, hence would be an exception under the statute[,] and the need for a contract in writing could be eliminated in most any kind of a sale." [Citation].

It is also my opinion that the record does not reflect that appellees "dealt" in soybeans, or that through their occupation, they held themselves out as having knowledge or skill peculiar to the practices or goods involved in the transaction. See [UCC] 2-104(1). "[A]lthough a farmer may well possess special knowledge or skill with respect to the production of a crop, the term 'merchant,' as used in the Uniform Commercial Code, contemplates special knowledge and skill associated with the marketplace. As to the area of farm crops, this special skill or knowledge means, for instance, special skill or knowledge associated with the operation of the commodities market. It is inconceivable that the drafters of the Uniform Commercial Code intended to place the average farmer, who merely grows his yearly crop and sells it to the local elevator, etc., on equal footing with the professional commodities dealer whose sole business is the buying and selling of farm commodities" [Citations]. If one who buys or sells something on an annual basis is a merchant, then the annual purchaser of a new automobile is a merchant who need not sign a contract for the purchase in order for the contract to be enforceable.…

If these farmers are not merchants, a contract signed by both parties is necessary for enforcement. If the farmer signs a contract, he is liable for breach of contract if he fails to live up to its terms. If he does not sign the contract, he cannot seek enforcement of the terms of the purchaser's offer to buy.…

Because I find no evidence in the record that appellees meet the statutory qualifications as merchants, I would affirm the decision of the trial court. I am authorized to state that [three other justices] join in this dissent.

CASE QUESTIONS

1. How is the UCC's ten-day-reply doctrine in issue here?
2. Five justices thought the farmers here should be classified as "merchants," and four of them thought otherwise. What argument did the majority have against calling the farmers "merchants"? What argument did the dissent have as to why they should not be called merchants?
3. Each side marshaled persuasive precedent from other jurisdictions to support its contention. As a matter of public policy, is one argument better than another?
4. What does the court mean when it says the defendants are not excluded from the definition of merchants "as a matter of law"?

Unconscionability in Finance Lease Contracts

Info. Leasing Corp. v. GDR Investments, Inc.

787 N.E.2d 652 (Ohio App. 2003)

Gorman, J.

The plaintiff-appellant, Information Leasing Corporation ("ILC"), appeals from the order of the trial court rendering judgment in favor of the defendants-appellees…GDR Investments, Inc. [defendant Arora's corporation], Pinnacle Exxon, and Avtar S. Arora, in an action to recover $15,877.37 on a five-year commercial lease of an Automated Teller Machine ("ATM").…

This is one of many cases involving ILC that have been recently before this court. ILC is an Ohio corporation wholly owned by the Provident Bank. ILC is in the business of leasing ATMs through a third party, or vendor. In all of these cases, the vendor has been…Credit Card Center ("CCC"). CCC was in the business of finding lessees for the machines and then providing the services necessary to operate them, offering the lessees attractive commissions. Essentially, CCC would find a customer, usually a small business interested in having an ATM available on its premises, arrange for its customer to sign a lease with ILC, and then agree to service the machine, keeping it stocked with cash and paying the customer a certain monthly commission. Usually, as in the case of [defendants], the owner of the business was required to sign as a personal guarantor of the lease. The twist in this story is that CCC soon went bankrupt, leaving its customers stuck with ATMs under the terms of leases with ILC but with no service provider. Rather than seeking to find another company to service the ATMs, many of CCC's former customers, like [defendants], simply decided that they no longer wanted the ATMs and were no longer going to make lease payments to ILC. The terms of each lease, however, prohibited cancellation. The pertinent section read,

LEASE NON-CANCELABLE AND NO WARRANTY. THIS LEASE CANNOT BE CANCELED BY YOU FOR ANY REASON, INCLUDING EQUIPMENT FAILURE, LOSS OR DAMAGE. YOU MAY NOT REVOKE ACCEPTANCE OF THE

EQUIPMENT. YOU, NOT WE, SELECTED THE EQUIPMENT AND THE VENDOR. WE ARE NOT RESPONSIBLE FOR EQUIPMENT FAILURE OR THE VENDOR'S ACTS. YOU ARE LEASING THE EQUIPMENT 'AS IS', [sic] AND WE DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED. WE ARE NOT RESPONSIBLE FOR SERVICE OR REPAIRS.

Either out of a sense of fair play or a further desire to make enforcement of the lease ironclad, ILC put a notice on the top of the lease that stated,

NOTICE: THIS IS A NON-CANCELABLE, BINDING CONTRACT. THIS CONTRACT WAS WRITTEN IN PLAIN LANGUAGE FOR YOUR BENEFIT. IT CONTAINS IMPORTANT TERMS AND CONDITIONS AND HAS LEGAL AND FINANCIAL CONSEQUENCES TO YOU. PLEASE READ IT CAREFULLY; FEEL FREE TO ASK QUESTIONS BEFORE SIGNING BY CALLING THE LEASING COMPANY AT 1-513-421-9191.

Arora, the owner of [defendant corporation], was a resident alien with degrees in commerce and economics from the University of Delhi, India. Arora wished to have an ATM on the premises of his Exxon station in the hope of increasing business. He made the mistake of arranging acquisition of the ATM through CCC. According to his testimony, a representative of CCC showed up at the station one day and gave him "formality papers" to sign before the ATM could be delivered. Arora stated that he was busy with other customers when the CCC representative asked him to sign the papers. He testified that when he informed the CCC representative that he needed time to read the documents before signing them, he was told not to worry and…that the papers did not need his attention and that his signature was a mere formality. Arora signed the ILC lease, having never read it.

Within days, CCC went into bankruptcy. Arora found himself with an ATM that he no longer wanted.…According to his testimony, he tried unsuccessfully to contact ILC to take back the ATM. Soon Arora suffered a mild heart attack, the gas station went out of business, and the ATM, which had been in place for approximately eighteen days, was left sitting in the garage, no longer in use until ILC came and removed it several months later.

Unfortunately for Arora, the lease also had an acceleration clause that read,

DEFAULT. If you fail to pay us or perform as agreed, we will have the right to (i) terminate this lease, (ii) sue you for all past due payment AND ALL FUTURE PAYMENTS UNDER THIS LEASE, plus the Residual Value we have placed on the equipment and other charges you owe us, (iii) repossess the equipment at your expense and (iv) exercise any other right or remedy which may be available under applicable law or proceed by court act.

The trial court listened to the evidence in this case, which was awkwardly presented due in large part to Arora's decision to act as his own trial counsel. Obviously impressed with Arora's honesty and sympathetic to his situation, the trial court found that Arora owed ILC nothing. In so ruling, the court stated that ILC "ha[d] not complied with any of its contractual obligations and that [Arora] appropriately canceled any obligations by him, if there really were any." The court also found that ILC, "if they did have a contract, failed to mitigate any damages by timely picking up the machine after [Arora] gave them notice to pick up the machine."…

ILC contends, and we do not disagree, that the lease in question satisfied the definition of a "finance lease" under [UCC 2A-407]. A finance lease is considerably different from an ordinary lease in that it adds a third party, the equipment supplier or manufacturer (in this case, the now defunct CCC). As noted by White and Summers, "In effect, the finance lessee * * * is relying upon the manufacturer * * * to provide the promised goods and stand by its promises and warranties; the [lessee] does not look to the [lessor] for these. The [lessor] is only a finance lessor and deals largely in paper, rather than goods." [Citation].

One notorious feature of a finance lease is its typically noncancelable nature, which is specifically authorized by statute [UCC 2A-407]. [UCC 2A-407(1)] provides in the case of a finance lease that is not a consumer lease, "[T]he lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods." The same statutory section also makes clear that the finance lease is "not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom it runs." [Citation]

Because of their noncancelable nature, finance leases enjoy somewhat of a reputation. The titles of law review articles written about them reveal more than a little cynicism regarding their fairness: [Citations].

…As described by Professors White and Summers, "The parties can draft a lease agreement that carefully excludes warranty and promissory liability of the finance lessor to the lessee, and that sets out what is known in the trade as a 'hell or high water clause,' namely, a clause that requires the lessee to continue to make rent payments to the finance lessor even though the [equipment] is

unsuitable, defective, or destroyed."…"The lessor's responsibility is merely to provide the money, not to instruct the lessee like a wayward child concerning a suitable purchase * * *. Absent contrary agreement, even if [, for example, a finance-leased] Boeing 747 explodes into small pieces in flight and is completely uninsured, lessee's obligation to pay continues."

…Some people complain about being stuck with the bill; Arora's complaint was that he was stuck with the ATM.…

To begin the proper legal analysis, we note first that this was not a "consumer lease" expressly excepted from [UCC 2A-407]. A "consumer lease" is defined in [UCC 2A-103(e)] as one in which the lessee is "an individual and who takes under the lease primarily for a personal, family, or household purpose." This would definitely not apply here, where the ATM was placed on the business premises of the Exxon station, and where the lessee was [Arora's corporation] and not Arora individually. (Arora was liable individually as the personal guarantor of [his corporation]'s obligations under the lease.)…

Certain defenses do remain, however. First, the UCC expressly allows for the application of the doctrine of unconscionability to finance leases, both consumer and commercial. [Citation] authorizes the trial court to find "any clause of a lease contract to have been unconscionable at the time it was made * * *." If it so finds, the court is given the power to "refuse to enforce the lease contract, * * * enforce the remainder of the lease contract without the unconscionable clause, or * * * limit the application of the unconscionable clause as to avoid any unconscionable result." [Citation]

In this case, the trial court made no findings as to whether the finance lease was unconscionable. The primary purpose of the doctrine of unconscionability is to prevent oppression and unfair surprise. [Citation] "Oppression" refers to substantive unconscionability and arises from overly burdensome or punitive terms of a contract, whereas "unfair surprise" refers to procedural unconscionability and is implicated in the formation of a contract, when one of the parties is either overborne by a lack of equal bargaining power or otherwise unfairly or unjustly drawn into a contract. [Citation]

It should be pointed that, although harsh, many characteristics of a finance lease are not inherently unconscionable and, as we have discussed, are specifically authorized by statute. Simply because a finance lease has a "hell or high water clause" does not make it unconscionable. As noted, a finance lease is a separate animal—it is supposed to secure minimal risk to the lessor. At least one court has rejected the argument that an acceleration clause in a commercial finance lease is punitive and unconscionable in the context of parties of relatively equal bargaining power. See [Citation]

At the heart of Arora's defense in this case was his claim that he was misled into signing the finance lease by the CCC representative and was unfairly surprised to find himself the unwitting signatory of an oppressive lease. This is clearly an argument that implicated procedural unconscionability. His claim of being an unwitting signatory, however, must be carefully balanced against the law in Ohio that places upon a person a duty to read any contract before signing it, a duty that is not excused simply because a person willingly gives into the encouragement to "just go ahead and sign." See [Citation]

Moreover, we note that courts have also recognized that the lessor may give, through word or conduct, the lessee consent to cancel an otherwise noncancelable lease. [UCC 2A-40792)(b)] makes a finance lease "not subject to cancellation, termination, modification, repudiation, excuse, or substitution *without the consent of the party to whom it runs.*" (Emphasis supplied.) As noted by the court in *Colonial Court* [Citation], the UCC does not say anything with respect to the form or content of the consent. The *Colonial Pacific* court concluded, therefore, "that the consent may be oral and may be established by conduct that reasonably manifests an intent. * * * Any manifestations that the obligation of the lessee will not be enforced independently of the obligation that runs to the consenting party is sufficient." The question whether consent has been given to a cancellation is a question of fact for the trier of fact.

We raise this point because the evidence indicates that there was some communication between Arora and ILC before ILC retrieved the ATM. It is unclear whether ILC removed the ATM at Arora's request, or whether the company was forcibly repossessing the equipment pursuant to the default provision of the lease. In view of the murkiness of the testimony, it is unclear when the ATM was taken back and when the final lease payment was made. One interesting question that arises from ILC's retrieval of the ATM, not addressed in the record, is what ILC did with the equipment afterward. Did ILC warehouse the equipment for the next four and one-half years (conduct that would appear unprofitable and therefore unlikely) or did the company then turn around and lease the ATM to someone else? If there was another lease, was ILC actually seeking a double recovery on the ATM's rental value? In this regard, we note that the trial court ruled that ILC had failed to mitigate its damages, a finding that is not supported by the current record, but may well prove to be true upon further trial of the matter.

In sum, this is a case that requires a much more elaborate presentation of evidence by the parties, and much more detailed findings of fact and conclusions of law than those actually made by the trial court. We sustain ILC's assignment of error upon the basis that the trial court did not apply the correct legal analysis, and that the evidence of record did not mandate a judgment in Arora's favor. Because of the number of outstanding issues and unresolved factual questions, we reverse the trial court's judgment and remand this case for a new trial consistent with the law set forth in this opinion.

Judgment reversed and cause remanded.

CASE QUESTIONS

1. Why would a finance lease have such an iron-clad, "hell or high water" noncancellation clause as is apparently common and demonstrated here?
2. On what basis did the lower court rule in the defendant's favor?
3. What is an acceleration clause?
4. What was Mr. Arora's main defense? What concern did the court have with it?
5. The appeals court helpfully suggested several arguments the defendant might make on remand to be relieved of his contract obligations. What were they?

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11.10.6: Summary and Exercises

Summary

Sales law is a special type of contract law, governed by Article 2 of the Uniform Commercial Code (UCC), adopted in every state but Louisiana. Article 2 governs the sale of goods only, defined as things movable at the time of identification to the contract for sale. Article 2A, a more recent offering, deals with the leasing of goods, including finance leases and consumer leases. The Convention on Contracts for the International Sale of Goods (CISG) is an international equivalent of Article 2.

Difficult questions sometimes arise when the subject of the contract is a hybrid of goods and real estate or goods and services. If the seller is called on to sever crops, timber, or minerals from the land, or the buyer is required to sever and can do so without material harm to the land, then the items are goods subject to Article 2. When the goods are "sold" incidental to a service, the "predominant factor" test is used, but with inconsistent results. For two categories of goods, legislation specifically answers the question: foodstuffs served by a restaurant are goods; blood supplied for transfusions is not.

Although they are kin, in some areas Article 2 differs from the common law. As regards mutual assent, the UCC abolishes the mirror image rule; it allows for more indefiniteness and open terms. The UCC does away with some requirements for consideration. It sometimes imposes special obligations on merchants (though defining a merchant is problematic), those who deal in goods of the kind, or who by their occupations hold themselves out as experts in the use of the goods as between other merchants and in selling to nonmerchants. Article 2 gives courts greater leeway than under the common law to modify contracts at the request of a party, if a clause is found to have been unconscionable at the time made.

EXERCISES

1. Ben owns fifty acres of timberland. He enters into a contract with Bunyan under which Bunyan is to cut and remove the timber from Ben's land. Bunyan enters into a contract to sell the logs to Log Cabin, Inc., a homebuilder. Are these two contracts governed by the UCC? Why?
2. Clarence agreed to sell his farm to Jud in exchange for five antique cars owned by Jud. Is this contract governed by the UCC? Why?
3. Professor Byte enters into a contract to purchase a laptop computer from Ultra-Intelligence Inc. He also enters into a contract with a graduate student, who is to write programs that will be run on the computer. Are these two contracts governed by the UCC? Why?
4. Pat had a skin problem and went to Dr. Pore, a dermatologist, for treatment. Dr. Pore applied a salve obtained from a pharmaceutical supplier, which made the problem worse. Is Dr. Pore liable under Article 2 of the UCC? Why?
5. Zanae visited the Bonita Burrito restaurant and became seriously ill after eating tainted food. She was rushed to a local hospital, where she was given a blood transfusion. Zanae developed hepatitis as a result of the transfusion. When she sued the restaurant and the hospital, claiming remedies under the UCC, both defended the suit by arguing that they were providing services, not goods. Are they correct? Why?
6. Bill, the owner of Bill's Used Books, decided to go out of business. He sold two of his bookcases to Ned. Ned later discovered that the bookcases were defective and sued Bill on the theory that, as a merchant, he warranted that the bookcases were of fair, average quality. Will Ned prevail on this theory? Why?
7. Rufus visited a supermarket to purchase groceries. As he moved past a display of soda pop and perhaps lightly brushed it, a bottle exploded. Rufus sustained injury and sued the supermarket, claiming breach of warranty under the UCC. Will Rufus win? Why?
8. Carpet Mart bought carpet from Collins & Aikman (Defendant) represented to be 100 percent polyester fiber. When Carpet Mart discovered in fact the carpet purchased was composed of cheaper, inferior fiber, it sued for compensatory and punitive damages. Defendant moved for a stay pending arbitration, pointing to the language of its acceptance form: "The acceptance of your order is subject to all the terms and conditions on the face and reverse side hereof, including arbitration, all of which are accepted by buyer; it supersedes buyer's order form."

   The small print on the reverse side of the form provided, among other things, that all claims arising out of the contract would be submitted to arbitration in New York City. The lower court held that Carpet Mart was not bound by the arbitration agreement

appearing on the back of Collins & Aikman's acknowledgment form, and Defendant appealed. How should the appeals court rule?

9. Plaintiff shipped to Defendant—Pizza Pride Inc. of Jamestown, North Carolina—an order of mozzarella cheese totaling $11,000. That same day, Plaintiff mailed Defendant an invoice for the order, based on Plaintiff's understanding that an oral contract existed between the parties whereby Defendant had agreed to pay for the cheese. Defendant was engaged in the real estate business at this time and had earlier been approached by Pizza Pride Inc. to discuss that company's real estate investment potential. Defendant denied ever guaranteeing payment for the cheese and raised the UCC's Statute of Frauds, Section 2-201, as an affirmative defense. The Plaintiff contended that because Defendant was in the business of buying and selling real estate, she possessed knowledge or skill peculiar to the practices involved in the transaction here. After hearing the evidence, the court concluded as a matter of law that Defendant did agree to pay for the cheese and was liable to Plaintiff in the amount of $11,000. Defendant appealed. How should the appeals court rule?
10. Seller offered to sell to Buyer goods at an agreed price "to be shipped to Buyer by UPS." Buyer accepted on a form that included this term: "goods to be shipped FedEx, Buyer to pay freight." Seller then determined not to carry on with the contract as the price of the goods had increased, and Seller asserted that because the acceptance was different from the offer, there was no contract. Is this correct?

SELF-TEST QUESTIONS

1. Among subjects the UCC does not cover are
    1. letters of credit
    2. service contracts
    3. sale of goods
    4. bank collections
2. When a contract is unconscionable, a court may
    1. refuse to enforce the contract
    2. strike the unconscionable clause
    3. limit the application of the unconscionable clause
    4. take any of the above approaches
3. Under the UCC, the definition of *merchant* is limited to
    1. manufacturers
    2. retailers
    3. wholesalers
    4. none of the above
4. For the purpose of sales law, *goods*
    1. always include items sold incidental to a service
    2. include things movable at the time of identification to the contract
    3. include blood supplied for transfusions
    4. include all of the above
5. Article 2 differs from the common law of contracts
    1. in no substantial way
    2. by disallowing parties to create agreements with open terms
    3. by obligating courts to respect all terms of the contract
    4. by imposing special obligations on merchants

SELF-TEST AnswerS

1. a
2. d
3. d
4. b

5. d

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SECTION OVERVIEW

11.11: Title and Risk of Loss

Learning Objectives

After reading this chapter, you should understand the following:

1. Why title is important and at what point in the contracting relationship the buyer acquires title
2. Why risk of loss is important, when risk of loss passes to the buyer, and when the buyer acquires an insurable interest
3. Under what circumstances the buyer can obtain title when a nonowner sells the goods

Parties to a sales contract will usually agree on the obvious details of a sales transaction—the nature of goods, the price, and the delivery time, as discussed in the next chapter. But there are two other issues of importance lurking in the background of every sale:

1. When does the title pass to the buyer? This question arises more in cases involving third parties, such as creditors and tax collectors. For instance, a creditor of the seller will not be allowed to take possession of goods in the seller's warehouse if the title has already passed to the buyer.
2. If goods are damaged or destroyed, who must bear the loss? The answer has obvious financial significance to both parties. If the seller must bear the loss, then in most cases he must pay damages or send the buyer another shipment of goods. A buyer who bears the loss must pay for the goods even though they are unusable. In the absence of a prior agreement, loss can trigger litigation between the parties.

11.11.1: Title and Risk of Loss

11.11.2: Transfer of Title

11.11.3: Title from Nonowners

11.11.4: Risk of Loss

11.11.5: Cases

11.11.6: Summary and Exercises

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11.11.1: Title and Risk of Loss

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11.11.2: Transfer of Title

LEARNING OBJECTIVES

1. Understand why it is important to know who has title in a sales transaction.
2. Be able to explain when title shifts.
3. Understand when a person who has no title can nevertheless pass good title on to a buyer.

Why It Is Important When Title Shifts

There are three reasons why it is important when title shifts from seller to buyer—that is, when the buyer gets title.

It Affects Whether a Sale Has Occurred

First, a sale cannot occur without a shift in title. You will recall that a sale is defined by the Uniform Commercial Code (UCC) as a "transfer of title from seller to buyer for a price." Thus if there is no shift of title, there is no sale. And there are several consequences to there being no sale, one of which is—concerning a merchant-seller—that no implied warranty of merchantability arises. (Again, as discussed in the previous chapter, an implied warranty provides that when a merchant-seller sells goods, the goods are suitable for the ordinary purpose for which such goods are used.) In a lease, of course, title remains with the lessor.

Creditors' Rights

Second, title is important because it determines whether creditors may take the goods. If Creditor has a right to seize Debtor's goods to satisfy a judgment or because the parties have a security agreement (giving Creditor the right to repossess Debtor's goods), obviously it won't do at all for Creditor to seize goods when Debtor doesn't have title to them—they are somebody else's goods, and seizing them would be conversion, a tort (the civil equivalent of a theft offense).

Insurable Interest

Third, title is related to who has an **insurable interest**. A buyer cannot legally obtain insurance unless he has an insurable interest in the goods. Without an insurable interest, the insurance contract would be an illegal gambling contract. For example, if you attempt to take out insurance on a ship with which you have no connection, hoping to recover a large sum if it sinks, the courts will construe the contract as a wager you have made with the insurance company that the ship is not seaworthy, and they will refuse to enforce it if the ship should sink and you try to collect. Thus this question arises: under the UCC, at what point does the buyer acquire an insurable interest in the goods? Certainly a person has insurable interest if she has title, but the UCC allows a person to have insurable interest with less than full title. The argument here is often between two insurance companies, each *denying* that its insured had insurable interest as to make it liable.

Goods Identified to the Contract

The Identification Issue

The UCC at Section 2-401 provides that "title to goods cannot pass under a contract for sale prior to their identification to the contract." (In a lease, of course, title to the leased goods does not pass at all, only the right to possession and use for some time in return for consideration.Uniform Commercial Code, Section 2A-103(1)(j).) So identification to the contract has to happen before title can shift. **Identification to the contract** here means that the seller in one way or another picks the goods to be sold out of the mass of inventory so that they can be delivered or held for the buyer.

Article 67 of the CISG says the same thing: "[T]he risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise."

When are goods "identified"? There are two possibilities as to when identification happens.

Parties May Agree

Section 2-501(1) of the UCC says "identification can be made at any time and in any manner explicated agreed to by the parties."

UCC Default Position

If the parties do not agree on when identification happens, the UCC default kicks in. Section 2-501(1) of the UCC says identification occurs

1. when the contract is made if it is for the sale of goods already existing and identified;
2. if the contract is for the sale of future goods other than those described in paragraph c., when goods are shipped, marked, or otherwise identified by the seller as goods to which the contract refers;
3. when crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contract or for the sale of corps to be harvested within twelve months or the next normal harvest seasons after contracting, whichever is longer.

Thus if Very Fast Food Inc.'s purchasing agent looks at a new type of industrial sponge on Delta Sponge Makers' store shelf for restaurant supplies, points to it, and says, "I'll take it," identification happens then, when the contract is made. But if the purchasing agent wants to purchase sponges for her fast-food restaurants, sees a sample on the shelf, and says, "I want a gross of those"—they come in boxes of one hundred each—identification won't happen until one or the other of them chooses the gross of boxes of sponges out of the warehouse inventory.

When Title Shifts

Parties May Agree

Assuming identification is done, when does title shift? The law begins with the premise that the agreement of the parties governs. Section 2-401(1) of the UCC says that, in general, "title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties." Many companies specify in their written agreements at what moment the title will pass; here, for example, is a clause that appears in sales contracts of Dow Chemical Company: "Title and risk of loss in all goods sold hereunder shall pass to Buyer upon Seller's delivery to carrier at shipping point." Thus Dow retains title to its goods only until it takes them to the carrier for transportation to the buyer.

Because the UCC's default position (further discussed later in this chapter) is that title shifts when the seller has completed delivery obligations, and because the parties may agree on delivery terms, they also may, by choosing those terms, effectively agree when title shifts (again, they also can agree using any other language they want). So it is appropriate to examine some delivery terms at this juncture. There are three possibilities: shipment contracts, destination contracts, and contracts where the goods are not to be moved.

Shipment Contracts

In a **shipment contract**, the seller's obligation is to send the goods to the buyer, but not to a particular destination. The typical choices are set out in the UCC at Section 2-319:

- **F.O.B. [place of shipment]** (the place from which the goods are to be shipped goes in the brackets, as in "F.O.B. Seattle"). F.O.B. means "free on board"; the seller's obligation, according to Section 2-504 of the UCC, is to put the goods into the possession of a carrier and make a reasonable contract for their transportation, to deliver any necessary documents so the buyer can take possession, and promptly notify the buyer of the shipment.
- **F.A.S. [named port]** (the name of the seaport from which the ship is carrying the goods goes in the brackets, as in "F.A.S. Long Beach"). F.A.S means "free alongside ship"; the seller's obligation is to at his "expense and risk deliver the goods alongside the vessel in the manner usual in that port" and to provide the buyer with pickup instructions.Uniform Commercial Code, Section 2-319(2).
- **C.I.F.** and **C. & F.** These are actually not abbreviations for delivery terms, but rather they describe who pays insurance and freight. "C.I.F" means "cost, insurance, and freight"—if this term is used, it means that the contract price "includes in a lump sum the cost of the goods and the insurance and freight to the named destination."Uniform Commercial Code, Section 2-320. "C. & F." means that "the price so includes cost and freight to the named destination."Uniform Commercial Code, Section 2-320.

Destination Contracts

In a **destination contract**, the seller's obligation is to see to it that the goods actually arrive at the destination. Here again, the parties may employ the use of abbreviations that indicate the seller's duties. See the following from the UCC, Section 2-319:

- **F.O.B. [destination]** means the seller's obligation is to "at his own expense and risk transport the goods to that place and there tender delivery of them" with appropriate pickup instructions to the buyer.
- **Ex-ship** "is the reverse of the F.A.S. term."Uniform Commercial Code, Section 2-322. It means "from the carrying vessel"—the seller's obligation is to make sure the freight bills are paid and that "the goods leave the ship's tackle or are otherwise properly unloaded."
- **No arrival, no sale** means the "seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival."Uniform Commercial Code, Section 2-324. If the goods don't arrive, or if they are damaged or deteriorated through no fault of the seller, the buyer can either treat the contract as avoided, or pay a reduced amount for the damaged goods, with no further recourse against the seller.Uniform Commercial Code, Section 2-613.

Goods Not to Be Moved

It is not uncommon for contracting parties to sell and buy goods stored in a grain elevator or warehouse without physical movement of the goods. There are two possibilities:

1. Goods with documents of title. A first possibility is that the ownership of the goods is manifested by a **document of title**—"bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers."Uniform Commercial Code, Section 1-201(15). In that case, the UCC, Section 2-401(3)(a), says that title passes "at the time when and the place where" the documents are delivered to the buyer.
2. Goods without documents of title. If there is no physical transfer of the goods and no documents to exchange, then UCC, Section 2-401(3)(b), provides that "title passes at the time and place of contracting."

Here are examples showing how these concepts work.

Suppose the contract calls for Delta Sponge Makers to "ship the entire lot of industrial grade Sponge No. 2 by truck or rail" and that is all that the contract says about shipment. That's a "shipment contract," and the UCC, Section 2-401(2)(a), says that title passes to Very Fast Foods at the "time and place of shipment." At the moment that Delta turns over the 144 cartons of 1,000 sponges each to a trucker—perhaps Easy Rider Trucking comes to pick them up at Delta's own factory—title has passed to Very Fast Foods.

Suppose the contract calls for Delta to "deliver the sponges on June 10 at the Maple Street warehouse of Very Fast Foods Inc." This is a destination contract, and the seller "completes his performance with respect to the physical delivery of the goods" when it pulls up to the door of the warehouse and tenders the cartons.Uniform Commercial Code, Section 2-401(2)(b). "Tender" means that the party—here Delta Sponge Makers—is ready, able, and willing to perform and has notified its obligor of its readiness. When the driver of the delivery truck knocks on the warehouse door, announces that the gross of industrial grade Sponge No. 2 is ready for unloading, and asks where the warehouse foreman wants it, Delta has tendered delivery, and title passes to Very Fast Foods.

Suppose Very Fast Foods fears that the price of industrial sponges is about to soar; it wishes to acquire a large quantity long before it can use them all or even store them all. Delta does not store all of its sponges in its own plant, keeping some of them instead at Central Warehousing. Central is a **bailee**, one who has rightful possession but not title. (A parking garage often is a bailee of its customers' cars; so is a carrier carrying a customer's goods.) Now assume that Central has issued a **warehouse receipt** (a document of title that provides proof of ownership of goods stored in a warehouse) to Delta and that Delta's contract with Very Fast Foods calls for Delta to deliver "document of title at the office of First Bank" on a particular day. When the goods are not to be physically moved, that title passes to Very Fast Foods "at the time when and the place where" Delta delivers the document.

Suppose the contract did not specify physical transfer or exchange of documents for the purchase price. Instead, it said, "Seller agrees to sell all sponges stored on the north wall of its Orange Street warehouse, namely, the gross of industrial Sponge No. 2, in cartons marked B300–B444, to Buyer for a total purchase price of $14,000, payable in twelve equal monthly installments,

beginning on the first of the month beginning after the signing of this agreement." Then title passes at the time and place of contracting—that is, when Delta Sponge Makers and Very Fast Foods sign the contract.

So, as always under the UCC, the parties may agree on the terms they want when title shifts. They can do that directly by just saying when—as in the Dow Chemical example—or they can indirectly agree when title shifts by stipulating delivery terms: shipment, destination, goods not to be moved. If they don't stipulate, the UCC default kicks in.

UCC Default Provision

If the parties do not stipulate by any means when title shifts, Section 2-401(2) of the UCC provides that "title passes to the buyer at the time and place at which seller completes his performance with reference to the physical delivery of the goods." And if the parties have no term in their contract about delivery, the UCC's default delivery term controls. It says "the place for delivery is the seller's place of business or if he has none his residence," and delivery is accomplished at the place when the seller "put[s] and hold[s] conforming goods at the buyer's disposition and give[s] the buyer any notification reasonably necessary to enable him to take delivery."Uniform Commercial Code, Sections 2-308 and 2-503.

KEY TAKEAWAY

Title is important for three reasons: it determines whether a sale has occurred, it determines rights of creditors, and it affects who has an insurable interest. Parties may explicitly agree when title shifts, or they may agree indirectly by settling on delivery terms (because absent explicit agreement, delivery controls title passage). Delivery terms to choose from include shipment contracts, destination contracts, and delivery without the goods being moved (with or without documents of title). If nothing is said about when title shifts, and the parties have not indirectly agreed by choosing a delivery term, then title shifts when delivery obligations under the contract are complete, and if there are no delivery terms, delivery happens when the seller makes the goods available at seller's place of business (or if seller has no place of business, goods will be made available at seller's residence)—that's when title shifts.

EXERCISES

1. Why does it matter who has title?
2. If the parties do not otherwise agree, when does title shift from seller to buyer?
3. Why does the question of delivery terms arise in examining when title shifts?
4. When does title shift for goods stored in a warehouse that are not to be moved?

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11.11.3: Title from Nonowners

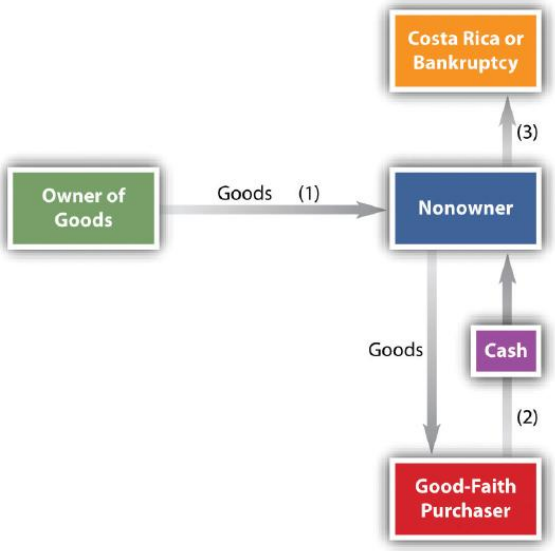
LEARNING OBJECTIVE

1. Understand when and why a nonowner can nevertheless pass title on to a purchaser.

The Problem of Title from Nonowners

We have examined when title transfers from buyer to seller, and here the assumption is, of course, that seller had good title in the first place. But what title does a purchaser acquire when the seller has no title or has at best only a voidable title? This question has often been difficult for courts to resolve. It typically involves a type of eternal triangle with a three-step sequence of events, as follows (see Figure 18.1 "Sales by Nonowners"): (1) The nonowner obtains possession, for example, by loan or theft; (2) the nonowner sells the goods to an innocent purchaser for cash; and (3) the nonowner then takes the money and disappears, goes into bankruptcy, or ends up in jail. The result is that two innocent parties battle over the goods, the owner usually claiming that the purchaser is guilty of **conversion** (i.e., the unlawful assumption of ownership of property belonging to another) and claiming damages or the right to recover the goods.

Figure 18.1 Sales by Nonowners



The Response to the Problem of Title from Nonowners

The Basic Rule

To resolve this dilemma, we begin with a basic policy of jurisprudence: a person cannot transfer better title than he or she had. (The Uniform Commercial Code [UCC] notes this policy in Sections 2-403, 2A-304, and 2A-305.) This policy would apply in a sale-of-goods case in which the nonowner had a void title or no title at all. For example, if a nonowner stole the goods from the owner and then sold them to an innocent purchaser, the owner would be entitled to the goods or to damages. Because the thief had no title, he had no title to transfer to the purchaser. A person cannot get good title to goods from a thief, nor does a person have to retain physical possession of her goods at all times to retain their ownership—people are expected to leave their cars with a mechanic for repair or to leave their clothing with a dry cleaner.

If thieves could pass on good title to stolen goods, there would be a hugely increased traffic in stolen property; that would be unacceptable. In such a case, the owner can get her property back from whomever the thief sold it to in an action called **replevin** (an action to recover personal property unlawfully taken). On the other hand, when a buyer in good faith buys goods from an apparently reputable seller, she reasonably expects to get good title, and that expectation cannot be dashed with impunity without faith in the market being undermined. Therefore, as between two innocent parties, sometimes the original owner does lose, on the theory that (1) that person is better able to avoid the problem than the downstream buyer, who had absolutely no control over the

situation, and (2) faith in commercial transactions would be undermined by allowing original owners to claw back their property under all circumstances.

So the basic legal policy that a person cannot pass on better title than he had is subject to a number of exceptions. In Chapter 22 "Secured Transactions and Suretyship", for instance, we examine how a buyer in the ordinary course of business is allowed to purchase goods free of security interests that the seller has given to creditors. Likewise, the law governing the sale of goods contains exceptions to the basic legal policy. These usually fall within one of two categories: sellers with voidable title and entrustment.

The Exceptions

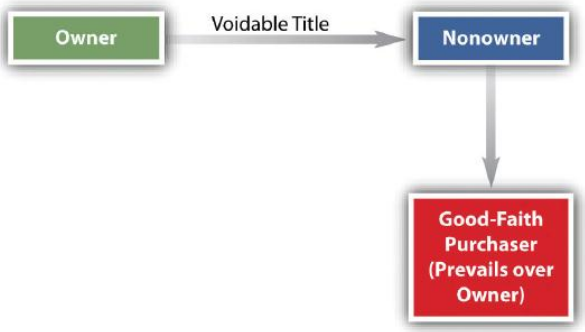
As noted, there are exceptions to the law governing the sale of goods.

Sellers with a Voidable Title

Under the UCC, a person with a voidable title has the power to transfer title to a good-faith purchaser for value (see Figure 18.2 "Voidable Title"). The UCC defines *good faith* as “honesty in fact in the conduct or transaction concerned.”Uniform Commercial Code, Section 1-201(19). A “purchaser” is not restricted to one who pays cash; any taking that creates an interest in property, whether by mortgage, pledge, lien, or even gift, is a purchase for purposes of the UCC. And “value” is not limited to cash or goods; a person gives value if he gives any consideration sufficient to support a simple contract, including a binding commitment to extend credit and security for a preexisting claim. Recall from Chapter 9 "The Agreement" that a “voidable” title is one that, for policy reasons, the courts will cancel on application of one who is aggrieved. These reasons include fraud, undue influence, mistake, and lack of capacity to contract. When a person has a voidable title, title can be taken away from her, but if it is not, she can transfer better title than she has to a good-faith purchaser for value. (See Section 18.4.2 "Defrauding Buyer Sells to Good-Faith Purchaser for Value" at the end of this chapter.)

Rita, sixteen years old, sells a video game to her neighbor Annie, who plans to give the game to her nephew. Since Rita is a minor, she could rescind the contract; that is, the title that Annie gets is voidable: it is subject to be avoided by Rita’s rescission. But Rita does not rescind. Then Annie discovers that her nephew already has that video game, so she sells it instead to an office colleague, Donald. He has had no notice that Annie bought the game from a minor and has only a voidable title. He pays cash. Should Rita—the minor—subsequently decide she wants the game back, it would be too late: Annie has transferred good title to Donald even though Annie’s title was voidable.

Figure 18.2 Voidable Title



Suppose Rita was an adult and Annie paid her with a check that later bounced, but Annie sold the game to Donald before the check bounced. Does Donald still have good title? The UCC says he does, and it identifies three other situations in which the good-faith purchaser is protected: (1) when the original transferor was deceived about the identity of the purchaser to whom he sold the goods, who then transfers to a good-faith purchaser; (2) when the original transferor was supposed to but did not receive cash from the intermediate purchaser; and (3) when “the delivery was procured through fraud punishable as larcenous under the criminal law.”Uniform Commercial Code, Sections 2-403(1), 2-403(1), 2A-304, and 2A-305.

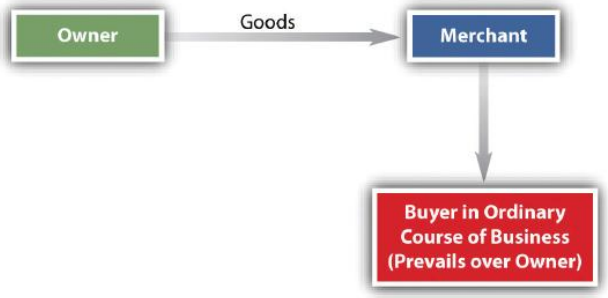
This last situation may be illustrated as follows: Dimension LLC leased a Volkswagen to DK Inc. The agreement specified that DK could use the Volkswagen solely for business and commercial purposes and could not sell it. Six months later, the owner of DK,

Darrell Kempf, representing that the Volkswagen was part of DK's used-car inventory, sold it to Edward Seabold. Kempf embezzled the proceeds from the sale of the car and disappeared. When DK defaulted on its payments for the Volkswagen, Dimension attempted to repossess it. Dimension discovered that Kempf had executed a release of interest on the car's title by forging the signature of Dimension's manager. The Washington Court of Appeals, applying the UCC, held that Mr. Seabold should keep the car. The car was not stolen from Dimension; instead, by leasing the vehicle to DK, Dimension transferred possession of the car to DK voluntarily, and because Seabold was a good-faith purchaser, he won.*Dimension Funding, L.L.C. v. D.K. Associates, Inc.*, 191 P.3d 923 (Wash. App. 2008).

Entrustment

A merchant who deals in particular goods has the power to transfer all rights of one who entrusts to him goods of the kind to a "buyer in the ordinary course of business" (see Figure 18.3 "Entrustment").Uniform Commercial Code, Sections 2-403(2), 2A-304(2), and 2A-305(2). The UCC defines such a buyer as a person who buys goods in an ordinary transaction from a person in the business of selling that type of goods, as long as the buyer purchases in "good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods."Uniform Commercial Code, Section 1-201(9). Bess takes a pearl necklace, a family heirloom, to Wellborn's Jewelers for cleaning; as the **entrustor**, she has entrusted the necklace to an **entrustee**. The owner of Wellborn's—perhaps by mistake—sells it to Clara, a buyer, in the ordinary course of business. Bess cannot take the necklace back from Clara, although she has a cause of action against Wellborn's for conversion. As between the two innocent parties, Bess and Clara (owner and purchaser), the latter prevails. Notice that the UCC only says that the entrustee can pass *whatever title the entrustor had* to a good-faith purchaser, not necessarily good title. If Bess's cleaning woman borrowed the necklace, soiled it, and took it to Wellborn's, which then sold it to Clara, Bess could get it back because the cleaning woman had no title to transfer to the entrustee, Wellborn's.

Figure 18.3 Entrustment



Entrustment is based on the general principle of estoppel: "A rightful owner may be estopped by his own acts from asserting his title. If he has invested another with the usual evidence of title, or an apparent authority to dispose of it, he will not be allowed to make claim against an innocent purchaser dealing on the faith of such apparent ownership."*Zendman v. Harry Winston, Inc.*, 111 N.E. 2d 871 (N.Y. 1953).

KEY TAKEAWAY

The general rule—for obvious reasons—is that nobody can pass on better title to goods than he or she has: a thief cannot pass on good title to stolen goods to anybody. But in balancing that policy against the reasonable expectations of good-faith buyers that they will get title, the UCC has made some exceptions. A person with voidable title can pass on good title to a good-faith purchaser, and a merchant who has been entrusted with goods can pass on title of the entrustor to a good-faith purchaser.

EXERCISES

1. Why is it the universal rule that good title to goods cannot be had from a thief?
2. What is the "voidable title" exception to the universal rule? Why is the exception made?
3. What is the "entrusting" exception to the general rule?

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11.11.4: Risk of Loss

LEARNING OBJECTIVES

1. Understand why who has the risk of loss is important.
2. Know how parties may agree on when the risk of loss shifts.
3. Know when the risk of loss shifts if there is no breach, and if there is a breach.
4. Recognize what “insurable interest” is, why it is important, and how it attaches.

Why Risk of Loss Is Important

“Risk of loss” means who has to pay—who bears the risk—if the goods are lost or destroyed *without the fault of either party*. It is obvious why this issue is important: Buyer contracts to purchase a new car for $35,000. While the car is in transit to Buyer, it is destroyed in a landslide. Who takes the $35,000 hit?

The CISG, Article 66, provides as follows: “Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.”

When Risk of Loss Passes

The Parties May Agree

Just as title passes in accordance with the parties’ agreement, so too can the parties fix the risk of loss on one or the other. They may even devise a formula to divide the risk between themselves.Uniform Commercial Code, Section 2-303.

Common terms by which parties set out their delivery obligations that then affect when title shifts (F.O.B., F.A.S., ex-ship, and so on) were discussed earlier in this chapter. Similarly, parties may use common terms to set out which party has the risk of loss; these situation arise with trial sales. That is, sometimes the seller will permit the buyer to return the goods even though the seller had conformed to the contract. When the goods are intended primarily for the buyer’s use, the transaction is said to be “sale on approval.” When they are intended primarily for resale, the transaction is said to be “sale or return.” When the “buyer” is really only a sales agent for the “seller,” it is a consignment sale.

Sale on Approval

Under a **sale-on-approval contract**, risk of loss (and title) remains with the seller until the buyer accepts, and the buyer’s trial use of the goods does not in itself constitute acceptance. If the buyer decides to return the goods, the seller bears the risk and expense of return, but a merchant buyer must follow any reasonable instructions from the seller. Very Fast Foods asks Delta for some sample sponges to test on approval; Delta sends a box of one hundred sponges. Very Fast plans to try them for a week, but before that, through no fault of Very Fast, the sponges are destroyed in a fire. Delta bears the loss.Uniform Commercial Code, Section 2-327(1)(a).

Sale or Return

The buyer might take the goods with the expectation of reselling them—as would a women’s wear shop buy new spring fashions, expecting to sell them. But if the shop doesn’t sell them before summer wear is in vogue, it could arrange with the seller to return them for credit. In contrast to sale-on-approval contracts, **sale-or-return contracts** have risk of loss (and title too) passing to the buyer, and the buyer bears the risk and expense of returning the goods.

Occasionally the question arises whether the buyer’s other creditors may claim the goods when the sales contract lets the buyer retain some rights to return the goods. The answer seems straightforward: in a sale-on-approval contract, where title remains with the seller until acceptance, the buyer does not own the goods—hence they cannot be seized by his creditors—unless he accepts them, whereas they are the buyer’s goods (subject to his right to return them) in a sale-or-return contract and may be taken by creditors if they are in his possession.

Consignment Sales

In a consignment situation, the seller is a bailee and an agent for the owner who sells the goods for the owner and takes a commission. Under the Uniform Commercial Code (UCC), this is considered a sale or return, thus the consignee (at whose place the goods are displayed for sale to customers) is considered a buyer and has the risk of loss and title.Uniform Commercial Code, Section 2-326(3). The consignee's creditors can take the goods; that is, unless the parties comply "with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or where it is established that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others" (or complies with secured transactions requirements under Article 9, discussed in a later chapter).Uniform Commerical Code, Section 2-326.

The UCC Default Position

If the parties fail to specify how the risk of loss is to be allocated or apportioned, the UCC again supplies the answers. A generally applicable rule, though not explicitly stated, is that risk of loss passes when the seller has completed obligations under the contract. Notice this is *not* the same as when title passes: title passes when seller has completed *delivery* obligations under the contract, risk of loss passes when *all* obligations are completed. (Thus a buyer could get good title to nonconforming goods, which might be better for the buyer than not getting title to them: if the seller goes bankrupt, at least the buyer has something of value.)

Risk of Loss in Absence of a Breach

If the goods are *conforming*, then risk of loss would indeed pass when delivery obligations are complete, just as with title. And the analysis here would be the same as we looked at in examining shift of title.

A shipment contract. The contract requires Delta to ship the sponges by carrier but does not require it to deliver them to a particular destination. In this situation, risk of loss passes to Very Fast Foods when the goods are delivered to the carrier.

The CISG—pretty much like the UCC—provides as follows (Article 67):

If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.

A destination contract. If the destination contract agreement calls for Delta to deliver the sponges by carrier to a particular location, Very Fast Foods assumes the risk of loss only when Delta's carrier tenders them at the specified place.

The CISG provides for basically the same thing (Article 69): "If the contract is for something other than shipment, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery."

Goods not to be moved. If Delta sells sponges that are stored at Central Warehousing to Very Fast Foods, and the sponges are not to be moved, Section 2-509(2) of the UCC sets forth three possibilities for transfer of the risk of loss:

1. The buyer receives a negotiable document of title covering the goods. A document of title is negotiable if by its terms goods are to be delivered to the bearer of the document or to the order of a named person.
2. The bailee acknowledges the buyer's right to take possession of the goods. Delta signs the contract for the sale of sponges and calls Central to inform it that a buyer has purchased 144 cartons and to ask it to set aside all cartons on the north wall for that purpose. Central does so, sending notice to Very Fast Foods that the goods are available. Very Fast Foods assumes risk of loss upon receipt of the notice.
3. When the seller gives the buyer a nonnegotiable document of title or a written direction to the bailee to deliver the goods and the buyer has had a reasonable time to present the document or direction.

All other cases. In any case that does not fit within the rules just described, the risk of loss passes to the buyer only when the buyer actually receives the goods. Cases that come within this section generally involve a buyer who is taking physical delivery from the seller's premises. A merchant who sells on those terms can be expected to insure his interest in any goods that remain under his control. The buyer is unlikely to insure goods not in his possession. The *Ramos* case (Section 18.4.3 "Risk of Loss, Seller a

Merchant" in this chapter) demonstrates how this risk-of-loss provision applies when a customer pays for merchandise but never actually receives his purchase because of a mishap.

Risk of Loss Where Breach Occurs

The general rule for risk of loss was set out as this: risk of loss shifts when seller has completed obligations under the contract. We said if the goods are conforming, the only obligation left is delivery, so then risk of loss would shift upon delivery. But if the goods are nonconforming, then the rule would say the risk doesn't shift. And that's correct, though it's subject to one wrinkle having to do with insurance. Let's examine the two possible circumstances: breach by seller and breach by buyer.

First, suppose the *seller* breaches the contract by proffering nonconforming goods, and the buyer *rejects* them—never takes them at all. Then the goods are lost or damaged. Under Section 2-510(1) of the UCC, the loss falls on seller and remains there until seller cures the breach or until buyer accepts despite the breach. Suppose Delta is obligated to deliver a gross of industrial No. 2 sponges; instead it tenders only one hundred cartons or delivers a gross of industrial No. 3 sponges. The risk of loss falls on Delta because Delta has not completed its obligation under the contract and Very Fast Foods doesn't have possession of the goods. Or suppose Delta has breached the contract by tendering to Very Fast Foods a defective document of title. Delta cures the defect and gives the new document of title to Very Fast Foods, but before it does so the sponges are stolen. Delta is responsible for the loss.

Now suppose that a seller breaches the contract by proffering nonconforming goods and that the buyer, not having discovered the nonconformity, *accepts* them—the nonconforming goods are in the buyer's hands. The buyer has a right to revoke acceptance, but before the defective goods are returned to the seller, they are destroyed while in the buyer's possession. The seller breached, but here's the wrinkle: the UCC says that the seller bears the loss only to the extent of any deficiency in the buyer's insurance coverage.Uniform Commercial Code, Section 2-510(2). Very Fast Foods had taken delivery of the sponges and only a few days later discovered that the sponges did not conform to the contract. Very Fast has the right to revoke and announces its intention to do so. A day later its warehouse burns down and the sponges are destroyed. It then discovers that its insurance was not adequate to cover all the sponges. Who stands the loss? The seller does, again, to the extent of any deficiency in the buyer's insurance coverage.

Second, what if the *buyer* breaches the contract? Here's the scenario: Suppose Very Fast Foods calls two days before the sponges identified to the contract are to be delivered by Delta and says, "Don't bother; we no longer have a need for them." Subsequently, while the lawyers are arguing, Delta's warehouse burns down and the sponges are destroyed. Under the rules, risk of loss does not pass to the buyer until the seller has delivered, which has not occurred in this case. Nevertheless, responsibility for the loss here has passed to Very Fast Foods, to the extent that the seller's insurance does not cover it. Section 2-510(3) of the UCC permits the seller to treat the risk of loss as resting on the buyer for a "commercially reasonable time" when the buyer repudiates the contract before risk of loss has passed to him. This transfer of the risk can take place only when the goods are identified to the contract. The theory is that if the buyer had taken the goods as per the contract, the goods would not have been in the warehouse and thus would not have been burned up.

Insurable Interest

Why It Matters

We noted at the start of this chapter that who has title is important for several reasons, one of which is because it affects who has an insurable interest. (You can't take out insurance in something you have no interest in: if you have no title, you may not have an insurable interest.) And it was noted that the rules on risk of loss are affected by insurance. (The theory is that a businessperson is likely to have insurance, which is a cost of business, and if she has insurance and also has possession of goods—even nonconforming ones—it is reasonable to charge her insurance with loss of the goods; thus she will have cause to take care of them in her possession, else her insurance rates increase.) So in commercial transactions insurance is important, and when goods are lost or destroyed, the frequent argument is between the buyer's and the seller's insurance companies, neither of which wants to be responsible. They want to deny that their insured had an insurable interest. Thus it becomes important who has an insurable interest.

Insurable Interest of the Buyer

It is not necessary for the buyer to go all the way to having title in order for him to have an insurable interest. The buyer obtains a "special property and insurable interest in goods by identification of existing goods as goods to which the contract refers."Uniform Commercial Code, Section 2-501(1). We already discussed how "identification" of the goods can occur. The parties can do it by branding, marking, tagging, or segregating them—and they can do it at any time. We also set out the rules for when goods will be considered identified to the contract under the UCC if the parties don't do it themselves (Section 18.1.2 "Goods Identified to the Contract").

Insurable Interest of the Seller

As long as the seller retains title to or any security interest in the goods, he has an insurable interest.

Other Rights of the Buyer

The buyer's "special property" interest that arises upon identification of goods gives the buyer rights other than that to insure the goods. For example, under Section 2-502 of the UCC, the buyer who has paid for unshipped goods may take them from a seller who becomes insolvent within ten days after receipt of the whole payment or the first installment payment. Similarly, a buyer who has not yet taken delivery may sue a third party who has in some manner damaged the property.

KEY TAKEAWAY

Knowing who has the risk of loss in a contract for the sale of goods is important for obvious reasons: it is not uncommon for goods to be lost or stolen between the time they leave the seller's possession and before the buyer gets them. The parties are certainly free to agree on when the risk of loss shifts; if they do not, the UCC says it shifts when the seller has completed obligations under the contract. Thus if there is no breach, the risk of loss shifts upon delivery. If there is a breach, the UCC places the risk of loss on the breaching party, with this caveat: where the nonbreaching party is in control of the goods, the UCC places the risk of loss on that party to the extent of her insurance coverage. So if there is a breach by the seller (delivery of nonconforming goods), the risk of loss never shifts except if the buyer has taken possession of the nonconforming goods; in that case, the buyer does have the risk of loss insofar as her insurance covers the loss. If the buyer breaches by repudiating before the risk of loss passes to him (by the goods' delivery), the UCC permits the seller to treat the risk of loss as resting on the buyer for a commercially reasonable time as to goods identified to the contract.

Insurable interest becomes important when goods suffer a casualty loss because—among other reasons—often neither the seller's nor the buyer's insurance company wants *its* insured to have an interest in the goods: each side denies it. The seller retains an insurable interest if he has title to or any security interest in the goods, and the buyer obtains an insurable interest by identification of existing goods as goods to which the contract refers. A person has an insurable interest in any property owned or in the person's possession.

EXERCISES

1. Which is more important in determining who has the risk of loss, the agreement of the parties or the UCC's default provisions?
2. When does the risk of loss shift to the buyer if the parties have no agreement on the issue?
3. Why does the UCC impose the risk of loss to the extent of his insurance on a nonbreaching party if that party has control of the goods?
4. Why can a person not take out insurance for goods in which the person has no interest? How does a seller retain an insurable interest? When does the buyer get an insurable interest?

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11.11.5: Cases

Transfer of Title: Destination Contracts

Sam and Mac, Inc. v. Treat

783 N.E.2d 760 (Ind. App. 2003)

Anthony L. Gruda and Sharon R. Gruda (the "Grudas") owned and operated Gruda Enterprises, Inc. (Gruda Enterprises), which in turn operated The Kitchen Works, a kitchen supply business. On March 5, 1998, Gruda Enterprises contracted to sell a set of kitchen cabinets to Sam and Mac, Inc. [SMI], a commercial construction and contracting corporation. Gruda Enterprises was also to deliver and install the cabinets. Because it did not have the cabinets in stock, Gruda Enterprises ordered them from a manufacturer. On March 14, 1998, nine days after placing the order, SMI pre-paid Gruda Enterprises for the cabinet order.

On May 14, 1998, prior to delivery and installation of the cabinets, the Grudas ceased operation of Gruda Enterprises and filed for personal bankruptcy. Gruda Enterprises did not file for bankruptcy and was not dissolved. Instead, the Grudas' stock in Gruda Enterprises became part of their bankruptcy estate.…When no cabinets were delivered or installed, and the Grudas ceased operation of Gruda Enterprises, SMI asked Treat, who was the landlord of Gruda Enterprises, to open the business premises and permit SMI to remove cabinets from the property. Treat declined, stating that he feared he would incur liability to Gruda Enterprises if he started giving away its inventory. Treat and other secured creditors sued Gruda Enterprises, which owed them money. [Summary judgment was for Treat, SMI appeals.]

SMI contends that there was a completed sale between SMI, as the buyer, and Gruda Enterprises, as the seller. Specifically, SMI maintains that title to the cabinets under [UCC] 2-401(3)(b) passed to SMI when the contract for sale was [made].…Therefore, SMI argues that the trial court improperly granted summary judgment in favor of Treat because [SMI] held title and, thus, a possessory interest in the cabinets.…

[T]he contract is governed by the…Indiana Uniform Commercial Code (UCC). 2-401 establishes the point in time at which title passes from seller to buyer. Specifically, 2-401(2) provides, in pertinent part, that unless explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with respect to the physical delivery of goods.…

Moreover, the record indicates that SMI and Gruda Enterprises did not have an explicit agreement to pass title at any other time, or at any time prior to actual delivery of the cabinets. SMI argues that title passed to it under 2-401(3)(b) ["where delivery is to be made without moving the goods,…if the goods are at the time of contacting already identified and no documents are to be delivered, title passes at the time and place of contacting."].…However, the record reflects that SMI admitted that the terms of the contract required Gruda Enterprises to not only order the cabinets, but to deliver and install them at the location specified by SMI, i.e. the house that SMI was building. 2-403(3) applies to purchases of goods where delivery is to be made without moving the goods. SMI argues that since the cabinets were identified at the time of contracting and no documents needed delivery, title passed at the time and place of contracting.…

[T]itle to goods cannot pass under a contract for sale prior to their identification in the contract. *See* 2-401(1). This does not mean that title passes when the goods are identified. It only means that identification is merely the earliest possible opportunity for title to pass.…[I]dentification does not, in and of itself, confer either ownership or possessory rights in the goods. [UCC] 2-401(2)(b) states that "[i]f the contract requires delivery at destination, title passes on tender there." In the present case, tender did not occur when Gruda Enterprises called SMI to notify it that the cabinets were in and ready to be delivered and installed. SMI requested that the cabinets remain at the warehouse until the house it was building was ready for the cabinets to be installed.…[W]e find that SMI and Gruda Enterprises agreed to a destination point, *i.e.* the house that SMI was building. Accordingly, we find that 2-401(2)(b) is also applicable. The title to the cabinets did not pass to SMI because the cabinets were not delivered and installed at the agreed upon destination. Therefore, we conclude that SMI does not have a possessory interest in the cabinets.

Based on the foregoing, we conclude that the trial court properly granted summary judgment in favor of Treat.…Affirmed.

CASE QUESTIONS

1. One argument made by the plaintiff was that because the plaintiff had paid for the goods and they had been identified to the contract, title passed to the plaintiff. Why did the court disagree with this contention?

2. When would title to the cabinets have shifted to the plaintiff?
3. This is footnote 2 (it was not included in the parts of the case set out above): "We note that Treat owned Kitchen Wholesalers, Inc., from approximately 1987 to approximately June 20, 1996. On or about June 20, 1996, Kitchen Wholesalers, Inc. sold its assets, inventory, equipment, and business to Gruda Enterprises. The Grudas executed an Agreement for Sale of Assets, Lease, and Security Agreement, as well as a Promissory Note in which they agreed to pay $45,000 for the assets, inventory, equipment, and business, and to pay monthly rent of $1,500 for the premises where the business was located, and secured their obligations with inventory, equipment, and proceeds therefrom, of the business which they were purchasing. Treat filed and perfected a security interest in the accounts receivable, inventory, and equipment of The Kitchen Works on August 28, 1998. The Grudas currently owe Treat $61,794.99."

   This means that when the Grudas failed to pay Treat, he had a right to repossess all assets *belonging to them*, including the cabinets—Treat was a creditor of the Grudas. SMI, of course, contended it had title to the cabinets. Based on the court's analysis, who is going to get the cabinets?

Defrauding Buyer Sells to Good-Faith Purchaser for Value

Marlow v. Conley

787 N.E.2d 490, (Ind. App. 2003)

Donald E. Marlow appeals the trial court's judgment in favor of Robert L. Medley and Linda L. Medley (collectively, the "Medleys") on Marlow's complaint for replevin. Marlow raises [this issue],…whether the Medleys obtained good title to a truck pursuant to Indiana UCC 2-403(1). We affirm.

The relevant facts follow. On May 21, 2000, Robert Medley attended a car show in Indianapolis. Henderson Conley attended the same car show and was trying to sell a 1932 Ford Truck ("Truck"). Conley told Robert that he operated a "buy here, pay here car lot," and Robert saw that the Truck had a dealer license plate. Robert purchased the Truck for $7,500.00 as a gift for Linda. Conley gave Robert the Truck's certificate of title, which listed the owner as Donald Marlow. When Robert questioned Conley about the owner of the Truck, Conley responded that Marlow had signed the title as part of a deal Conley had made with him. After purchasing the Truck, Robert applied to the Bureau of Motor Vehicles for a certificate of title in Linda's name.

On December 18, 2000, Marlow filed a complaint against Conley and the Medleys.…At the bench trial, Marlow testified that he had met Conley at a car show in Indianapolis on May 19, 2000, and Conley had told him that Conley owed a "car lot" on the west side of Indianapolis. Marlow also testified that Conley came to his house that night, but he "didn't let him in." Rather, Marlow testified that Conley "[came] over [his] fence…a big high fence." According to Marlow, Conley asked him to invest in Conley's business that night. Marlow gave Conley $500.00. Marlow testified that Conley came back the next day and Marlow gave him an additional $4,000.00. Marlow then testified that Conley stole the certificate of title for the Truck from Marlow's house and stole the Truck from his garage. According to Marlow, he told Conley later in the day to bring his Truck back and Conley told him that it had caught on fire. Marlow testified that he then called the police. However, in the May 30, 2000 police report, which was admitted into evidence at trial, the police officer noted the following:

The deal was [Conley] gets $4500.00, plus an orange '32 Ford truck. In return, [Marlow] would get a '94 Ford flatbed dump truck and an '89 Ford Bronco. [Marlow] stated that he has not received the vehicles and that [Conley] keeps delaying getting the vehicles for him. [Conley] gave [Marlow] several titles of vehicles which are believed to be junk. [Conley] told [Marlow] that he has a car lot at 16th and Lafayette Road.

[The trial court determined that Marlow bought the truck from Conley, paying Conley $4500 plus a Ford flatbed truck and Ford Bronco.]

…

The issue is whether the Medleys obtained good title to the Truck pursuant to Indiana UCC 2-403(1) [voidable title passed on to good-faith purchaser]. We first note that UCC 2-401(2) provides that "[u]nless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods.…" Further, 2-403(1) provides as follows: "A purchaser of goods acquires all title which his transferor had or had power to transfer.…A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a

transaction of purchase, the purchaser has such power even though:…(d) the delivery was procured through fraud punishable as theft under the criminal law."

Thus, Conley, as purchaser of the goods, acquired all title to the Truck that Marlow, as transferor, had or had power to transfer. Additionally, even if Conley had "voidable title," he had the power to transfer good title to the Medleys if they were "good faith purchasers for value." Consequently, we must determine whether Conley had voidable title and, if so, whether the Medleys were good faith purchasers for value.

A. Voidable Title

We first determine whether Conley had voidable title to the Truck.…[T]he UCC does not define "voidable title." However, we have held that Indiana's UCC 2-403 is consistent with Indiana's common law, which provided that "legal title passes to a defrauding buyer. This title is not void; it is voidable, which means that when title gets into the hands of a bona fide purchaser for value then he will prevail over the defrauded seller." [Citation] Thus, a "defrauding buyer" obtains voidable title. However, a thief obtains void title. See, e.g., [Citation] holding that a renter who stole a motor home had void title, not voidable title, and could not convey good title).…

Here, Marlow argues that Conley stole the Truck and forged his name on the certificate of title. However, the trial court was presented with conflicting evidence regarding whether Conley stole the Truck and the certificate of title or whether Conley and Marlow had a business deal and Conley failed to comply with the agreement. The trial court found that:

Evidence presented concerning [Marlow's] complaint to the Indianapolis Police Department on May 30, 2000 casts doubt on the credibility of [Marlow's] trial testimony as the report states the truck and title were obtained by Conley in exchange for a 1994 Ford Flatbed Dump Truck and a 1989 Ford Bronco plus the payment of $4500.00 by [Marlow]. Apparently, [Marlow] was complaining to the police concerning Conley's failure to deliver the two Ford vehicles.

…The trial court did not find Marlow's testimony regarding the theft of the Truck and the certificate of title to be credible.… [B]ased upon the trial court's findings of fact, we must assume that the police report accurately describes the circumstances under which Conley obtained possession of the Truck and its signed certificate of title. Consequently, we assume that Marlow gave Conley $4,500.00 and the Truck in exchange for two other vehicles. Although Conley gave Marlow the certificates of title for the two vehicles, he never delivered the vehicles.

Conley's title is voidable if "the delivery was procured through fraud punishable as theft under the criminal law" under 2-403(1)(d).…Assuming that Conley knew that he would not deliver the two vehicles to Marlow, the delivery of the Truck to Conley was procured through fraud punishable as theft. Consequently, Marlow was defrauded, and Conley obtained voidable title to the Truck.…

B. Good Faith Purchasers for Value

Having determined that Conley obtained voidable title to the Truck, we must now determine whether the Medleys were good faith purchasers for value. Marlow does not dispute that the Medleys were purchasers for value. Rather, Marlow questions their "good faith" because they purchased the Truck from someone other than the person listed on the Truck's certificate of title. [UCC 1-201919] defines good faith as "honesty in fact in the conduct or transaction concerned." Marlow argues that Robert did not purchase the Truck in good faith because, although Robert purchased the vehicle from Conley, he was aware that the certificate of title was signed by Marlow.

…Here, the sole evidence presented by Marlow regarding the Medleys' lack of good faith is the fact that the certificate of title provided by Conley was signed by Marlow. Robert testified that he thought Conley was a licensed dealer and operated a "buy here, pay here" car lot. The Truck had a dealer license plate. Robert questioned Conley about the certificate of title. Conley explained that Marlow had signed the title as part of a deal Conley had made with him. Robert also testified that he had previously purchased vehicles at car shows and had previously purchased a vehicle from a dealer where the certificate of title had the previous owner's name on it.…

The Medleys' failure to demand a certificate of title complying with [the Indiana licensing statute] does not affect their status as good faith purchasers in this case.…The statute does not void transactions that violate the statute. [Citations] Although the failure

to comply with [the licensing statute] may, combined with other suspicious circumstances, raise questions about a purchaser's good faith, we find no such circumstances here. Consequently, the Medleys were good faith purchasers for value.…

Lastly, Marlow also argues that the Medleys violated [licensing statutes] by providing false information to the Bureau of Motor Vehicles because the Medleys allegedly listed the seller of the Truck as Marlow rather than Conley. We noted above that legal title to a vehicle is governed by the sales provisions of the UCC rather than the Indiana Certificate of Title Act. Thus, although false statements to the Bureau of Motor Vehicles under Ind.Code § 9-18-2-2 could result in prosecution for perjury, such false statements do not affect legal title to the vehicle.

In summary, we conclude that, as a defrauding buyer, Conley possessed voidable title and transferred good title to the Medleys as good faith purchasers for value.…Thus, legal title to the Truck passed to the Medleys at the time Conley delivered the Truck to them. See UCC 2-401(2) ("[T]itle passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods.…"). This result is consistent with the policy behind 2-403.

Section 2-403 was intended to determine the priorities between the two innocent parties: (1) the original owner who parts with his goods through fraudulent conduct of another and (2) an innocent third party who gives value for the goods to the perpetrator of the fraud without knowledge of the fraud. By favoring the innocent third party, the Uniform Commercial Code endeavors to promote the flow of commerce by placing the burden of ascertaining and preventing fraudulent transactions on the one in the best position to prevent them, the original seller. The policy behind the UCC is to favor the Medleys because, as between the Medleys and Marlow, Marlow was in the best position to prevent the fraudulent transaction.

For the foregoing reasons, we affirm the trial court's judgment for the Medleys. Affirmed.

CASE QUESTIONS

1. The court determined Marlow was defrauded by Conley. How did Conley defraud Marlow?
2. What is the rationale, here expressed, for the UCC's provision that a defrauding purchaser (Conley) can pass on title to a good-faith purchaser for value?
3. Why did Marlow think the Medleys should not be considered good-faith purchasers?
4. Why would the UCC prevail over the state's certificate of title act?

Risk of Loss, Seller a Merchant

Ramos v. Wheel Sports Center

409 N.Y.S.2d 505 (N.Y. Civ. Ct. 1978)

Mercorella, J.

In this non-jury action plaintiff/purchaser is seeking to recover from defendant/vendor the sum of $893 [about $3,200 in 2010 dollars] representing the payment made by plaintiff for a motorcycle.

The parties entered into a sales contract wherein defendant agreed to deliver a motorcycle to plaintiff by June 30, 1978, for the agreed price of $893. The motorcycle was subsequently stolen by looters during the infamous power blackout of July 11, 1977.

It is uncontroverted that plaintiff paid for the motorcycle in full; was given the papers necessary for registration and insurance and did in fact register the cycle and secure liability insurance prior to the loss although license plates were never affixed to the vehicle. It is also conceded that the loss occurred without any negligence on defendant's part.

Plaintiff testified that defendant's salesman was informed that plaintiff was leaving on vacation and plaintiff would come for the cycle when he returned. He further testified that he never saw or rode the vehicle. From the evidence adduced at trial it is apparent that plaintiff never exercised dominion or control over the vehicle.

Defendant's president testified that he had no knowledge of what transpired between his salesman and plaintiff nor why the cycle was not taken prior to its loss.

The sole issue presented to the Court is which party, under the facts disclosed, bears the risk of loss?

It is the opinion of this Court that defendant must bear the risk of loss under the provisions of Section 2-509(3) of the Uniform Commercial Code.

This section provides that "…the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant…." Section 2-103(1)(c) states that receipt of goods means taking physical possession of them. [Authors' note: UCC revisions have changed the rule so that risk of loss passes to the buyer on his receipt of the goods *irrespective* of whether the seller is a merchant or not. It is still 2-509(3), however.]

The provision tends more strongly to hold risk of loss on the seller than did the former Uniform Sales Act. Whether the contract involves delivery at the seller's place of business or at the situs of the goods, a merchant seller cannot transfer risk of loss and it remains on him until actual receipt by the buyer, even though full payment has been made and the buyer notified that the goods are at his disposal. The underlying theory is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them.

The Court is also of the opinion that no bailee/bailor relationship, constructive or otherwise, existed between the parties.

Accordingly, let judgment be entered in favor of plaintiff for the sum of $893, together with interest, costs and disbursements.

CASE QUESTIONS

1. What caused the loss here, through no fault of either party?
2. What is the rationale for holding the merchant-seller liable in this circumstance?
3. Suppose instead that Ramos had purchased the motorcycle at a garage sale from an acquaintance and the same loss occurred. Who would bear the risk then?

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11.11.6: Summary and Exercises

Summary

Two significant questions lurk in the background of any sale: (1) when does title pass? and (2) who must bear the risk of loss if the goods are destroyed or damaged through no fault of either party?

In general, title passes when the buyer and the seller agree that it passes. If the buyer and the seller fail to specify the time at which title passes, Article 2 lays down four rules: (1) under a shipment contract, title passes when the seller places the goods with the carrier; (2) under a destination contract, title passes when the goods are tendered at the place of delivery; (3) under a contract calling for delivery of documents of title, title passes when the seller tenders documents of title, even if the goods are not physically moved; and (4) when no physical delivery or exchange of documents is called for, title passes when the contract is signed.

The buyer and the seller may also specify who must bear the risk of loss. But if they do not, Article 2 sets out these four rules: (1) when the seller must ship by carrier but not to any particular destination, risk passes to the buyer when the seller delivers the goods to the carrier; (2) when the goods must be transported to a particular destination, risk passes when the carrier tenders them at that destination; (3) if the goods are held by a bailee who has issued a negotiable document of title, risk passes when the buyer receives the document; (4) in other cases, risk of loss turns on whether the seller is a merchant. If he is a merchant, risk passes when the buyer receives the goods; if he is not a merchant, risk passes when the seller tenders the goods. These rules are modified when either of the parties breaches the contract. In general, unless the breach is cured, the risk of uninsured losses lies on the party who breached.

Either party may insure the goods if it has an insurable interest in them. The buyer has an insurable interest in goods identified to the contract—for example, by marking them in some manner. The seller has an insurable interest as long as he retains title or a security interest.

In fixing passage of title and risk of loss, the parties often use shorthand terminology whose meaning must be mastered to make sense of the contract. These terms include F.O.B.; F.A.S.; ex-ship; C.I.F.; C.F.; no arrival, no sale; sale on approval; and sale or return. Use of these terms in a contract can have a significant effect on title and risk of loss.

Sometimes goods are sold by nonowners. A person with voidable title has the power to transfer title to a good-faith purchaser for value. A merchant who deals in particular goods has the power to transfer all rights of one who entrusts to him goods of the kind. And a rightful owner may be estopped by his own acts from asserting title against an innocent purchaser.

EXERCISES

1. Betty from Baltimore contracts to purchase one hundred purple llama figurines from Sam of Syracuse. Sam is to send the goods by carrier and is not required to deliver them to Betty's Boutique, their destination. He ships them by train, which unfortunately crashes in Delaware. All the figurines are destroyed. Whose loss is it? Why?
2. In Exercise 1, assume that the train did not crash but that Sam's creditors attempted to seize the goods before their arrival. May the creditors do so? Why?
3. Hattie's Head Shop signed a written agreement with the Tangerine Computer Company to supply a Marilyn, a supercomputer with bubble memory, to total up its orders and pay its foreign agents. The contract provided that the computer was to be specially built and that Tangerine would deliver it by carrier to Hattie's ready to install no later than June 1. Tangerine engineers worked feverishly to comply with the contract terms. On May 25, the computer stood gleaming in Tangerine's shipping department. That night, before the trucks could depart, a tornado struck the factory and destroyed the computer intended for Hattie's. Whose loss is it? Why?
4. In Exercise 3, assume that the tornado did not strike but that Tangerine's creditors attempted to seize the computer. May they? Why?
5. On February 18, Clancy, who was in debt, took his stereo to Lucy's repair shop. Because Lucy and Clancy were old friends, Lucy didn't give him a receipt. On February 19, hounded by creditors, Clancy sold the stereo on credit to Grover, who was to pick it up on February 21 at Lucy's, pay Lucy the repair bill, and pay the balance of the purchase price to Clancy. Who is entitled to the radio if, on February 20, Clancy's creditor appears with the sheriff to seize the stereo from Lucy? Why?

6. Assume in Exercise 5 that, instead of the attempted seizure of the stereo by the creditor, Lucy's shop and the stereo are destroyed by fire on February 20. Must Grover still pay Clancy for the stereo? Why?
7. Cleo's Close-Outs, a wholesaler of discounted merchandise, offered Randy's Retailers a chance to buy all the contents of a shipment of bathtub toys just received. Cleo estimated that she had between five hundred and six hundred rubber ducks and wrote on October 21 offering them to Randy for only one dollar each if Randy would pick them up at Cleo's. Randy received the letter in the mail the next day and mailed his acceptance immediately. In the wee hours of the following morning, October 23, a fire consumed Cleo's warehouse, melting the ducks into an uneven soup. Assuming that Cleo was a merchant, who bears the loss? Why?
8. Plaintiff, a manufacturer of men's clothing in Los Angeles, contracted to sell a variety of clothing items to Defendant, Harrison's clothing store in Westport, Connecticut, "F.O.B. Los Angeles." Plaintiff delivered the goods to Trucking Company and received a bill of lading. When the goods arrived at Defendant's store about two weeks later, Mrs. Harrison, Defendant's wife, who was in charge of the store at the time, requested the truck driver to deliver the goods inside the door of the shop. The driver refused and ultimately drove away. The goods were lost. Defendant refused to pay for the goods and raised as a defense that "the Plaintiff refused to deliver the merchandise into the Defendant's place of business." Who wins and why?*Ninth Street East, Ltd. v. Harrison*, 259 A.2d 772 (Conn. 1968).
9. Jackson owned a number of guns and asked his friend Willard, who ran a country store, if Willard would let Jackson display the guns in the store for sale on consignment. Willard would get some compensation for his trouble. Willard agreed. Subsequently Willard's creditors seized assets of the store, including the guns. Jackson protested that they were his guns, not Willard's, and that the latter's creditors should keep their hands off them. Given no other facts, who wins?
10. Plaintiff advertised his car for sale. Roberts stopped by to look at it. He took it for a short test drive, returned to Plaintiff's house, and said, "I like it, but my wife needs to look at it before I buy it. I'll be back in less than half an hour." Roberts took the car and never returned. Plaintiff called the police, who later found the car in a neighboring state. Defendant had bought it from Roberts, who had presented him with forged registration papers. Plaintiff then sued Defendant to get the car back. Who wins?

SELF-TEST QUESTIONS

1. In a sale-on-approval contract
    1. the goods are intended primarily for the buyer's use
    2. the goods are intended primarily for resale
    3. the risk of loss is on the buyer
    4. the buyer obtains title upon receipt of the goods
2. As a general rule
    1. goods cannot be sold by persons with voidable title
    2. a rightful owner cannot be estopped from asserting title against an innocent purchaser
    3. a merchant cannot transfer the rights of a person who entrusts goods to him
    4. a person with voidable title has the power to transfer title to a good-faith purchaser for value
3. In general, title passes
    1. to a buyer when the contract is signed
    2. when the buyer and the seller agree that it passes
    3. to a buyer when the seller receives payment for goods
    4. under none of the above conditions
4. When a destination contract does not specify when title is to pass, it passes
    1. when the goods are shipped
    2. when the contract is signed
    3. when the buyer pays for the goods
    4. when the seller tenders delivery
5. In a C.I.F. contract
    1. the seller must obtain insurance
    2. the buyer must obtain insurance

3. the seller has fewer duties than with a C.F. contract
4. title passes to the buyer when the seller tenders delivery

SELF-TEST AnswerS

1. a
2. d
3. b
4. d
5. a

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SECTION OVERVIEW

11.12: Performance and Remedies

Learning Objectives

After reading this chapter, you should understand the following:

1. What performance is expected of the seller in a sales contract
2. What performance is expected of the buyer in a sales contract
3. What rights and duties the buyer has if there is a nonconforming delivery
4. How, in general, the UCC approaches remedies
5. What the seller's remedies are for breach by the buyer
6. What the buyer's remedies are for breach by the seller
7. What excuses the UCC provides for nonperformance

In Part II, we examined contract performance and remedies under common law. In this chapter, we examine performance and remedies under Article 2, the law of sales, of the Uniform Commercial Code (UCC). In the next chapter, we cover special remedies for those damaged or injured by defective products.

The parties often set out in their contracts the details of performance. These include price terms and terms of delivery—where the goods are to be delivered, when, and how. If the parties fail to list these terms, the rules studied in this chapter will determine the parties' obligations: the parties may agree; if they do not, the UCC rules kick in as the default. In any event, the parties have an obligation to act in good faith.

11.12.1: Performance by the Seller

11.12.2: Performance by Buyer

11.12.3: Remedies

11.12.4: Excuses for Nonperformance

11.12.5: Cases

11.12.6: Summary and Exercises

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11.12.1: Performance by the Seller

LEARNING OBJECTIVE

1. Understand what is meant when it is said the seller has a duty to “make a timely delivery of conforming goods.”

The Seller’s Duty in General

The general duty of the seller is this: to make a timely delivery of conforming goods.Uniform Commercial Code, Sections 2-301and 2-309.

The CISG, Article 30, says, “The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.”

Analysis of the Seller’s Duty

Timing

By agreement or stipulation, the parties may fix the time when delivery is to be made by including statements in contracts such as “Delivery is due on or before July 8” or “The first of 12 installments is due on or before July 8.” Both statements are clear.

If the parties do not stipulate in their contract when delivery is to occur, the UCC fills the gap. Section 2-309 of the UCC says, “The time for shipment or any other action under a contract if not provided for in this Article or agreed upon shall be a reasonable time.” And what is a “reasonable time” is addressed by comment 1 to this section:

It thus turns on the criteria as to “reasonable time” and on good faith and commercial standards set forth in Sections 1-202, 1-203 and 2-103. It…depends on what constitutes acceptable commercial conduct in view of the nature, purposes and circumstances of the action to be taken.

The CISG (Article 33) provides as follows:

The seller must deliver the goods

(a) if a date is fixed by or determinable from the contract, on that date;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

Delivery

The parties may agree as to how delivery shall be accomplished; if they do not, the UCC fills the gap.

The CISG (Article 31) says this:

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists

(a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph…in placing the goods at the buyer’s disposal at that place [where the goods are];

(c) in other cases—in placing the goods at the buyer’s disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

By Agreement

The parties may use any language they want to agree on delivery terms.

If There Is No Agreement

If the parties do not stipulate delivery terms or if their agreement is incomplete or merely formulaic, the UCC describes the seller's obligations or gives meaning to the formulaic language. (Because form contracts are prevalent, formulaic language is customary.) You recall the discussion in Chapter 18 "Title and Risk of Loss" about when title shifts: we said title shifts when the seller has completed delivery obligations under the contract, and we ran through how those obligations are usually expressed. A quick review here is appropriate.

The contract may be either a *shipment* contract, a *destination* contract, or a contract where the *goods are not to be moved* (being held by a bailee). In any case, unless otherwise agreed, the delivery must be at a reasonable time and the **tender** (the offer to make delivery) must be kept open for a reasonable time; the buyer must furnish facilities "reasonably suited to the receipt of the goods."Uniform Commercial Code, Section 2-503.

In a shipment contract, the seller has four duties: (1) to deliver the goods to a carrier; (2) to deliver the goods with a reasonable contract for their transportation; (3) to deliver them with proper documentation for the buyer; and (4) to promptly notify the buyer of the shipment (UCC, Section 2-504). The contract may set out the seller's duties using customary abbreviations, and the UCC interprets those: "F.O.B [insert place where goods are to be shipped from]" means "free on board"—the seller must see to it that the goods are loaded on the vehicle of conveyance at the place of shipment. "F.A.S. [port of shipment inserted here]" means the seller must see to it that the goods are placed along the ship on the dock ready to be loaded (Section 2-319). Price terms include "C.I.F.," which means the sale price includes the cost of the goods, insurance, and freight charges, and "C. & F.," which means the sales price includes the cost of the goods at a cheaper unit price and freight but not insurance.Uniform Commercial Code, Section 2-320. If it is clear from the contract that the seller is supposed to ship the goods (i.e., the buyer is not going to the seller's place to get them) but not clear whether it is a shipment or a destination contract, the UCC presumes it is a shipment contract.Uniform Commercial Code, Section 2-503(5).

If it is a destination contract, the seller has two duties: to get the goods to the destination at the buyer's disposal and to provide appropriate documents of delivery.Uniform Commercial Code, Section 2-503. The contract language could be "F.O.B. [place of destination inserted here]," which obligates the seller to deliver to that specific location; "ex-ship," which obligates the seller to unload the goods from the vehicle of transportation at the agreed location (e.g., load the goods onto the dock); or it could be "no arrival, no sale," where the seller is not liable for failure of the goods to arrive, unless she caused it.Uniform Commercial Code, Sections 2-319, 2-322, and 2-324.

If the goods are in the possession of a bailee and are not to be moved—and the parties don't stipulate otherwise—the UCC, Section 2-503 says delivery is accomplished when the seller gives the buyer a negotiable document of title, or if none, when the bailee acknowledges the buyer's right to take the goods.

If nothing at all is said about delivery, the place for delivery is the seller's place of business or his residence if he has no place of business.Uniform Commercial Code, Section 2-308.

Conforming Goods

As always, the parties may put into the contract whatever they want about the goods as delivered. If they don't, the UCC fills the gaps.

By Agreement

The parties may agree on what "conforming goods" means. An order will specify "large grade A eggs," and that means something in the trade. Or an order might specify "20 gross 100-count boxes No. 8 × 3/8 × 32 Phillips flathead machine screws." That is a screw with a designated diameter, length, number of threads per inch, and with a unique, cruciform head insert to take a particular kind of driver. The buyer might, for example, agree to purchase "seconds," which are goods with some flaw, such as clothes with seams not sewed quite straight or foodstuffs past their pull date. The parties may also agree in the contract what happens if nonconforming goods are delivered, as we'll see later in this chapter.

If There Is No Agreement

If nothing is said in the contract about what quality of goods conform to the contract, then the UCC default rule kicks in. The seller is to make a **perfect tender**: what is delivered must in every respect conform to the contract.Uniform Commercial Code, Section 2-601. And if what is delivered doesn't conform to the contract, the buyer is not obligated to accept the goods.

The CISG has no perfect tender rule. Article 46 provides this:

If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter. If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Installment Contracts

Unless otherwise agreed, all goods should be delivered at one time, and no payment is due until tender. But where circumstances permit either party to make or demand delivery in lots, Section 2-307 of the UCC permits the seller to demand payment for each lot if it is feasible to apportion the price. What if the contract calls for delivery in installment, and one installment is defective—is that a material breach of the whole contract? No. Section 2-612 of the UCC says this:

(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole.

Cure for Improper Delivery

Failure to make a perfect tender, unless otherwise agreed, is a material breach of the sales contract. However, before the defaulting seller is in complete default, she has a right to cure. Here's what the UCC says in Section 2-508:

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

Buyer orders Santa Claus candles deliverable November 5; on October 25 the goods are delivered, but they're not right: they're Christmas *angel* candles instead. But the seller still has eleven days to cure, and the buyer must allow that. Buyer places an order exactly the same as the first order, and the order arrives on November 5 in the original manufacturer's packaging, but they're not right. "Well," says the seller, "I thought they'd be OK right out of the package. I'll get the correct ones to you right away." And the buyer would have a duty to allow that, if "right away" is a "further reasonable time."

Article 48 of the CISG says this:

The seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention. If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

So, again, the seller's duty is to make a timely delivery of conforming goods. Let's take a look now at the buyer's duties.

KEY TAKEAWAY

The seller's obligation under the UCC is to make a timely delivery of conforming goods. For each element of the duty—timely, delivery, conforming goods—the parties may agree in their contract. If they do not, the UCC fills in default rules.

EXERCISES

1. If the parties do not specify a time for delivery, what is the UCC's default position?
2. What are the seller's obligations in an F.O.B. shipment contract? In an F.O.B. destination contract?
3. Compare the UCC's perfect tender rule to the common-law substantial performance doctrine.

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11.12.2: Performance by Buyer

LEARNING OBJECTIVES

1. Understand what the general duties of the buyer are.
2. Recognize what rights the buyer has if the seller tenders a nonconforming delivery.

General Duties of Buyer

The general duty of the buyer is this: inspection, acceptance, and payment.Uniform Commercial Code, Sections 2-301 and 2-513. But the buyer's duty does not arise unless the seller tenders delivery.

Inspection

Under Sections 2-513(1) and (2) of the Uniform Commercial Code (UCC), the buyer has a qualified right to inspect goods. That means the buyer must be given the chance to look over the goods to determine whether they conform to the contract. If they do not, he may properly reject the goods and refuse to pay. The right to inspect is subject to three exceptions:

1. The buyer waives the right. If the parties agree that payment must be made before inspection, then the buyer must pay (unless the nonconformity is obvious without inspection). Payment under these circumstances does not constitute acceptance, and the buyer does not lose the right to inspect and reject later.
2. The delivery is to be made C.O.D. (cash on delivery).
3. Payment is to be made against documents of title.

If the buyer fails to inspect, or fails to discover a defect that an inspection would have revealed, he cannot later revoke his acceptance, subject to some exceptions.

Acceptance

Acceptance is clear enough: it means the buyer takes the goods. But the buyer's options on improper delivery need to be examined, because that's often a problem area.

The buyer may accept goods by words, silence, or action. Section 2-606(1) of the UCC defines acceptance as occurring in any one of three circumstances:

1. **Words.** The buyer, after a reasonable opportunity to inspect, tells the seller either that the goods conform or that he will keep them despite any nonconformity.
2. **Silence.** The buyer fails to reject, after a reasonable opportunity to inspect.
3. **Action.** The buyer does anything that is inconsistent with the seller's ownership, such as using the goods (with some exceptions) or selling the goods to someone else.

Once the buyer accepts, she is obligated to pay at the contract rate and loses the right to reject the goods.Uniform Commercial Code, Section 2-607. She is stuck, subject to some exceptions.

Payment

The parties may specify in their contract what *payment* means and when it is to be made. If they don't, the UCC controls the transaction.Uniform Commercial Code, Sections 2-511 and 2-512.

A Buyer's Right on Nonconforming Delivery

Obviously if the delivery is defective, the disappointed buyer does not have to accept the goods: the buyer may (a) reject the whole, (b) accept the whole, or (c) accept any commercial unit and reject the rest (2-601, 2A-509), or (d)—in two situations—revoke an acceptance already made.

Rejection and a Buyer's Duties after Rejection

Under UCC, Section 2-601(a), rejection is allowed if the seller fails to make a perfect tender. The rejection must be made within a reasonable time after delivery or tender. Once it is made, the buyer may not act as the owner of the goods. If he has taken

possession of the goods before he rejects them, he must hold them with reasonable care to permit the seller to remove them. If the buyer is a merchant, then the buyer has a special duty to follow reasonable instructions from the seller for disposing of the rejected goods; if no instructions are forthcoming and the goods are perishable, then he must try to sell the goods for the seller's account and is entitled to a commission for his efforts. Whether or not he is a merchant, a buyer may store the goods, reship them to the seller, or resell them—and charge the seller for his services—if the seller fails to send instructions on the goods' disposition. Such storage, reshipping, and reselling are not acceptance or conversion by the buyer.

Acceptance of a Nonconforming Delivery

The buyer need not reject a nonconforming delivery. She may accept it with or without allowance for the nonconformity.

Acceptance of Part of a Nonconforming Delivery

The buyer may accept any commercial unit and reject the rest if she wants to. A **commercial unit** means "such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine), a set of articles (as a suite of furniture or an assortment of sizes), a quantity (as a bale, gross, or carload), or any other unit treated in use or in the relevant market as a single whole."Uniform Commercial Code, Sections 2-105 and 2A103(1).

Installment Sales

A contract for an installment sale complicates the answer to the question, "What right does the buyer have to accept or reject when the seller fails to deliver properly?" (An **installment contract** is one calling for delivery of goods in separate lots with separate acceptance for each delivery.) The general answer is found in the UCC at Section 2-612, which permits the buyer to reject any nonconforming installment if the nonconformity cannot be cured if it substantially impairs the value of that particular installment. However, the seller may avoid rejection by giving the buyer adequate assurances that he will cure the defect, unless the particular defect substantially impairs the value of the whole contract.

Suppose the Corner Gas Station contracts to buy 12,000 gallons of regular gasoline from Gasoline Seller, deliverable in twelve monthly installments of 1,000 gallons on the first of each month, with a set price payable three days after delivery. In the third month, Seller is short and can deliver only 500 gallons immediately and will not have the second 500 gallons until midmonth. May Corner Gas reject this tender? The answer depends on the circumstances. The nonconformity clearly cannot be cured, since the contract calls for the full 1,000 on a particular day. But the failure to make full delivery does not necessarily impair the value of that installment; for example, Corner Gas may know that it will not use up the 500 gallons until midmonth. However, if the failure will leave Corner Gas short before midmonth and unable to buy from another supplier unless it agrees to take a full 1,000 (more than it could hold at once if it also took Seller's 500 gallons), then Corner Gas is entitled to reject Seller's tender.

Is Corner Gas entitled to reject the entire contract on the grounds that the failure to deliver impairs the value of the contract as a whole? Again, the answer depends on whether the impairment was substantial. Suppose other suppliers are willing to sell only if Corner Gas agrees to buy for a year. If Corner Gas needed the extra gasoline right away, the contract would have been breached as whole, and Corner Gas would be justified in rejecting all further attempted tenders of delivery from Seller. Likewise, if the spot price of gasoline were rising so that month-to-month purchases from other suppliers might cost it more than the original agreed price with Seller, Corner Gas would be justified in rejecting further deliveries from Seller and fixing its costs with a supply contract from someone else. Of course, Corner Gas would have a claim against Seller for the difference between the original contract price and what it had to pay another supplier in a rising market (as you'll see later in this chapter).

Revocation

A **revocation** of acceptance means that although the buyer has accepted and exercised ownership of the goods, he can return the goods and get his money back. There are two circumstances in which the buyer can revoke an acceptance if the nonconformity "substantially impairs its value to him":Uniform Commercial Code, Section 2-608.

1. if the buyer reasonably thought the nonconformity would be cured and it is not within a reasonable time; or
2. if the acceptance was due to a latent defect that could not reasonably have been discovered before acceptance.

Consider two examples illustrated in the next paragraph. The first deals with point a (buyer thought nonconformity would be cured and it was not within a reasonable time), and the second gets to point b (latent defect).

In August 1983, the Borsages purchased a furnished mobile home on the salesperson's assertion that it was "the Cadillac of mobile homes." But when they moved in, the Borsages discovered defects: water leaks, loose moldings, a warped dishwasher door, a warped bathroom door, holes in walls, defective heating and cooling systems, cabinets with chips and holes, furniture that fell apart, mold and mildew in some rooms, a closet that leaked rainwater, and defective doors and windows. They had not seen these defects at the time of purchase because they looked at the mobile home at night and there were no lights on in it. The Borsages immediately complained. Repairmen came by but left, only promising to return again. Others did an inadequate repair job by cutting a hole in the bottom of the home and taping up the hole with masking tape that soon failed, causing the underside of the home to pooch out. Yet more repairmen came by but made things worse by inadvertently poking a hole in the septic line and failing to fix it, resulting in a permanent stench. More repairmen came by, but they simply left a new dishwasher door and countertop at the home, saying they didn't have time to make the repairs. In June 1984, the Borsages provided the seller a long list of uncorrected problems; in October they stopped making payments. Nothing happened. In March 1986—thirty-one months after buying the mobile home—they told the seller to pick up the mobile home: they revoked their acceptance and sued for the purchase price. The defendant seller argued that the Borsages' failure to move out of the house for so long constituted acceptance. But they were repeatedly assured the problems would be fixed, and moreover they had no place else to live, and no property to put another mobile home on if they abandoned the one they had. The court had no problem validating the Borsages' revocation of acceptance, under the section noted earlier, if they ever had accepted it. The seller might have a right to some rental value, though.*North River Homes, Inc., v. Borsage, Mississippi* (1992).

In April 1976, Clarence Miller ordered a new 1976 Dodge Royal Monaco station wagon from plaintiff Colonial Dodge. The car included a heavy-duty trailer package with wide tires. The evening of the day the Millers picked up the new car, Mrs. Miller noticed that there was no spare tire. The following morning, the defendant notified the plaintiff that he insisted on a spare tire, but when he was told there were no spare tires available (because of a labor strike), Mr. Miller told the plaintiff's salesman that he would stop payment on the check he'd given them and that the car could be picked up in front of his house. He parked it there, where it remained until the temporary registration sticker expired and it was towed by the police to an impound yard. Plaintiff sued for the purchase price, asserting that the missing spare tire did not "substantially impair the value of the goods to the buyer." On appeal to the Michigan Supreme Court, the plaintiff lost. "In this case the defendant's concern with safety is evidenced by the fact that he ordered the special package which included spare tires. The defendant's occupation demanded that he travel extensively, sometimes in excess of 150 miles per day on Detroit freeways, often in the early morning hours.…He was afraid of a tire going flat…at 3 a.m. Without a spare, he would be helpless until morning business hours. The dangers attendant upon a stranded motorist are common knowledge, and Mr. Miller's fears are not unreasonable." The court observed that although he had accepted the car before he discovered the nonconformity, that did not preclude revocation: the spare was under a fastened panel, concealed from view.*Colonial Dodge v. Miller*, 362 N.W.2d 704 (Mich. 1984).

KEY TAKEAWAY

The duty of the buyer in a sales contract is to inspect, accept, and pay. Failure to discover a defect that an inspection would have revealed is a waiver of right to complain. Normally the goods are conforming and the buyer accepts them, but upon discovery of a defect the buyer may reject the whole nonconforming delivery, part of it (the buyer has some duties if she has possession of the rejected goods), or in some cases reject one installment of an installment sale or, if one defective installment is serious enough to vitiate the whole contract, the buyer may consider the contract terminated. If goods have been accepted because the seller promised to fix defects or because the defects were latent, then the buyer may revoke the acceptance where the nonconformity substantially impairs the value of the contract to the buyer.

EXERCISES

1. If a buyer takes possession of goods and shortly thereafter discovers they are nonconforming, what duty does the nonmerchant buyer have with respect to the goods? What duty does the merchant buyer have with respect to the goods?
2. What is the difference between rejection and revocation?
3. Under what circumstances will a defective installment allow the buyer to reject that installment? Under what circumstances would a defective installment allow the buyer to terminate the contract?

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11.12.3: Remedies

LEARNING OBJECTIVES

1. Understand what purpose remedies serve under the UCC.
2. Be able to see when the parties' agreements as to limited remedies fail under the UCC.
3. Recognize what the seller's remedies are.
4. Recognize what the buyer's remedies are.

Remedies in General

General Policy

The general policy of the Uniform Commercial Code (UCC) is to put the aggrieved party in a good position as if the other party had fully performed—as if there had been a timely delivery of conforming goods. The UCC provisions are to be read liberally to achieve that result if possible. Thus the seller has a number of potential remedies when the buyer breaches, and likewise the buyer has a number of remedies when the seller breaches.

The CISG provides, at Article 74:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Specifying Remedies

We have emphasized how the UCC allows people to make almost any contract they want (as long as it's not unconscionable). Just as the parties may specify details of performance in the contract, so they may provide for and limit remedies in the event of breach.Uniform Commercial Code, Sections 2-719(1) and 2A-503(1). The following would be a typical limitation of remedy: "Seller's sole obligation in the event goods are deemed defective by the seller is to replace a like quantity of nondefective goods." A remedy is optional unless it is expressly agreed that it is the exclusive remedy.Uniform Commercial Code, Sections 2-719(1)(b) and 2A-503(2).

But the parties are not free to eliminate all remedies. As the UCC comment to this provision puts it, "If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract." In particular, the UCC lists three exemptions from the general rule that the parties are free to make their contract up any way they want as regards remedies:

1. When the circumstances cause the agreed-to remedy to fail or be ineffective, the default UCC remedy regime works instead.Uniform Commercial Code, Sections 2-719(2) and 2A-503(2).
2. Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable, but limitation of damages where the loss is commercial is not.Uniform Commercial Code, Sections 2-719(3) and 2A-503(2).
3. The parties may agree to liquidated damages: "Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty."Uniform Commercial Code, Section 2-718. The Code's equivalent position on *leases* is interestingly slightly different. UCC 2A-504(1) says damages may be liquidated "but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused" by the breach. It leaves out anything about difficulties of proof or inconvenience of obtaining another adequate remedy.

Statute of Limitations

The UCC statute of limitations for breach of any sales contract is four years. The parties may "reduce the period of limitation to not less than one year but may not extend it."Uniform Commercial Code, Section 2-725. Article 2A-506(1) is similar, but omits the

prohibition against extending the limitation. Article 2-725(2) goes on: “A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.”

Article 2A-506(2) is similar to 2-725(2).

Seller’s Remedies

Article 2 in General

Article 2-703 of the UCC lists the four things the buyer can do by way of default, and it lists—here slightly paraphrased—the seller’s remedies (2A-523(1) is similar for leases):

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract, then also with respect to the whole undelivered balance, the aggrieved seller may:

(1) withhold delivery of such goods;

(2) stop delivery by any bailee;

(3) identify to the contract conforming goods not already identified;

(4) reclaim the goods on the buyer’s insolvency;

(5) resell and recover damages;

(6) recover damages for non-acceptance or repudiation;

(7) or in a proper case recover the price;

(8) cancel.

Items (1)–(4) address the seller’s rights to deal with the goods; items (5)–(7) deal with the seller’s rights as regards the price, and item (8) deals with the continued existence of the contract.

The CISG’s take is similar. Article 61 and following state,

If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:…(a) require the buyer to pay the price. (b) Fix an additional period of time of reasonable length for performance by the buyer of his obligations; unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. (c) Declare the contract avoided if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract or if the buyer does not, within the additional period of time fixed by the seller [above], perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed. (d) The seller also has the right to damages.

To illustrate the UCC’s remedy provision, in this and the following section, we assume these facts: Howard, of Los Angeles, enters into a contract to sell and ship one hundred prints of a Pieter Bruegel painting, plus the original, to Bunker in Dallas. Twenty-five prints have already been delivered to Bunker, another twenty-five are en route (having been shipped by common carrier), another twenty-five are finished but haven’t yet been shipped, and the final twenty-five are still in production. The original is hanging on the wall in Howard’s living room. We will take up the seller’s remedies if the buyer breaches and if the buyer is insolvent.

Remedies on Breach

Bunker, the buyer, breaches the contract. He sends Howard an e-mail stating that he won’t buy and will reject the goods if delivery is attempted. Howard has the following cumulative remedies; election is not required.

Withhold Further Delivery

Howard may refuse to send the third batch of twenty-five prints that are awaiting shipment.

Stop Delivery

Howard may also stop the shipment. If Bunker is insolvent, and Howard discovers it, Howard would be permitted to stop any shipment in the possession of a carrier or bailee. If Bunker is not insolvent, the UCC permits Howard to stop delivery only of carload, truckload, planeload, or larger shipment. The reason for limiting the right to bulk shipments in the case of noninsolvency is that stopping delivery burdens the carrier and requiring a truck, say, to stop and the driver to find a small part of the contents could pose a sizeable burden.

Identify to the Contract Goods in Possession

Howard could "identify to the contract" the twenty-five prints in his possession. Section 2-704(1) of the UCC permits the seller to denote conforming goods that were not originally specified as the exact objects of the contract, if they are under his control or in his possession at the time of the breach. Assume that Howard had five hundred prints of the Bruegel painting. The contract did not state which one hundred of those prints he was obligated to sell, but once Bunker breached, Howard could declare that those particular prints were the ones contemplated by the contract. He has this right whether or not the identified goods could be resold. Moreover, Howard may complete production of the twenty-five unfinished prints and identify them to the contract, too, if in his "reasonable commercial judgment" he could better avoid loss—for example, by reselling them. If continued production would be expensive and the chances of resale slight, the seller should cease manufacture and resell for scrap or salvage value.

Resell

Howard could resell the seventy-five prints still in his possession as well as the original. As long as he proceeds in good faith and in a commercially reasonable manner, per Section 2-706(2) and Section 2A-527(3), he is entitled to recover the difference between the resale price and the contract price, plus incidental damages (but less any expenses saved, like shipping expenses). "Incidental damages" include any reasonable charges or expenses incurred because, for example, delivery had to be stopped, new transportation arranged, storage provided for, and resale commissions agreed on.

The seller may resell the goods in virtually any way he desires as long as he acts reasonably. He may resell them through a public or private sale. If the resale is public—at auction—only identified goods can be sold, unless there is a market for a public sale of futures in the goods (as there is in agricultural commodities, for example). In a public resale, the seller must give the buyer notice unless the goods are perishable or threaten to decline in value speedily. The goods must be available for inspection before the resale, and the buyer must be allowed to bid or buy.

The seller may sell the goods item by item or as a unit. Although the goods must relate to the contract, it is not necessary for any or all of them to have exited or to have been identified at the time of breach.

The seller does not owe the buyer anything if resale or re-lease results in a profit for the buyer.Uniform Commercial Code, Sections 2-706 and 2A-527.

Recover Damages

The seller may recover damages equal to the difference between the market price (measured at the time and place for tender of delivery) and the unpaid contract price, plus incidental damages, but less any expenses saved because of the buyer's breach. Suppose Howard's contract price was $100 per print plus $10,000 for the original and that the market price on the day Howard was to deliver the seventy-five prints was $75 (plus $8,000 for the original). Suppose too that the shipping costs (including insurance) that Howard saved when Bunker repudiated were $2,000 and that to resell them Howard would have to spend another $750. His damages, then, would be calculated as follows: original contract price ($17,500) less market price ($13,625) = $3,875 less $2,000 in saved expenses = $1,875 plus $750 in additional expenses = $2,625 net damages recoverable by Howard, the seller.

The CISG puts it similarly in Article 75: "If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable."

If the formula would not put the seller in as good a position as performance under the contract, then the measure of damages is lost profits—that is, the profit that Howard would have made had Bunker taken the original painting and prints at the contract price (again, deducting expenses saved and adding additional expenses incurred, as well as giving credit for proceeds of any resale).Uniform Commercial Code, Section 2-708(2); Section 2A-528(2) is similar. This provision becomes especially important for so-called lost volume sellers. Howard may be able to sell the remaining seventy-five prints easily and at the same price that Bunker had agreed to pay. Then why isn't Howard whole? The reason is that the second buyer was not a *substitute* buyer but an *additional* one; that is, Howard would have made that sale even if Bunker had not reneged on the contract. So Howard is still short a sale and is out a profit that he would have made had Bunker honored the contract.

Recover the Price

Howard—the seller—could recover from Bunker for the price of the twenty-five prints that Bunker holds. Or suppose they had agreed to a shipment contract, so that the risk of loss passed to Bunker when Howard placed the other prints with the trucker and that the truck crashed en route and the cargo destroyed. Howard could recover the price. Or suppose there were no market for the remaining seventy-five prints and the original. Howard could identify these prints to the contract and recover the contract price. If Howard did resell some prints, the proceeds of the sale would have to be credited to Bunker's account and deducted from any judgment. Unless sold, the prints must be held for Bunker and given to him upon his payment of the judgment.

Cancel the Contract

When Bunker repudiated, Howard could declare the contract cancelled. This would also apply if a buyer fails to make a payment due on or before delivery. Cancellation entitles the nonbreaching party to any remedies for the breach of the whole contract or for any unperformed balance. That is what happens when Howard recovers damages, lost profits, or the price.Uniform Commercial Code, Sections 2-703(f) and 2A-524(1)(a).

Again, the CISG is similar. Article 64 provides that the seller may declare the contract avoided "if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or if the buyer does not, within the additional period of time fixed by the seller perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed."

Note again that these UCC remedies are cumulative. That is, Howard could withhold future delivery *and* stop delivery en route, *and* identify to the contract goods in his possession, *and* resell, *and* recover damages, *and* cancel.

Remedies on Insolvency

The remedies apply when the buyer *breaches* the contract. In addition to those remedies, the seller has remedies when he learns that the buyer is insolvent, even if the buyer has not breached. Insolvency results, for example, when the buyer has "ceased to pay his debts in the ordinary course of business," or the buyer "cannot pay his debts as they become due."Uniform Commercial Code, Section 1-201(23).

Upon learning of Bunker's insolvency, Howard could refuse to deliver the remaining prints, unless Bunker pays cash not only for the remaining prints but for those already delivered. If Howard learned of Bunker's insolvency within ten days of delivering the first twenty-five prints, he could make a demand to reclaim them. If within three months prior to delivery, Bunker had falsely represented that he was solvent, the ten-day limitation would not cut off Howard's right to reclaim. If he does seek to reclaim, Howard will lose the right to any other remedy with respect to those particular items. However, Howard cannot reclaim goods already purchased from Bunker by a customer in the ordinary course of business. The customer does not risk losing her print purchased several weeks before Bunker has become insolvent.Uniform Commercial Code, Section 2-702 (3).

In the lease situation, of course, the goods belong to the lessor—the lessor has title to them—so the lessor can repossess them if the lessee defaults.Uniform Commercial Code, Section 2A-525(2).

Buyer's Remedies

In this section, let us assume that Howard, rather than Bunker, breaches, and all other circumstances are the same. That is, Howard had delivered twenty-five prints, twenty-five more were en route, the original painting hung in Howard's living room, another twenty-five prints were in Howard's factory, and the final twenty-five prints were in production.

In General

The buyer can do the following three things by way of defaulting: repudiate the contract, fail to deliver the goods, or deliver or tender nonconforming goods. Section 2-711 of the UCC provides the following remedies for the buyer:

Where the seller fails to make delivery or repudiates, or the buyer rightfully rejects or justifiably revokes, then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract, the buyer may

(1) cancel the contract, and

(2) recover as much of the price as has been paid; and

(3) “cover” and get damages; and

(4) recover damages for nondelivery.

Where the seller fails to deliver or repudiates, the buyer may also:

(5) if the goods have been identified recover them; or

(6) in a proper case obtain specific performance or

(7) replevy the goods.

On rightful rejection or justifiable revocation of acceptance, a buyer:

(8) has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller.

If the buyer has accepted non-conforming goods and notified seller of the non-conformity, buyer can

(9) recover damages for the breach;Uniform Commercial Code, Section 2-714.

and in addition the buyer may

(10) recover incidental damages and

(11) recover consequential damages.Uniform Commercial Code, Section 2-715.

Thus the buyer’s remedies can be divided into two general categories: (1) remedies for goods that the buyer does not receive or accept, when he has justifiably revoked acceptance or when the seller repudiates, and (2) remedies for goods accepted.

The CISG provides similar remedies at Articles 45–51:

If the seller fails to perform any of his obligations under the contract, buyer may (1) declare the contract avoided if the seller’s breach is fundamental; or (2) require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement; (3) require delivery of substitute goods if the non-conformity constitutes a fundamental breach of contract; (4) may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances; (5) may fix an additional period of time of reasonable length for performance by the seller of his obligations and unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract; (6) in case of non-conforming delivery, reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.

Goods Not Received

The UCC sets out buyer’s remedies if goods are not received or if they are rightfully rejected or acceptance is rightfully revoked.

Cancel

If the buyer has not yet received or accepted the goods (or has justifiably rejected or revoked acceptance because of their nonconformity), he may cancel the contract and—after giving notice of his cancellation—he is excused from further performance.Uniform Commercial Code, Sections 2-711(1), 2-106, 2A-508(1)(a), and 2A-505(1).

Recover the Price

Whether or not the buyer cancels, he is entitled to recover the price paid above the value of what was accepted.

Cover

In the example case, Bunker—the buyer—may "cover" and have damages: he may make a good-faith, reasonable purchase of substitute goods. He may then recover damages from the seller for the difference between the cost of cover and the contract price. This is the buyer's equivalent of the seller's right to resell. Thus Bunker could try to purchase seventy-five additional prints of the Bruegel from some other manufacturer. But his failure or inability to do so does not bar him from any other remedy open to him.

Sue for Damages for Nondelivery

Bunker could sue for damages for nondelivery. Under Section 2-713 of the UCC, the measure of damages is the difference between the market price at the time when the buyer learned of the breach and the contract price (plus incidental damages, less expenses saved). Suppose Bunker could have bought seventy-five prints for $125 on the day Howard called to say he would not be sending the rest of the order. Bunker would be entitled to $1,875—the market price ($9,375) less the contract price ($7,500). This remedy is available even if he did not in fact purchase the substitute prints. Suppose that at the time of breach, the original painting was worth $15,000 (Howard having just sold it to someone else at that price). Bunker would be entitled to an additional $5,000, which would be the difference between his contract price and the market price.

For leases, the UCC, Section 2A-519(1), provides the following: "the measure of damages for non-delivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default."

Recover the Goods

If the goods are unique—as in the case of the original Bruegel—Bunker is entitled to specific performance—that is, recovery of the painting. This section is designed to give the buyer rights comparable to the seller's right to the price and modifies the old common-law requirement that courts will not order specific performance except for unique goods. It permits specific performance "in other proper circumstances," and these might include particular goods contemplated under output or requirements contracts or those peculiarly available from one market source.Uniform Commercial Code, Sections 2-716(1) and 2A-521(1).

Even if the goods are not unique, the buyer is entitled to *replevy* them if they are identified to the contract and after good-faith effort he cannot recover them. **Replevin** is the name of an ancient common-law action for recovering goods that have been unlawfully taken; in effect it is not different from specific performance, and the UCC makes no particular distinction between them in Section 2-716. Section 2A-521 holds the same for leases. In our case, Bunker could replevy the twenty-five prints identified and held by Howard.

Bunker also has the right to recover the goods should it turn out that Howard is insolvent. Under UCC, Section 2-502, if Howard were to become insolvent within ten days of the day on which Bunker pays the first installment of the price due, Bunker would be entitled to recover the original and the prints, as long as he tendered any unpaid portion of the price.

For security interest in goods rightfully rejected, if the buyer rightly rejects nonconforming goods or revokes acceptance, he is entitled to a security interest in any goods in his possession. In other words, Bunker need not return the twenty-five prints he has already received unless Howard reimburses him for any payments made and for any expenses reasonably incurred in their inspection, receipt, transportation, care, and custody. If Howard refuses to reimburse him, Bunker may resell the goods and take from the proceeds the amount to which he is entitled.Uniform Commercial Code, Sections 2-711(3), 2-706, 2A-508(5), and 2A-527(5).

Goods Accepted

The buyer does not have to reject nonconforming goods. She may accept them anyway or may effectively accept them because the time for revocation has expired. In such a case, the buyer is entitled to remedies as long as she notifies the seller of the breach within a reasonable time.Uniform Commercial Code, Sections 2-714(1) and 2A-519(3). In our example, Bunker can receive three types of damages, all of which are outlined here.

Compensatory Damages

Bunker may recover damages for any losses that in the ordinary course of events stem from the seller's breach. Suppose Howard had used inferior paper that was difficult to detect, and within several weeks of acceptance the prints deteriorated. Bunker is entitled to be reimbursed for the price he paid.

Consequential Damages

Bunker is also entitled to consequential damages.Uniform Commercial Code, Sections 2-714(3), 2-715, and 2A-519(3). These are losses resulting from general or particular requirements of the buyer's needs, which the seller had reason to know and which the buyer could not reasonably prevent by cover or otherwise. Suppose Bunker is about to make a deal to resell the twenty-five prints that he has accepted, only to discover that Howard used inferior ink that faded quickly. Howard knew that Bunker was in the business of retailing prints and therefore he knew or should have known that one requirement of the goods was that they be printed in long-lasting ink. Because Bunker will lose the resale, he is entitled to the profits he would have made. (If Howard had not wished to take the risk of paying for consequential damages, he could have negotiated a provision limiting or excluding this remedy.) The buyer has the burden or proving consequential damages, but the UCC does not require mathematical precision. Suppose customers come to Bunker's gallery and sneer at the faded colors. If he can show that he would have sold the prints were it not for the fading ink (perhaps by showing that he had sold Bruegels in the past), he would be entitled to recover a reasonable estimate of his lost profits.

In *De La Hoya v. Slim's Gun Shop* the plaintiff purchased a handgun from the defendant, a properly licensed dealer. While the plaintiff was using it for target shooting, he was questioned by a police officer, who traced the serial number of the weapon and determined that—unknown to either the plaintiff or the defendant—it had been stolen. The plaintiff was arrested for possession of stolen property and incurred, in 2010 dollars, $3,000 in attorney fees to extricate himself from the criminal charges. He sued the defendant for breach of the implied warranty of title and was awarded the amount of the attorney fees as consequential damages. On appeal the California court held it foreseeable that the plaintiff would get arrested for possessing a stolen gun, and "once the foreseeability of the arrest is established, a natural and usual consequence is that the [plaintiff] would incur attorney's fee."*De La Hoya v. Slim's Gun Shop*, 146 Cal. Rptr. 68 (Super. 1978). Compare with *In re Stem* in the exercises later in this chapter.

Incidental Damages

Section 2-715 of the UCC allows incidental damages, which are "damages resulting from the seller's breach including expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach." Section 2A-520(1) of the UCC is similar for leases.

KEY TAKEAWAY

Parties to a contract for the sale of goods may specify what the remedies will be in case of breach. They may limit or exclude remedies, but the UCC insists that there be some remedies; if the parties agree to liquidated damages, the amount set cannot be a penalty.

If the parties do not agree to different remedies for the seller in case the buyer defaults, the UCC sets out remedies. As to the seller's obligation, he may cancel the contract. As to the goods, he may withhold or stop delivery, identify conforming goods to the contract, or reclaim goods upon the buyer's insolvency. As to money, he may resell and recover damages or lost profits and recover the price. Unless they are inconsistent, these remedies are cumulative. The point of the range of remedies is, as much as possible, to put the nonbreaching seller in the position she would have been in had there been no breach. The aggrieved lessor is entitled to similar remedies as the seller.

The UCC also provides a full panoply of remedies available to a buyer if the seller fails to deliver goods or if the buyer rightfully rejects them or revokes her acceptance. As to the buyer's obligations, she may cancel the contract. As to the goods, she may claim a security interest in those rightfully rejected, recover goods identified if the seller is insolvent, or replevy or seek specific performance to get goods wrongfully withheld. As to money, she may recover payments made or cover and recover damages for nondelivery. If the buyer accepts nonconforming goods, she is entitled to damages for breach of warranty. These remedies are

cumulative, so the aggrieved buyer may pursue any of them, unless the remedies are mutually exclusive. The Article on leases provides basically the same remedies for the aggrieved lessee (UCC 2A 520–523).

EXERCISES

1. What are the four things a breaching seller could do to cause the buyer grief, commercially speaking?
2. If the buyer breaches, what rights does the seller have in regard to the goods?
3. In regard to the money owed to her?
4. In regard to the continued existence of the contract?
5. What are the four things a breaching buyer could do to cause the seller grief, commercially speaking?
6. If the seller breaches, what rights does the buyer have in regard to the goods?
7. In regard to the money owed to him?
8. In regard to the continued existence of the contract?

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11.12.4: Excuses for Nonperformance

LEARNING OBJECTIVES

1. Recognize how parties are discharged if the goods are destroyed.
2. Determine what defenses are valid when it becomes very difficult or impossible to perform.
3. Understand the UCC's position on the right to adequate assurances and anticipatory repudiation.

In contracts for the sale of goods, as in common law, things can go wrong. What then?

Casualty to Identified Goods

As always, the parties may agree what happens if the goods are destroyed before delivery. The default is Sections 2-613 and 2A-221(a) of the Uniform Commercial Code (UCC). The UCC says that "where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer,…then (a) if the loss is total the contract is avoided; and (b) if the loss is partial the buyer may nevertheless accept them with due allowance for the goods' defects." Thus if Howard ships the original Bruegel to Bunker but the painting is destroyed, through no fault of either party, before delivery occurs, the parties are discharged. If the frame is damaged, Bunker could, if he wants, take the painting anyway, but at a discount.

The UCC's Take on Issues Affecting "Impossibility"

Although this matter was touched on in Chapter 15 "Discharge of Obligations", it is appropriate to mention briefly again the UCC's treatment of variations on the theme of "impossibility."

Impracticability

Sections 2-614(1) and 2A-404(1) of the UCC require reasonable substitution for berthing, loading, and unloading facilities that become unavailable. They also require reasonable substitution for transportation and delivery systems that become "commercially impracticable"; if a practical alternative exists, "performance must be tendered and accepted." If Howard agreed to send the prints by rail, but a critical railroad bridge is unusable and no trains can run, delivery by truck would be required.

Section 2-615 of the UCC says that the failure to deliver goods is not a breach of the seller's duty "if performance as agreed has become impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic government regulation or order whether or not it later proves to be invalid." Section 2A-405(b) of the UCC is similar for leases.

The CISG provides something similar at Article 79: "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences."

Right to Adequate Assurances of Performance

Section 2-609, Comment 1, of the UCC observes that "the essential purpose of a contract…is actual performance [but] a continuing sense of reliance and security that the promised performance will be forthcoming when due is an important feature of the bargain." Thus the UCC says that if one party has "reasonable grounds for insecurity arise…either party may in writing demand adequate assurance and until he receives such assurance may if commercially reasonable suspend [his own] performance[.]"

The CISG has a similar take at Article 71: "A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations. A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance."

Anticipatory Repudiation

Obviously if a person repudiates the contract it's clear she will not perform, but what if she repudiates before time for performance is due? Does the other side have to wait until nonperformance actually happens, or can he sue in anticipation of the other's default?

Sections 2-610 and 2A-402 of the UCC say the aggrieved party can do either: wait for performance or "resort to any remedy for breach." Under the UCC, Sections 2-611 and 2A-403, the one who has anticipatorily repudiated can "retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position[.]"

Suppose that Howard has cause to suspect that if he does deliver the goods, Bunker won't pay. Howard may write to Bunker and demand—not request—assurances of adequate performance. If such assurances are not adequately forthcoming, Howard may assume that Bunker has repudiated the contract and have remedies.

Article 72 of the CISG is pretty much the same: "If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided."

KEY TAKEAWAY

If, through no fault of either party, the goods are destroyed before the risk of loss has passed from the seller to the buyer, the parties are both discharged. If the expected means of performance is impossible, but an alternative is available, the alternative must be utilized. If performance becomes impracticable because of an unexpected contingency, failure to deliver the goods is excused. But a party who has concerns whether the other side will perform is entitled to adequate assurances of performance; if they are not forthcoming, the worried party may suspend performance. Where a party repudiates a contract before performance is due, the other side may sue immediately (anticipatory repudiation) or may wait until the time performance comes due and then sue.

EXERCISES

1. Suppose Plaintiff sues Defendant for breach of contract, and Defendant successfully raises an excuse for nonperformance. What liability does Defendant have now?
2. The contract read that the goods would be "shipped F.O.B. Seattle, by Burlington Northern Rail to the buyer in Vancouver, B.C." Due to heavy rain and mudslides, the rail line between Seattle and points north was impassable. Buyer insists Seller is obligated to send the goods by motor truck; Seller insists her performance has become impossible or at least that shipment must await the rail-line clearance. Who is correct? Explain.
3. Buyer manufactured ceramic insulators and ordered the dies into which the liquid ceramic would be poured for hardening and finishing from Seller, to be delivered April 15. The first test batch of a dozen dies arrived on February 15; these dies were defective. Buyer wrote inquiring whether the defects could be remedied in time for the final delivery. Seller responded, "We are working to address the problems here." Buyer again inquired; Seller responded, "As I said, we are working on the problems." Buyer fretted that the deadline—two months in the future—would not be met. What remedy, if any, does Buyer have now?

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11.12.5: Cases

Limitations of Remedy Results in No Remedy

Hartzell v. Justus Co., Inc.

693 F.2d 770 (8th Cir. S.D. 1982)

Arnold, J.

This is a diversity case arising out of the purchase by Dr. Allan Hartzell of Sioux Falls, South Dakota, of a log home construction kit manufactured by the defendant Justus Homes. Dr. Hartzell purchased the package in 1977 for $38,622 [about $135,000 in 2010 dollars] from Del Carter, who was Justus Homes' dealer for the Sioux Falls area. He also hired Carter's construction company, Natural Wood Homes, to build the house. Hartzell, who testified that the home eventually cost about $150,000, was dissatisfied with the house in many respects. His chief complaints were that knotholes in the walls and ceiling leaked rain profusely, and that the home was not weather tight because flashings were not included in the roofing materials and because the timbers were not kiln-dried and therefore shrank. He also complained that an undersized support beam, which eventually cracked, was included in the package. This latter defect was alleged to have resulted in cracks in the floor and inside doors that would not close. Hartzell further alleged that these structural defects were only partially remediable, and that the fair market value of the house was reduced even after all practicable repairs had been made. Alleging breach of implied and express warranties and negligence, he sought damages for this loss in value and for the cost of repairs. After a two-day trial, the jury returned a plaintiff's verdict for $34,794.67.

Justus Homes contends the District Court erred in failing to instruct the jury on a limitation-of-remedies clause contained in its contract with the plaintiff. The defendants rely on Clause 10c of the contract, which says Justus *will repair or replace defective materials*, and Clause 10d, which states that *this limited repair or replacement clause is the exclusive remedy available against Justus* [emphasis added]. These agreements, Justus asserts, are valid under the Uniform Commercial Code 2-719(1). Section 2-719(1) states:

(1) Subject to the provisions of subsections (2) and (3) of this section and of § 57A-2-718 on liquidation and limitation of damages,

(a) The agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

Subsection (1) of section 2-719 is qualified by subsection (2): "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title."…

The jury's verdict for the plaintiff in an amount almost exactly equal to the plaintiff's evidence of cost of repairs plus diminution in market value means it must have found that the structural defects were not entirely remediable. Such a finding necessarily means that the limited warranty failed of its essential purpose.

Two of our recent cases support this conclusion. In *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365 (8th Cir.1977), the defendant claimed, relying on a limitation-of-remedies clause similar to the one involved here, that the plaintiff's damages should be limited to the reasonable cost of repairing the railroad cars that plaintiff had bought from defendant. The jury verdict included, among other things, an award for the difference between the value of the cars as actually manufactured, and what they would have been worth if they had measured up to the defendant's representations. This Court affirmed the verdict for the larger amount. We held, construing the Minnesota U.C.C., which is identical to § 2-719 as adopted in South Dakota, that the limitation-of-remedies clause was ineffective because the remedy as thus limited failed of its essential purpose. The defendant, though called upon to make the necessary repairs, had refused to do so, and the repairs as performed by the plaintiff itself "did not fully restore the cars to totally acceptable operating conditions."

Here, Justus Homes attempted to help with the necessary repairs, which is more than Fruehauf did in the *Soo Line* case, but after the repairs had been completed the house was still, according to the jury verdict, not what Justus had promised it would be. The

purpose of a remedy is to give to a buyer what the seller promised him—that is, a house that did not leak. If repairs alone do not achieve that end, then to limit the buyer's remedy to repair would cause that remedy to fail of its essential purpose.…

An analogous case is *Select Pork, Inc. v. Babcock Swine, Inc.* [Citation], applying § 2-719 as adopted in Iowa. The defendant had promised to deliver to plaintiff certain extraordinary pigs known as Midwestern Gilts and Meatline Boars. Instead, only ordinary pigs were delivered. Plaintiff sued for breach of warranty, and defendant claimed that its damages, if any, should be limited to a return of the purchase price by an express clause to that effect in the contract. The District Court held that the clause was unenforceable because it was unconscionable, see § 2-719(3), and because it failed of its essential purpose. We affirmed,…"Having failed to deliver the highly-touted special pigs, defendants may not now assert a favorable clause to limit their liability." So here, where the house sold was found by the jury to fall short of the seller's promises, and where repairs could not make it right, defendant's liability cannot be limited to the cost of repairs. If the repairs had been adequate to restore the house to its promised condition, and if Dr. Hartzell had claimed additional consequential damages, for example, water damage to a rug from the leaky roof, the limitation-of-remedies clause would have been effective. But that is not this case.

There was no double recovery here: the verdict was not for cost of repair plus the entire decrease in market value, but rather for cost of repair plus the decrease in market value that still existed after all the repairs had been completed.

[T]he evidence in the record all demonstrate[s] that the repair or replacement clause was a failure under the circumstances of this case. Some of the house's many problems simply could not be remedied by repair or replacement. The clause having failed of its essential purpose, that is, effective enjoyment of implied and express warranties, the plaintiff was entitled, under UCC § 2-719(2), to any of the buyer's remedies provided by the Code. Among these remedies are consequential damages as provided in §§ 2-714 and 2-715(2).…

The judgment is affirmed.

CASE QUESTIONS

1. What did the seller here limit itself to do in case of defects? What was the limitation of remedy?
2. Did Justus Homes disclaim implied and expressed warranties with its contract language regarding limitation of remedies?
3. Was the essential purpose of the limitation of remedy to protect the party benefiting from it—here, the seller of the log home kit—or was the essential purpose of the limitation of remedy, as the court said, "effective enjoyment of implied and expressed warranties"?
4. In a part of the opinion excised, the court wrote, "A finding of unconscionability is, as a matter of logic, simply unnecessary in cases where § 2-719(2) applies." Would it be easier simply to say that the limitation of liability here was unconscionable?

Cure for Improper Delivery

Wilson v. Scampoli

228 A.2d 848 (D.C. App. 1967)

Myers, J.

This is an appeal from an order of the trial court granting rescission of a sales contract for a color television set and directing the return of the purchase price plus interest and costs.

Appellee [Mrs. Kolley's father] purchased the set in question on November 4, 1965, paying the total purchase price in cash. The transaction was evidenced by a sales ticket showing the price paid and guaranteeing ninety days' free service and replacement of any defective tube and parts for a period of one year. Two days after purchase the set was delivered and uncrated, the antennae adjusted and the set plugged into an electrical outlet to "cook out." When the set was turned on however, it did not function properly, the picture having a reddish tinge. Appellant's delivery man advised the buyer's daughter, Mrs. Kolley, that it was not his duty to tune in or adjust the color but that a service representative would shortly call at her house for that purpose. After the departure of the delivery men, Mrs. Kolley unplugged the set and did not use it.

On November 8, 1965, a service representative arrived, and after spending an hour in an effort to eliminate the red cast from the picture advised Mrs. Kolley that he would have to remove the chassis from the cabinet and take it to the shop as he could not determine the cause of the difficulty from his examination at the house. He also made a written memorandum of his service call, noting that the television '\"Needs Shop Work (Red Screen)." Mrs. Kolley refused to allow the chassis to be removed, asserting she

did not want a ‘repaired’ set but another ‘brand new’ set. Later she demanded the return of the purchase price, although retaining the set. Appellant refused to refund the purchase price, but renewed his offer to adjust, repair, or, if the set could not be made to function properly, to replace it. Ultimately, appellee instituted this suit against appellant seeking a refund of the purchase price. After a trial, the court ruled that “under the facts and circumstances the complaint is justified. Under the equity powers of the Court I will order the parties put back in their original status, let the $675 [about $4500 in 2010 dollars] be returned, and the set returned to the defendant.”

Appellant does not contest the jurisdiction of the trial court to order rescission in a proper case, but contends the trial judge erred in holding that rescission here was appropriate. He argues that he was always willing to comply with the terms of the sale either by correcting the malfunction by minor repairs or, in the event the set could not be made thereby properly operative, by replacement; that as he was denied the opportunity to try to correct the difficulty, he did not breach the contract of sale or any warranty thereunder, expressed or implied.

[The District of Columbia UCC 2-508] provides:

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

…

Removal of a television chassis for a short period of time in order to determine the cause of color malfunction and ascertain the extent of adjustment or correction needed to effect full operational efficiency presents no great inconvenience to the buyer. In the instant case, appellant’s expert witness testified that this was not infrequently necessary with new televisions. Should the set be defective in workmanship or parts, the loss would be upon the manufacturer who warranted it free from mechanical defect. Here the adamant refusal of Mrs. Kolley, acting on behalf of appellee, to allow inspection essential to the determination of the cause of the excessive red tinge to the picture defeated any effort by the seller to provide timely repair or even replacement of the set if the difficulty could not be corrected. The cause of the defect might have been minor and easily adjusted or it may have been substantial and required replacement by another new set—but the seller was never given an adequate opportunity to make a determination.

We do not hold that appellant has no liability to appellee, but as he was denied access and a reasonable opportunity to repair, appellee has not shown a breach of warranty entitling him either to a brand new set or to rescission. We therefore reverse the judgment of the trial court granting rescission and directing the return of the purchase price of the set.

Reversed.

CASE QUESTIONS

1. Why did the seller “have reasonable grounds to believe [the television] would be acceptable”?
2. What did Mrs. Kolley want?
3. Does this case require a buyer to accept patchwork goods or substantially repaired articles in lieu of flawless merchandise?

Seller’s Remedies When Buyer Defaults

Santos v. DeBellis

901 N.Y.S.2d 457 (N.Y. Sup.App. 2010)

Molia, J.

On March 1, 2008 and March 11, 2008, plaintiff made payments to defendant of $3,000 each, in connection with the purchase of a mobile home located in Fort Pierce, Florida. Thereafter, on March 13, 2008, plaintiff and defendant signed an agreement which had been prepared by defendant. The agreement described the subject property by its location, recorded the fact that plaintiff had paid defendant deposits totaling $6,000, set forth a closing date of March 25, 2008, and specified that “the remaining $27,000.00” was payable at closing to defendant by a guaranteed financial instrument. Plaintiff never paid the outstanding balance and brought this

action to recover the $6,000 deposit she paid to defendant. Following a nonjury trial, judgment was awarded in favor of defendant dismissing the complaint.

Because the sale of a mobile home constitutes a contract for the sale of goods rather than of real property [Citations], the parties' agreement was governed by the Uniform Commercial Code. The agreement, which was made after plaintiff had made the two $3,000 "deposit" payments, constituted a memorandum in confirmation of an oral agreement and, even though it omitted some terms, was sufficient to satisfy the statute of frauds [Citations].

Section 2-718 of the Uniform Commercial Code specifies that in the absence of a contractual provision with respect to the liquidation or limitation of damages and the return of deposits,

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds…

(b) [in the absence of contractually fixed terms] twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

Here, notwithstanding the fact that plaintiff, as buyer, had breached the contract, defendant failed to demonstrate any damages resulting therefrom; nor did defendant establish that plaintiff had received any benefits directly or indirectly by reason of the parties' agreement (*see* UCC 2-718[3]). Therefore, pursuant to UCC 2-718(2), plaintiff was entitled to the return of all but $500 of her deposit.

The order of the District Court dismissing the complaint is accordingly reversed, and judgment is awarded to plaintiff in the principal sum of $5,500.

CASE QUESTIONS

1. If the plaintiff had been a dealer in mobile homes and the unit here had been part of his inventory, he would be entitled to claim lost profits on the sale of one unit. Here, apparently, the plaintiff seller was a private party. Why was he not entitled to any damages greater than $500?
2. New York adopted the UCC in 1964. Five hundred dollars in 1964 would be worth about $3,500 in 2010. Why isn't the change in the dollar's value recognized here?

Buyer's Remedies When Seller Breaches

[Note: this case is slightly edited by the authors.]

Furlong v. Alpha Chi Omega Sorority

657 N.E.2d 866 (Ohio Mun. 1993)

Bachman, J.

In late September through mid-October 1992, plaintiff Johnathan James Furlong ("Furlong") contacted defendant Alpha Chi Omega Sorority ("AXO"), by phoning the chairperson of its social committee, Emily Lieberman ("Emily"), between a dozen and a dozen and a half times.

Ultimately (about the first week in October), Furlong received Emily's order for one hundred sixty-eight imprinted sweaters at $21.50 each (plus one free sweater) for delivery on Friday, October 23, 1992, so as to arrive in time for AXO's Midnight Masquerade III on the evening of Saturday, October 24, 1992.

The price was to be $3,612, [about $5600 in 2010 dollars] payable as follows: $2,000 down payment when the contract was made, and $1,612 balance when the sweaters were delivered.

An oral contract for the sale of goods (the imprinted sweaters) was made between Furlong and AXO, at a definite price and with specified dates for payment and for delivery.

At some point in those phone calls with Furlong, Emily said that the sweaters were to be custom designed with the following specified design: namely, with three colors (hunter green letters on top of maroon letters outlined in navy blue, and hunter green masks). Furlong promised to have them so imprinted (by a third party whom he would select).…Thereafter, he delivered to Emily an Ohio Wesleyan sweater with maroon letters to show her the maroon color.…Additionally, he faxed to Emily a two-page description of the sweaters, which not only included the designs for the fronts and the backs of the sweaters, but also included arrows showing where each of the three colors would go (hunter green letters on top of maroon letters outlined in navy blue, and hunter green masks).

Furlong and Emily created an express warranty by each of the above three statutory means: namely, by affirmation of fact (his initial phone calls); by sample (the maroon sweater) by description (the fax).This express warranty became part of the contract. Each of the three methods of showing the express warranty was not in conflict with the other two methods, and thus they are consistent and cumulative, and constitute the warranty. [2-317]

The design was a "dickered" aspect of the individual bargain and went clearly to the essence of that. Thus, the express warranty was that the sweaters would be in accordance with the above design (including types of colors for the letters and the mask, and the number of colors for the same). Further, the express warranty became part of the contract.

On October 13, 1992, AXO mailed Furlong a $2,000 check for the down payment; he deposited it in his bank account on October 16, 1992. Thereafter, as discussed below, Furlong had the sweaters imprinted (on Thursday, October 22) and delivered to AXO (on Friday, October 23). Upon receipt of the delivery, AXO gave a check to Furlong's agent in the amount of $1,612 for the balance of the purchase price. However, later on that day, AXO inspected the sweaters, discovered the design changes (mentioned below), caused AXO's bank to stop payment on the check, and stated AXO's objections in a phone call with Furlong. AXO has never paid Furlong that balance on the purchase price.

Furlong's obligation as the seller was to transfer and deliver the goods in accordance with the contract. AXO's obligation was to accept and pay in accordance with that contract. [2-301] We will now discuss whether it legally did so.

Furlong was a jobber for Argento Bros., Inc. ("Argento") and had Argento print the sweaters. In doing so, Furlong worked with Argento's artists. Early in the morning of Thursday (October 22, 1992), the artist(s) began to prepare the art work and recommended changes to the design. Furlong authorized the artist(s) to change the design without the knowledge or consent of AXO. Argento spent about eight hours printing the sweaters all day Thursday. Furlong did not phone AXO about the changes until the next day, Friday (October 23), after the sweaters were printed with those changes. Here are the five design changes that he made:

- The *first change* was to delete the agreed-upon outline for the letters (namely, the navy blue outline).
- The *second change* was to reduce the agreed-upon number of colors for the fronts and the backs (from three colors per side to two colors per side).
- The *third change* was to alter one of the agreed-upon colors (from maroon to red).
- The *fourth change* was to alter the agreed-upon scheme of colors for the letters on the fronts and the backs (namely, both sides were to have the same two colors of maroon and hunter green; whereas in fact the backs had neither of those colors, and instead had a navy blue color for the letters).
- The *fifth change* was to alter the agreed-upon color of the masks (from hunter green to maroon—actually red).

The court specifically finds that the color was *red* (actually, scarlet) and was *not maroon* (like the maroon-colored letters on the Ohio Wesleyan sweater).

The sweaters did not conform to the contract (specifically, the express warranty in the contract). Thus (in the words of the statute), the sweaters did "fail in any respect to conform to the contract." Actually, the sweaters failed in at least five respects. [2-601] Further, not only did they "fail in any respect," they failed in a substantial respect. In either event, they were a nonconforming tender of goods. [2-601]

On Friday morning (October 23), Furlong picked up the five to six boxes of sweaters from Argento and had a friend deliver them from Columbus to Bowling Green. The boxes arrived at the AXO house around midday. Sometime thereafter on the same day, Emily inspected one of them and screamed her dismay upon discovering that the sweaters were not what AXO had ordered.

The court rejects Furlong's assertion that he did all that he could do under the circumstances. The obvious answer is that he did not do enough. He should have gotten AXO's prior consent to the changes. He could have done this by providing for more lead time-between the time that Argento prepared the art work and the time that it printed the sweaters. Instead, he had both done at the same time (Thursday morning).

Finally, and alternatively, plaintiff should have entered into a contract that gave him discretion to make design changes without AXO's consent. We must remember that "these sweaters," as Furlong himself admits (and describes), were to be "custom-designed" for AXO. Thus, they were to be printed according to AXO's specifications, and not according to Furlong's discretion.

Next, Furlong asserts that AXO—after learning of the changes—should have agreed to his offer of compromise: namely, that he would reduce the unit price of the sweaters in exchange for AXO's keeping them and paying the reduced price. Also, Furlong asserts that AXO should have communicated his compromise offer to AXO's members and pledges. In both respects, the court disagrees: Although the law allowed AXO to do so, it did not require AXO to do. Instead, AXO did exactly what the law allowed: AXO rejected the nconforming goods in whole.

About 4:00 p.m. on the same day that the sweaters arrived at the AXO house (Friday, October 23), Amy—as the AXO president—phoned Furlong. She said that the sweaters were not what AXO had ordered. She stated the specifics as to why the sweaters were not as ordered. She offered to return the sweaters to him, but he said "No." AXO still has possession or custody of the boxes of sweaters.

[The UCC] provides: "Rejection of goods must be within a reasonable time after their delivery * * *. It is ineffective unless the buyer seasonably notifies the seller." [2-602] AXO did what this statute requires.

That statute further provides: "[I]f the buyer has before rejection taken physical possession of goods * * *, he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them[.]" [2-602(2)(b)] AXO has done this, too. From the above, it is seen that AXO legally rejected the sweaters on the same day that AXO received physical possession of them.

The court disagrees with Furlong's assertion that AXO accepted the sweaters. He is confusing a layman's understanding of the term *accept* ("to receive a thing [with a consenting mind])," Webster's Collegiate Dictionary (5 Ed.1947), at 6, with the statutory meaning of the term. The mere fact that AXO took physical possession of the sweaters does not, by itself, mean that AXO legally "accepted" them.

In regard to…seller's remedies, Furlong has no legal remedies because AXO did not breach the contract. Thus, he is not entitled to an award for the $1,612 balance that he claims is due on the contract price.

As concluded above, AXO rightfully rejected the sweaters, after having paid part of the purchase price: namely, $2,000. AXO is entitled to cancel the contract and to recover the partial payment of the purchase price. [2-606]

Also, as concluded above, AXO still has rightful possession or control of the sweaters. AXO has a security interest in the sweaters in its possession or control for the part payment made on the purchase price—but when reimbursed for that part payment AXO must return the sweaters to Furlong.

The court will prepare, file, and serve a judgment entry as follows: dismissing with prejudice Furlong's claim against all defendants; dismissing with prejudice Emily Lieberman's and Amy Altomondo's counterclaims against Furlong; granting AXO's counterclaim (for $2,000, plus ten percent per annum postjudgment interest and costs).

Further, that entry will order AXO's attorney (Mr. Reddin) to retain possession of the sweaters either until further court order or until AXO's judgment is satisfied in full (whereupon he shall surrender the sweaters to Furlong if Furlong picks them up within thirty days thereafter, or, if Furlong does not, he may then dispose of them as abandoned property without any liability).

Judgment accordingly.

CASE QUESTIONS

1. Surely the plaintiff could not have thought that the radically altered design would be acceptable for the young women's masquerade ball. On what basis did he think he would be entitled to the full payment contracted for?
2. Whether Amy Altomondo knew it or not, she did what the UCC says a buyer should do when nonconforming goods are delivered. What are those steps?

3. What does it mean that AXO has a security interest in the sweaters? Security for what?

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11.12.6: Summary and Exercises

Summary

As with most of the Uniform Commercial Code (UCC), the parties may specify the terms of their performance. Only if they fail to do so does Article 2 (and 2A) provide the terms for them. The seller's duty is to make a timely delivery of conforming goods. In the absence of agreement, the time for delivery is a reasonable one, and the place of delivery is the seller's place of business. All goods must be tendered in a single delivery, unless circumstances permit either party the right to make or demand delivery in lots.

If the seller ships nonconforming goods but has time to meet his contractual obligations or if he reasonably believed the goods would be suitable, he may notify the buyer of his intention to cure, and if he does so in a timely manner the buyer must pay.

The buyer's general obligation is to inspect, accept, and pay. If an inspection reveals that the goods are nonconforming, the buyer may reject them; if he has accepted because defects were latent or because he received assurances that the defects would be cured, and they are not, the buyer may revoke his acceptance. He then has some duties concerning the goods in his possession. The buyer must pay for any conforming goods; payment may be in any manner consistent with current business customs. Payment is due at the time and place at which the buyer will ultimately receive the goods.

The general policy of the UCC is to put an aggrieved party in as good a position as she would have been had the other party fully performed. The parties may specify or limit certain remedies, but they may not eliminate all remedies for a breach. However, if circumstances make an agreed-on remedy inadequate, then the UCC's other remedies apply; parties may not unconscionably limit consequential damages; they may agree to liquidated damages, but not to unreasonable penalties.

In general, the seller may pursue the following remedies: withhold further delivery, stop delivery, identify to the contract goods in her possession, resell the goods, recover damages or the price, or cancel the contract. In addition, when it becomes apparent that the buyer is insolvent, the seller may, within certain time periods, refuse to deliver the remaining goods or reclaim goods already delivered.

The buyer, in general, has remedies. For goods not yet received, she may cancel the contract; recover the price paid; cover the goods and recover damages for the difference in price; or recover the specific goods if they are unique or in "other proper circumstances." For goods received and accepted, the buyer may recover ordinary damages for losses that stem from the breach and consequential damages if the seller knew of the buyer's particular needs and the buyer could not reasonably cover.

The UCC provides some excuses for nonperformance: casualty of the goods, through no fault of either party; the nonhappening of presupposed conditions that were a basic assumption of the contract; substituted performance if the agreed-on methods of performance become impracticable; right to adequate assurances of performance when reasonable grounds for insecurity of performance arise; anticipatory repudiation and resort to any remedy, before time for performance is due, is allowed if either party indicates an unwillingness to perform.

EXERCISES

1. Anne contracted to sell one hundred cans of yellow tennis balls to Chris, with a delivery to be made by June 15.
    1. On June 8, Anne delivered one hundred cans of white tennis balls, which were rejected by Chris. What course of action would you recommend for Anne, and why?
    2. Assume Ann had delivered the one hundred cans of white balls on June 15; these were rejected by Chris. Under what circumstances might Anne be allowed additional time to perform the contract?
    3. If the contract did not specify delivery, when must Anne deliver the tennis balls?
2. 1. When Anne delivers the tennis balls, does Chris have a right to inspect them? If Chris accepts the white tennis balls, may the acceptance be revoked?
    2. Assume Chris decided she could use twenty-five cans of the white balls. Could she accept twenty-five cans and reject the rest?
    3. Suppose Anne delivered white tennis balls because a fire at her warehouse destroyed her entire stock of yellow balls. Does the fire discharge Anne's contractual duties?

4. If Chris rejected the white tennis balls and Anne refused to deliver yellow ones, may Chris recover damages? If so, how would they be calculated?

3. In 1961, Dorothy and John Wilson purchased a painting from Hammer Galleries titled *Femme Debout*. It cost $11,000 (about $78,000 in 2010 dollars) and came with this promise: “The authenticity of this picture is guaranteed.” In 1984, an expert deemed the painting a fake. The district court held that the Wilsons’ suit for breach of warranty, filed in February 1987—twenty-one years after its purchase—was barred by the UCC’s four-year statute of limitations. The Wilsons argued, however, that the Code’s exception to the four-year rule applied:Uniform Commercial Code, Section 2-725(2). “A breach of warranty occurs when tender of delivery is made, except where a warranty explicitly extends to future performance and discovery must await the time of such performance the cause of action accrues when the breach is or should have been discovered.”

   They said the painting “performed” by being an authentic Vuillard—a French artist—and that the warranty of authenticity not only guaranteed the present “being” of the painting but also extended, as required by 2-725(2), to the future existence as a Vuillard. Therefore, they contended, explicit words warranting future performance would be superfluous: a warranty that promises authenticity “now and at all times in the future” would be redundant. How should the court rule?

4. Speedi Lubrication Centers Inc. and Atlas Match Corp. entered into a contract that provided for Speedi to buy 400,000 advertising matchbooks from Atlas, to be paid for within thirty days of delivery of each shipment. Orders for such matches required artwork, artists’ commissions, and printing plates. Atlas sent twenty-two cases of matches to Speedi with an invoice showing $2,100 owed. Almost ninety days later, Speedi sent Atlas a check for $1,000, received the same day Atlas sent Speedi a letter declaring Speedi to be in material breach of the contract. A second check for $1,100 was later received; it bounced but was later replaced by a cashier’s check. The contract provided that an untimely payment was a breach, and it included these provisions related to liquidated damages:

   Atlas shall have the right to recover from Purchaser the price of all matchbooks and packaging delivered and/or identified to this agreement at the time of Purchaser’s breach hereof and shall be additionally entitled to recover fifty percent (50%) of the contract price of matchbooks and/or packaging ordered hereby, but not delivered or identified to this Agreement at the time of Purchaser’s breach. Purchaser agrees that the percentage as specified hereinabove…will be reasonable and just compensation for such breach, and Purchaser hereby promises to pay such sum as liquidated damages, not as penalty in the event of any such breach.

   On appeal, Speedi complained that the liquidated damages clause was a penalty. Is the matter settled by the contract saying the liquidated damages are reasonable? On what criteria would a court determine whether liquidated damages are reasonable?

5. Mrs. Kaiden made a $5,000 deposit on the purchase of new 1973 Rolls-Royce automobile. Lee Oldsmobile, the seller, confirmed the request by transmitting a regular order form, which Mrs. Kaiden signed and returned. The price was $29,500.00 [about $150,000 in 2010 dollars]. Some of the correspondence and a notation on Mrs. Kaiden’s check indicated that delivery was expected in November. The order form, however, specified no delivery date. Further, it contained a disclaimer of liability for delay in delivery beyond the dealer’s control, and it provided that the dealer had the right, upon failure of the purchaser to accept delivery, to retain as liquidated damages any cash deposit made. On November 21, 1973, Mrs. Kaiden notified Lee by telephone that she had purchased another Rolls-Royce elsewhere. She told the salesman to cancel her order. On November 29, Lee Oldsmobile notified Mrs. Kaiden that the car was ready for delivery. She refused delivery and demanded the return of her deposit. The dealer refused. In January 1974, the dealer—without notice to the Kaidens—sold the Rolls-Royce to another purchaser for $26,495. Mrs. Kaiden sued Lee Oldsmobile for the $5,000 deposit. The dealer carefully itemized its losses on the Kaiden deal—$5080.07. On what basis did the court dismiss the liquidated damages clause? What is the consequence of the dealer’s failure to give notice of the private sale under UCC, Section 2-706(3)?
6. Hemming saw an advertisement for a Cadillac convertible once owned by the famous early rock ’n’ roll singer Elvis Presley. He contracted to buy it from Whitney for $350,000 and sent Whitney $10,000 as a deposit. But, after some delay, Whitney returned the $10,000 and informed Hemming that the car had been sold to another purchaser. What remedy does Hemming have?
7. Murrey manufactured and sold pool tables. He was approached by Madsen, who had an idea for a kind of electronic pool table that would light up and make sounds like a pinball machine. Madsen made a $70,000 deposit on an order for one hundred tables but then encountered difficulties and notified Murrey that he would be unable to accept delivery of the tables. Murrey broke the tables up, salvaging materials worth about $15,000 and using the rest for firewood. The evidence was that the tables, if

completed by Murrey, could have been sold for $45,000 as regular pool tables. Madsen gets his deposit back less expenses incurred by Murrey. But what principle affects Murrey's measure of damages, his right to claim expenses incurred?

8. In January 1992, Joseph Perna bought an eleven-year-old Oldsmobile at a New York City police auction sale for $1,800 plus towing fees. It had been impounded by the police for nonpayment of parking tickets. The bill of sale from the police to Perna contained this language: "subject to the terms and conditions of any and all chattel mortgages, rental agreements, liens, conditional bills of sale, and encumbrances that may be on the motor vehicle of the [its original owner]." About a year later Perna sold the car to a coworker, Elio Marino, for $1,200. Marino repaired and improved the car by replacing the radiator, a gasket, and door locks. Ten months after his father bought the car, Marino's son was stopped by police and arrested for driving a stolen vehicle; Mario paid $600 to a lawyer to get that matter resolved, and he never got the car back from the police. Is Perna liable to Marino for the value of the car? Is Perna liable for the consequential damages—the attorney's fees? The relevant UCC sections are 2-312(2) and 2-714.
9. William Stem bought a used BMW from Gary Braden for $6,600 on Braden's assertion that as far as he knew the car had not been wrecked and it was in good condition. Less than a week later Stem discovered a disconnected plug; when connected the oil-sensor warning light glowed. Mechanics informed Stem that the car was made up of the front end of a 1979 BMW and the rear end of a 1975 BMW, and the front half had 100,000 more miles on it than Stem thought. Six weeks after he purchased the car, Stem wrote Braden a letter that he refused the car and intended to rescind the sale. Braden did not accept return of the car or refund the money, and Braden continued to drive it for seven months and nearly 9,000 miles before suing. He had no other car and needed to transport his child. These issues were before the Alabama Supreme Court, construing UCC, Section 2-608: did Stem's use of the car, notwithstanding his letter of rescission, constitute such use of it as to be an acceptance? And if not, does Stem owe Braden anything for its use?
10. Donnelly ordered a leather motorcycle jacket from Leathers Inc. The jacket was specially designed according to Donnelly's instructions: it had a unique collar, various chromed studs throughout, and buckles, and he required an unusually large size. The coat cost $6,000. Donnelly paid $1,200 as a deposit, but after production was nearly complete, he telephoned Leathers Inc. and repudiated the contract. What should Leathers do now?

SELF-TEST QUESTIONS

1. In the absence of agreement, the place of delivery is
    1. the buyer's place of business
    2. the seller's place of business
    3. either the buyer's place of business or the buyer's residence
    4. any of the above
2. The UCC's statute of limitations is
    1. two years
    2. three years
    3. four years
    4. none of the above
3. Under the UCC, if the buyer breaches, the seller can
    1. withhold further delivery
    2. resell the goods still in the seller's possession
    3. recover damages
    4. do all of the above
4. If the seller breaches, the buyer can generally
    1. recover the goods, even when the goods have not been identified to the contract and the seller is not insolvent
    2. purchase substitute goods and recover their cost
    3. purchase substitute goods and recover the difference between their cost and the contract price
    4. recover punitive damages
5. Following a seller's breach, the buyer can recover the price paid
    1. if the buyer cancels the contract

2. only for goods the buyer has accepted
3. for all the goods the buyer was to have received, whether or not they were accepted
4. under none of the above conditions

SELF-TEST AnswerS

1. b
2. c
3. d
4. c
5. d

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CHAPTER OVERVIEW

12: The Tort System

12.1: Introduction

12.2: Intentional Torts and Negligence

12.3: Product and Strict Liability

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12.1: Introduction

Learning Objectives

- Explain torts system application to business.



Figure 12.1.1: Introduction (Credit: Free-Photos/ pixabay/ Attribution 2.0 Generic (CC BY 2.0))

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12.2: Intentional Torts and Negligence

Civil suits arise from damages suffered by one or more persons or entities at the hands of another person or entity. The damage can happen in a variety of circumstances, and may be intentional or unintentional. Unlike criminal cases, civil suits seek to provide some form of remedy for the loss suffered by an injured party. Civil suits are decided by judges and juries based on the specific situation, especially when violation of **statutes**, or laws, is not in question.

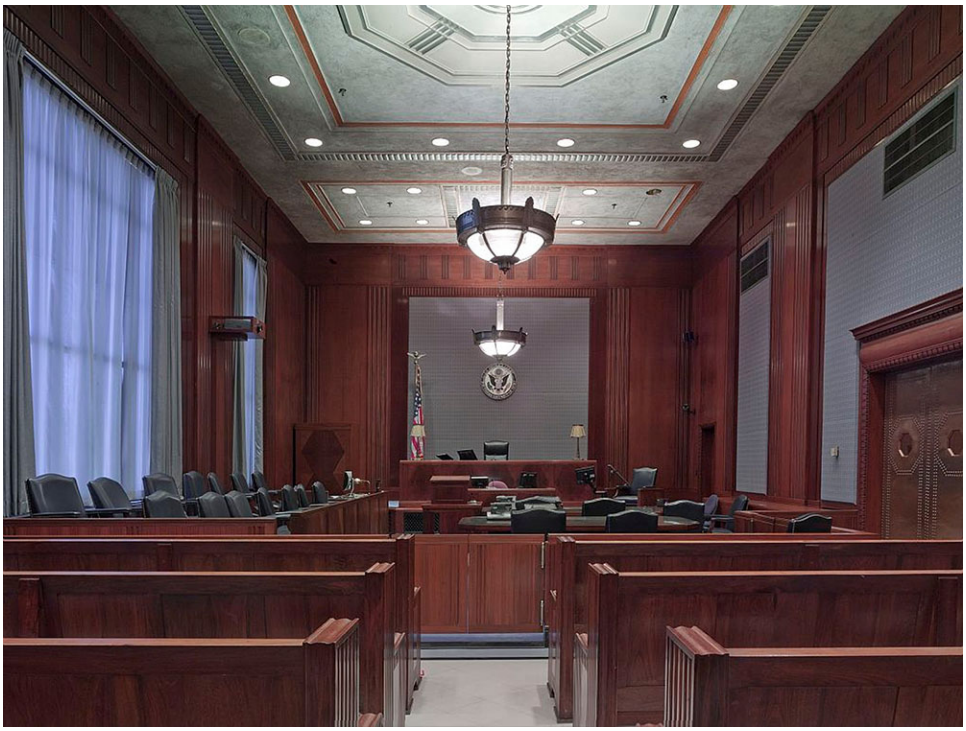


Figure **12.2.1**: Civil suits are decided in court by judges and juries. (Credit: Coffee/ pixabay/ License: CC0)

Torts

Civil suits involve different causes of action, and they are included in one general classification: **torts**. The word "tort" means "wrong" in French. Thus, torts are wrongs committed against others who suffer some form of damage as a result. While these damages could also be the result of criminal action, the criminal element of the matter is not tried in a civil lawsuit. The standard of proof is lower for civil suits, and a finding of liability in a tort case does not necessarily translate to guilt in a criminal case.

The actor of the wrongs has historically been called a **tortfeasor**. When a wrong is committed by a tortfeasor, damage is done to another. **Tort law** seeks to address this damage based on the circumstances of the issue, which is based on **fault**. Civil lawsuits are used by the injured parties to seek redress for the loss associated with the tort. Unlike criminal proceedings, redress is often provided in the form of money as opposed to incarceration. As such, the burden of proof of fault is lower. The **offender**, or tortfeasor, who commits the act is the accused in a civil suit. The **plaintiff**, who is the injured party, files the lawsuit on which the civil court will make a decision. The offender ultimately becomes the **defendant**, who must respond to the accusations of the plaintiff in a civil suit.

During tort litigation, the judge and jury have certain separate functions (Kionka, 2013):

Table **12.2.1**: Functions During a Tort Litigation

The Judge Decides Issues of Law	The Jury Decides Questions of Fact
The duty of the defendant to the plaintiff, if any	What happened
The elements of the defense	Legal consequences of what happened
Application of legal rules	The damages suffered by the plaintiff

Harm

Two types of torts are intentional torts and negligence. **Intentional torts** occur as the result of a conscious and purposeful act. **Negligence** occurs when an individual does not exercise duty of care. Torts are acts or omissions that result in injury or **harm** to an individual in such a way that it leads to a civil wrong that occurs as liability (WEX, n.d.). In tort law, harm can be defined as a loss or disadvantage suffered as a result of the actions or omissions of another (WEX, n.d.). This loss can be physical harm, such as slipping and falling on a wet floor, or personal property harm, such as allowing water to ruin furniture. The damage is the result of what someone else did, or did not do, either intentionally or based on a lack of reasonable care.

There are two basic elements to torts: damages and compensation (Laws, tort.laws.com). Tort law acts to compensate persons who have suffered damages at the hands of another (Baime, 2018). Tort law determines the legal responsibility of the defendant and the value of the harm. Different types of torts look at different types of circumstances.

Intentional Torts

Intentional torts are committed by an offender who understands that he or she is committing a tort. Intent does not always equate to directly causing an end result. In some cases, the intent may be something else, such as the possession of knowledge that some harm may occur. The harm may result from intentional action, or due to some circumstance that the offender feels will be excusable (Kionka, 2013).

Some circumstances that could allow the defendant to argue that the action is excusable would include: permission by the injured party, or defense of property, self, or another person (Kionka, 2013). If the injured party agrees to allow the defendant to juggle knives and one slips and causes harm, the action might be excusable to some extent. If a defendant caused harm to the plaintiff's car while trying to avoid being hit by the car, it would likely be excusable.

Different types of intentional torts are based on different circumstances and face different **remedies**, or means of recovering losses (Baime, 2018):

- **Assault** is an intentional tort that occurs when an individual has a reasonable apprehension of an intentional act that is designed to cause harm to himself or herself, or to another person.
- **Malicious prosecution** occurs when an individual files groundless complaints to initiate a criminal matter against another.
- **Defamation** occurs when an individual intentionally creates and promotes malicious falsehoods about another. Defamation can occur in two ways: slander and libel. **Slander** is, in effect, when falsehoods are spoken. **Libel** occurs when falsehoods are expressed in written or other recorded forums.
- **Invasion of privacy** involves unwanted production of negative public information. Different standards apply to invasion of privacy based on the status of the individual as a public figure.

Negligence

Negligence is another type of tort that has two meanings. It is the name of a **cause of action** in a tort, and it is a form of conduct that does not meet the **reasonable standard of care** (Kionka, 2013). The cause of action is the reason for the damage, and the standard of care is based on the care that a reasonable person would need in a given situation. Negligence is decided by determining the duty of the defendant, whether or not the defendant committed a breach of that duty, the cause of the injury, and the injury itself.

For an action to be deemed negligent, there must be a legal **duty of care**, or responsibility to act, based on the reasonable standard in a situation (Baime, 2018). An individual can be considered negligent if he agreed to watch a child, but did not do so, and then harm came to the child. An individual would not be considered negligent if he did not know that he was supposed to watch the child, or did not agree to watch the child.



Figure 12.2.2: If an individual agrees to watch a child and the child is injured while that person pays attention to her cell phone, it would be considered negligence. (Credit: JESHOOTScom/ pixabay/ License: CC0)

A **reasonable person** is defined as someone who must exercise reasonable care based on what he or she knows about the situation, how much experience he or she has with the situation, and how he or she perceives the situation (Kionka, 2013). In some cases, this knowledge could be based on common knowledge of community matters, such as knowing that a bridge is closed for repairs.

In some cases, the duty of care is based on a **special relationship**, which is a relationship based on an implied duty of care. This implied duty of care often comes about as a **duty to aid**, or a duty to protect another, e.g., a nurse caring for patients in a hospital, or a lifeguard being responsible for swimmers in the guarded area (Baime, 2018). A passerby does not have a duty to aid, but if the individual tries to help, then he or she is responsible for acting responsibly.

The elements of a negligence cause of action are (Kionka, 2013):

- A duty by the defendant to either act or refrain from acting
- A breach of that duty, based on a failure to conform to the standard of care by the defendant
- A causal connection between the defendant's action or inaction, and the injury to the plaintiff
- Measurable harm that can be remedied in monetary damages

Foreseeability

Negligence case decisions are influenced by whether or not a defendant could have predicted that an action or inaction could have resulted in the tort, or **foreseeability** (Baime, 2018). Responsibility is often based on whether or not the harm caused by an action or inaction was **reasonably foreseeable**, which means that the result was fairly obvious before it occurred (Baime, 2018). A person assisting an inebriated individual into her car could be considered negligent due to the likelihood that harm would come to her while she is driving in an intoxicated state. This situation is an example of the **foreseeable probability of harm**.

Conclusion

Intentional torts and negligence arise based on intentional and unintentional acts committed by individuals. Damages are decided in civil courts by first determining fault and harm, and then by assigning a remedy. Sometimes, the damage can be excused if the

circumstances indicate that the defendant acted with permission, or in his or her own defense. The main standard used to make a decision is the reasonable standard of care: what would a reasonable person do?

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12.3: Product and Strict Liability

Determination of fault and damages for intentional torts and negligence are based on the reasonable standard of care. Another form of torts looks at liability without fault, or **strict liability**. Strict liability determines liability, or harm, based on reasons other than fault (CCBC Legal Studies, n.d.). The mistakes leading to harm can be completely unintentional, and in some cases, unavoidable. Yet, damage is done, and a civil suit arises.

Strict Liability

Strict liability provides a remedy when harm is suffered through no intentional fault. The courts needed to create a standard that would cover this form of tort, or one without fault. The courts came up with the **abnormally dangerous activity standard**, which assigns responsibility when an individual engages in some form of dangerous activity, even if care is taken to avoid mishap (CCBC Legal Studies, n.d.). If a homeowner has horses in a pasture that is bounded by electric fencing, it can be determined that the homeowner exercised reasonable care. However, suppose that the electricity goes down, the horses get out onto the road, and an accident occurs as a result. In this case, the owner is responsible, even though he took reasonable care and the event was unforeseen.



Figure **12.3.1**: If horses get out of a fenced-in area, the owner would be liable for any damage they cause while loose. (Credit: Slack/ pexels/ License: CC0)

For a court to assign strict liability based on abnormally dangerous activities, the activity must meet certain criteria. The court must establish that at least four of the following six factors are present (CCBC Legal Studies, n.d.):

- The activity poses a high degree of risk of harm to a person, the land of another, or the property owned by another.
- The harm resulting from this activity would likely be substantial.
- The use of reasonable care would not eliminate this risk.
- The activity is not something that would be considered a matter of common usage.
- The activity is not appropriate for the place where it occurs.
- The danger of the activity overshadows the benefit it poses to a given community.

In essence, the basis for determining strict liability is the extent of the risk involved in the activity. This basis could also apply to the ownership of dangerous pets. A dog that is known to be aggressive would qualify the owner for strict liability should it get out and bite someone. The courts would find that the owner knew, or should have known, that the dog was dangerous and had a propensity to cause harm (Kionka, 2013).

Trespass

In some situations, the owner of the dangerous activity might not be held liable. One such situation is trespassing. Trespassing occurs as an individual enters or remains upon property owned by another without permission (Kionka, 2013). In the case of trespassing, the owner of the property does not have a duty to make the premises safe based on reasonable care for the trespasser (Kionka, 2013). Also, the owner does not have a responsibility to cancel or alter activities on the premises to avoid endangering the trespasser (Kionka, 2013).



Figure **12.3.2**: Train tracks are a common area for trespassing. (Credit: Muscat_Coach/ pixabay/ License: CC0)

In some cases, however, the property owner could be held liable (Kionka, 2013):

- When the area in question is a common place for trespassing
- When the owner knows a trespasser is present
- When the trespasser needs aid, then the owner has a duty to rescue him or her
- When the trespasser is a child, and the dangerous activity is deemed as an **attractive nuisance**, or an attraction that a reasonable child would wish to view

Even though trespassing can present an exception to liability in the presence of a dangerous activity, it is not a given. There are numerous exceptions that allow for liability. In effect, strict liability can occur in a given situation even when the property owner has provided care that goes above and beyond what is reasonable. The court does not need to establish proof of lack of due care when applying strict liability to a case (Baime, 2018).

Product Liability

Individuals are not always the defendants involved in civil suits. Manufacturers, wholesalers, distributors, and retailers can also be named in torts that pertain to products and qualify as strict liability (CCBC Legal Studies, n.d.). Some products contain flaws that

were not intentionally created; such flaws may not be discovered until an individual suffers harm as a result of using them.

It is not always possible to conclusively prove that an act or omission was responsible for the harm (Baime, 2018). As a result, the courts developed the doctrine of **res ipsa loquitor**, which means that whatever it is speaks for itself. The burden of proof shifts from the plaintiff to the defendant, who must disprove negligence. However, the plaintiff must first establish three factors (Baime, 2018):

- The defendant had control over the product in question while it was being manufactured.
- Under normal use and circumstances, the product would not cause damage or harm, but damage or harm has occurred in the case in question.
- The behavior of the plaintiff did not significantly contribute to the harm caused.

The doctrine of res ipsa loquitor does not establish proof of negligence, but it does allow the jury to infer what is not explicitly available pertaining to negligent acts or omissions on the part of the defendant (Baime, 2018).

Negligence can occur when products are created because defects can harm consumers. Think about the potential harm that would occur if brake manufacturers were negligent. This negligence would cause brakes to have flaws, which would prevent them from doing their job of stopping cars. If a car does not stop, people will likely be injured. The manufacturing defect would result in a product liability lawsuit, based on legal responsibility for the harmful consequences proximately caused by the product defect (Baime, 2018). Since the courts would not be able to see the negligence occurring, the courts would base their decision on res ipsa loquitor and the fact that the brakes would not normally fail under normal use by the driver.



Figure **12.3.3**: If brakes do not work like they are supposed to, it could be the result of a manufacturing defect that would result in product liability. (Credit: Valtercirillo/ pixabay/ License: CC0)

The Unreasonably Dangerous Product Standard

In the case of product liability, the court uses an unreasonably dangerous product standard to determine liability. The unreasonably dangerous product would be so dangerous that the danger would be beyond the expectation of the user, and a less dangerous option could have been produced instead (Kionka, 2013). This type of unreasonably dangerous product often falls into one of three categories (Kionka, 2013):

- A flaw in the manufacturing process that occurred because the manufacturer failed to exercise proper care during manufacturing
- A defect in the design of the product, which makes it dangerous, and safer alternatives are available and economically feasible

- The product includes insufficient warnings or instructions for the proper use of the product and its potential dangers

Defenses

There are defenses to product liability claims. In some cases, the plaintiff's own behaviors contribute to his or her injuries, based on his or her own negligence. This situation is known as **contributory negligence**. Contributory negligence, when determined by the court, prevents any recovery of damages by the plaintiff (Baime, 2018). So, if the court finds contributory negligence, the plaintiff is unable to recover any damages for the injury. Two forms of contributory negligence are assumption of risk and misuse.

Assumption of risk is one defense. In some cases, the defendant can argue that the user assumed the risk of using the product if he or she used the product while knowing that the defect in the product created a risk (CCBC Legal Studies, n.d.). An individual who purchases a saw and sees that the guard is too small to cover the teeth, but decides to use it anyway, is assuming the risk of using the product. If the saw cuts the individual, then the manufacturer could argue that the person assumed the risk because he saw the defect, understood the risk, and used the saw anyway.

Another defense is product **misuse**. In some cases, an individual will use a product in ways that it is not meant to be used (CCBC Legal Studies, n.d.). The user might not be aware of a defect, and he or she proceeds to use the product incorrectly. Misuse by the individual would be to blame for any resulting harm.



Figure 12.3.4: Using a chainsaw with bare feet could be dangerous and add to the risk of use without a guard. If the plaintiff suffered harm because his bare foot could not hold the wood down properly, he could be responsible for comparative negligence. (Credit: edman_eu/ pixabay/ License: CC0)

Plaintiffs might also be responsible for **comparative negligence**. With comparative negligence, the plaintiff's own actions in the use of the product contributed to the harm caused by the product, but the plaintiff might still receive damages (CCBC Legal Studies, n.d.). The amount of negligence on behalf of each part (plaintiff and defendant) is compared to determine the damages to which the plaintiff is entitled (Baime, 2018). If a plaintiff is found to be 30% responsible, and the defendant 70% responsible, then the plaintiff would be entitled to 70% of the damages suffered.

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CHAPTER OVERVIEW

13: Employment and Labor Law

13.1: Employment, Worker Protection, and Immigration Law

13.2: Labor Law

13.3: Equal Opportunity in Employment

13.4: End Notes

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13.1: Employment, Worker Protection, and Immigration Law

Compared to other countries in the West, stringent and extensive employee protections came fairly late to the United States. Up until 1959, for example, employers had the right to fire a worker without giving any reason. This concept, which was was known as **at-will employment**, was applicable in all states. The concept of at-will employment does, however, continue today, and all employees are considered to be at-will unless they are employed under a collective bargaining agreement, or under a contract for a set duration. Employers can still fire employees for any reason, but they cannot be fired for illegal reasons, as set out in the U.S. or state constitutions, federal law, state statutes, or public policy. In this section, some of the main employee rights and company responsibilities will be introduced.



Figure 13.1.1: Employees have various rights in the workplace and companies have various responsibilities toward them. (Credit: Raw Pixel/ pexels/ License: CC0)

Health and Safety

Workers have the right to be safe at work, and companies have responsibilities to employees in the event that they are harmed while undertaking work on behalf of the employer. The **Occupational Safety and Health Act**, passed in 1970, is the main legislative action that governs health and safety in the workplace. The Act established the **Occupational Safety and Health Administration (OSHA)**, which is a federal agency whose role is to "assure safe and healthy working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance." Private employers and federal government agencies are all covered under OSHA protection, although the self-employed and workers at state and local governments in most states are not covered. OSHA has adopted thousands of regulations to enforce the Occupational Safety and Health Act. It imposes a number of record-keeping and reporting requirements on private employers. In addition, employers are required to inform employees of their health and safety rights by posting appropriate notices in the workplace.

Table 13.1.1

Type of OSHA Standard	Description	Example
Specific Duty Standards	Standards that apply to specific types of work, procedures, work conditions, and equipment	Safe handling of compressed gas cylinders
General Duty Standards	Standards that apply to all employers and that impose a duty to protect workers from known hazards	Standards pertaining to indoor air quality and workplace violence

Workers' Compensation Acts help employees claim compensation for injuries that occur on the job. States require employers to either purchase workers' compensation insurance, or have the ability to self-insure against compensation claims. Workers' compensation insurance covers a range of different injuries, including physical injuries, mental illnesses that can be shown to be employment-related, and stress.

Under the terms of the Acts, a **Workers' Compensation Agency** is established at the state level to provide judicial and administrative services to help in the resolution of claims for compensation. In the event of a claim, a three-step process is put into place:

1. The worker files a claim with the agency.
2. The agency establishes the legitimacy of the claim.
3. If the injury is determined to be legitimate, compensation benefits are paid accordingly.

It is important to note that workers' compensation is understood to be an **exclusive remedy**. This term means that workers cannot sue the employer in court for further damages beyond that which is paid out under the compensation claim. An exception is made when the employer intentionally injures the worker, however. Furthermore, workers have the right to sue any third party involved in the cause of the injury to recover additional damages.

Case Insight

In the case *Chad A. Kelley v. Marsha P. Ryan, Administrator, Ohio Bureau of Workers' Compensation, and Coca-Cola Enterprises*, Chad A. Kelley attended a team-building event held by his employer, Coca-Cola, to celebrate the launch of a new product. All employees attending the event were required to canoe down a river, which Kelley, with colleagues, achieved without incident. Employees waiting on the river bank began to splash one another, and according to witnesses, Kelley said that it would take more than some splashing to get him wet. Consequently, several colleagues tried to throw Kelley into the water, which led him to sustain neck injuries. The Ohio Bureau of Workers' Compensation denied Kelley's claim for benefits, however, arguing that Kelley had instigated "horseplay" that removed the incident from the scope and course of employment. In 2009, an appellate court ruled that this conclusion was incorrect and that the employer was, in fact, responsible. Kelley was entitled to the compensation.

Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) sets out provisions that delineate fair labor and unfair labor. There are three main categories covered in the Act:

1. Child labor
2. Minimum wage provisions
3. Overtime pay requirements

The FLSA prohibits oppressive **child labor** as well as the shipping of goods produced by firms that make use of oppressive labor. The FLSA sets the minimum age for non-agricultural work as 14. However, there are some exceptions. People under the age of 14 who are classed as minors may deliver newspapers, perform babysitting or chores around the home, and can work in businesses owned by their families, as long as the work is not deemed to be hazardous. In addition, minors may perform in television, radio, movie, or theatrical productions. Once an employee becomes 18, child labor regulations no longer apply.

Under the terms of the FLSA, employees in covered industries, with the exception of apprentices and students, must be paid the federal minimum wage. Congress is responsible for reviewing the level of the minimum wage on a periodic basis and raising it to compensate for increases in the cost of living caused by inflation. In 2009, Congress raised the federal minimum wage to $7.25 an hour. This increase was the first in almost a decade (although in 2014, President Obama signed an executive order that increased the minimum wage to $10.10 for those employed on new federal contracts).

FLSA also mandates that employees who work more than 40 hours in a week should receive overtime pay that is equal to at least one and one-half times their regular wage for every additional hour worked. Four categories of employees are excluded from this provision, however: executives, administrative employees, professional employees, and outside salespersons.

Family and Medical Leave Act

The Family and Medical Leave Act (FMLA), enacted in 1993, guarantees all eligible workers up to 12 weeks of unpaid leave during any 12-month period for family and medical emergencies. The FMLA applies to all public and private employers with 50 or more employees, covers employees who have worked for the employer for at least one year, and applies to employees who have worked at least 25 hours a week for each of 12 months prior to the leave. The events that qualify workers for leave are:

- The birth of a child

- The adoption of a child
- The placement of a foster child in the employee's care
- The care of a seriously ill spouse, parent, or child
- Any serious health condition that prevents the worker from being able to perform any of the essential functions of the job

Once the employee returns to work, he or she must be restored to the same or equivalent position. Social Security benefits also provide benefits to certain employees and their dependents. The types of benefits that fall under Social Security regulations include disability benefits, Medicare benefits, survivors' benefits, and retirement benefits.

Ending Employment

There are are also several regulations that cover workers who are terminated or who lose their employment. These are summarized in the following table.

Table **13.1.2**

Regulation	Description
Consolidated Omnibus Budget Reconciliation Act (COBRA)	Mandates that employees who are terminated must be provided with the opportunity to continue to participate in group health insurance, so long as they agree to pay the group rate premium. The employer is required to notify employees of their COBRA rights.
Employee Retirement Income Security Act (ERISA)	This Act covers any pension plan offered by employers to their workers, and is designed to prevent abuses and fraudulent use of those plans. Under the terms of ERISA, employers are required to keep certain records pertaining to the plans, and to report on those records at regular intervals. The Act also provides for **vesting**, which occurs when an employee has a nonforfeitable right to receive pension benefits.
Unemployment compensation	Unemployment compensation programs are paid to those who become temporarily unemployed, and are funded by employers through employment taxes. Workers who quit voluntarily or who are terminated for bad conduct are not eligible for compensation. In addition, in order to qualify for the benefits, applicants must demonstrate that they are available for work.

Immigration Law

There are vast areas of immigration law that are applicable to employment. The U.S. Citizenship and Immigration Service (USCIS) administers a range of different immigration programs that enable U.S. employers to employ foreign national workers. For example, under the EB-1 visa, U.S. employers can employ foreign nationals who have **extraordinary ability** for certain types of work. Under the terms of the Immigration Reform and Control Act (IRCA), employers are required to examine evidence of employees' identity and complete mandatory paperwork for each employee. There are serious financial and criminal penalties for employers who knowingly hire undocumented workers.

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13.2: Labor Law

Labor relations is the general term used to describe the relationship between employers and employees, as well as governance of that relationship. It refers to the micro-level interactions that take place between workers and individual managers, as well as the macro-level relations that occur between the external institutions that are tasked with governing such relations. This understanding of labor relations acknowledges the fact that there is a plurality of interests that must be taken into account in the processes and procedures of negotiation, bargaining, and dispute settlement relating to the workplace. It also recognizes that employees and employers' representatives are fundamental to the process of industrial relations, and that the state plays a key role in the development of labor laws, the regulation of collective bargaining, and the administration of disputes. There has been considerable flux and development in the nature of U.S. labor over the past century. However, the most substantial changes have occurred since the 1950s. Changes have been particularly evident in the role that the state has been expected to play in employment relations between workers, their representatives, and their employers. This section introduces some of the key milestones in labor relations in the United States, and describes the role played by **trade unions** in governing the relationship between employers and employees.

What Is a Trade Union?

A trade union, or labor union, is an organized group of workers who come together to lobby employers about conditions affecting their work. There currently are around **60** unions representing **14** million workers across the United States. Unions are organized according to the type of work that workers do. For example, the American Federation of Teachers is the labor union for teaching personnel, while the the International Association of Fire Fighters covers fire fighters. Many unions in the United States are organized as **local unions**. This type of union is a locally (i.e., company or region) based group of workers who organize under a charter from a national union. For example, Affiliated Property Craftspersons Local 44 is the Los Angeles union of entertainment professional craftpersons, chartered under the International Alliance of Theatrical Stage Employees.

Timeline of Developments in Labor Law

- **1886**. The American Federation of Labor was formed in Columbus, Ohio. This group was a national federation of labor unions who came together to bolster their power in industrial unionism. The AFL was the largest union grouping in the United States well into the twentieth century. However, the Federation was craft-dominated, such that only craft workers like artisans and silversmiths were allowed to belong.
- **1932**. The Norris-LaGuardia Act was passed. This Act prohibited **yellow-dog contracts**, or contracts that prevented workers from joining labor unions. In addition, federal courts were barred from issuing injunctions to prevent groups of workers from engaging in boycotts, strikes, and picketing.
- **1935**. The Congress of Industrial Organizations was established. This establishment extended the union movement because it allowed semi-skilled and unskilled workers to become members.
- **1935**. The Wagner Act, or **National Labor Relations Act**, was passed. This Act is the major statute of United States labor law. The Act established that employees have the right to form, assist, and join labor organizations, to engage in collective bargaining with employers, and to engage in concerted activity to promote those rights.
- **1947**. The Labor-Management Relations Act, also known as the Taft-Hartley Act, imposed restrictions on the power of labor unions. It made changes to union election rules and outlined and provided remedies for six unfair practices by labor unions (see box below).
- **1959**. The Labor Management Reporting and Disclosure Act, or Landrum-Griffin Act, was passed, which regulates the internal affairs of trade unions, as well as their officials' relationships with employers. All union members are granted equal rights to vote for candidates, take part in membership meetings, and nominate candidates for office.
- **1988**. The Worker Adjustment and Retraining Notification (WARN) Act requires that employers with more than 100 employees give workers at least 60 days notice before engaging in layoffs or plant closings.

Table **13.2.1**

Amendments of the TaftHartley Act	Description
1	Protects employees from unfair coercion by unions that could lead to discrimination against employees.
2	States that employers cannot refuse to hire prospective workers because they refuse to join a union. This amendment also grants the employer the right to sign an agreement with a union that requires the employee to join the union before the employee's 30th day of employment.
3	Unions must bargain in good faith with employers.
4	Prevents unions from engaging in secondary boycotts.
5	Prevents unions from taking advantage of either employers or members. For example, unions cannot charge members excessive membership dues or cause employers to pay for work that has not been performed.
6	Grants employers the right to free speech. Expressed opinions about labor issues do not constitute unfair labor practices, as long as the employer does not threaten to withhold benefits from, or engage in, retribution against the worker.

The National Labor Relations Board

The National Labor Relations Board (NLRB) was established to administer, interpret, and enforce the terms of the National Labor Relations Act. It has jurisdiction over all workers, except for government employees and employees in the transportation industry, who are governed under a separate statute (The Railway Labor Act). Other workers not covered by the NLRB include agricultural workers, confidential employees (employees who develop or present management's position or who have access to confidential information related to bargaining employees), independent contractors, and those employed by a spouse or a parent. The NLRB has three main functions:

1. To monitor the conduct of unions and employers during elections to determine whether employees wish to be represented by a union
2. To remedy and prevent unfair labor practices by unions or employers
3. To establish rules interpreting the NLRA



Figure 13.2.1: Under the terms of the National Labor Relations Act, employees have the right to strike as part of their efforts to secure better working conditions. (Credit: Geralt/ pixabay/ License: CC0)

Organizing a Union

For a union to be formed and organized, the union must identify an **appropriate bargaining unit**. This term is used to describe the group of workers that the union is looking to represent. Under the terms of the **inaccessibility exception**, employees and union officials have the right to engage in union solicitation on the firm's property if they cannot otherwise access employees to communicate with them. The next stage is to run an election. There are three types of elections:

- **Consent election**. This election is held when there are not any substantial issues under dispute between the union and the employer. Both parties agree to waive the pre-election hearing.
- **Contest election**. This election is for a union that is contested by the employer. The NLRB is required to supervise this kind of election.
- A **decertification election** is held when employees indicate that they wish to vote out the union or join another.

In order to try to bolster their power, elected unions often attempt to install a **union security agreement**. This agreement pertains to the extent to which the union can demand that employees join the union, and whether the employer will be required to collect fees and dues on behalf of the union. A **closed shop** is a workplace where union membership is a requirement for employment. A **union shop** is a place of employment where the employee is required to join the union within a specified number of days after being hired. An **agency shop** is a workplace that does not require the employee to join the union, but where agency fees to the union must be paid. Union security agreements are the outcome of collective bargaining agreements.

Collective Bargaining

Collective bargaining involves the union and the employer negotiating contract terms. The outcome is known as a **collective bargaining agreement**. The types of terms that are usually negotiated are wages and salaries, hours, and the terms and conditions of employment. If union members dispute working conditions, unfair labor practices, or economic benefits, they have the right to participate in a cessation of work activities, known as a **strike**. There is a mandatory cooling off period of sixty days before a strike can commence. Some collective bargaining agreements include no-strike clauses. Although strikes are permitted according to the NRLA, some strikes are illegal:

- Violent strikes
- Sit-down strikes
- Wildcat (unauthorized) strikes
- Intermittent, or partial strikes

In addition to striking, union members have the right to picket. This process involves walking in front of the employer's premises with signs that advertise the strike and the union's demands. Picketing is lawful as long as it does not:

- Involve violence
- Prevent customers from entering the premises
- Prevent non-striking workers from entering the premises
- Prevent the business from receiving deliveries or pickups

Secondary boycott picketing occurs when the union pickets the employer's customers or suppliers. This type of picketing is legal if it is product picketing, but illegal if the picket is directed against a neutral business.

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13.3: Equal Opportunity in Employment

A Landmark Case

In 1982, the financial services company Price Waterhouse announced a vacancy for the position of partner. Ann Hopkins, an employee of the company at the time, applied, but after an assessment, was passed over. Hopkins sued the company, arguing that she had billed more than $34 million in consulting contracts for the firm, far more than any of the other 87 candidates, who were all male. In rejecting her application, the partners at the company argued that Hopkins was "too macho" and that she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled and wear jewelry." In the landmark legal suit that followed, Hopkins was awarded $371,000 in back pay, and Price Waterhouse was forced to make her a partner.

Laws Governing Equal Opportunity in Employment

Employees are protected in the workplace by a number of laws enacted at both the federal and state levels. Federal laws are usually considered to be the minimum level of protection, and state laws can provide employees with more, but not less, protection. In this section, the major laws pertaining to equal opportunity are discussed.

Civil Rights Act of 1964 – Title VII (Amended By the Civil Rights Act of 1991)

The Civil Rights Act provides broad provisions pertaining to citizens' civil rights. Title VII of the Civil Rights Act deals with discrimination in employment. It bans employers from discriminating against employees in their hiring, firing, and promotion practices on the basis of sex, national origin, color, religion, or race. All employers who are engaged in commercial activity and who employ 15 or more employees for 20 consecutive weeks in a year are covered by the Act. The Act also sets out the two main ways in which discrimination can be proven: disparate treatment and disparate impact.

Disparate treatment means that the employee believes that he or she has been discriminated against on the basis of one of the protected classes set out in the CRA. Proving that the employer engaged in disparate treatment is a three-step process:

1. The employee (plaintiff) is required to demonstrate a **prima facie** (accepted as correct unless proven otherwise) case of discrimination.
2. The employer (defendant) must show legitimate, non-discriminatory business reasons for undertaking the action.
3. The employee must demonstrate that the reason given by the employer is a mere pretext.

A trier of fact, usually a jury, will use the evidence presented to determine whether discrimination did in fact occur. If the jury finds for the employee-plaintiff, damages can be awarded, such as what occurred in the landmark Ann Hopkins case, described in the opening box. If the jury finds for the employer-defendant, no damages are assessed.

Table 13.3.1

Damages Permissible Under Title VII of the CRA
Up to two years of back pay
Compensatory damages
Punitive damages
Remedial seniority
Costs (e.g., attorney fees and court costs)
Court orders (e.g., reinstatement)

Disparate impact cases are cases of unintentional discrimination. This type of case occurs when the employer engages in a practice that has a disproportionately injurious impact on a protected class. Disparate impact cases are difficult to prove. The burden of responsibility is on the employee-plaintiff to statistically establish that the action impacts the protected class. The defendant can avoid liability by demonstrating that the practice is a business responsibility. The burden of proof then shifts to the employee to prove that the alleged business necessity is a mere pretext. These steps were established in *Griggs v. Duke Power Co.*

Duke Power required all job applicants to have a high school diploma and to reach a certain minimum score on a professional intelligence test. Willie Griggs, the plaintiff, established that the rule was racially discriminatory because only 12 percent of black men in the state had high school diplomas (compared to 34 percent of white men), and only 6 percent of blacks had passed similar intelligence tests, compared to 58 percent of whites. Duke Power tried to argue that the provisions were necessary to upgrade the quality of the workforce, but the court did not agree that this defense was an adequate business-related justification, and the plaintiff was successful.

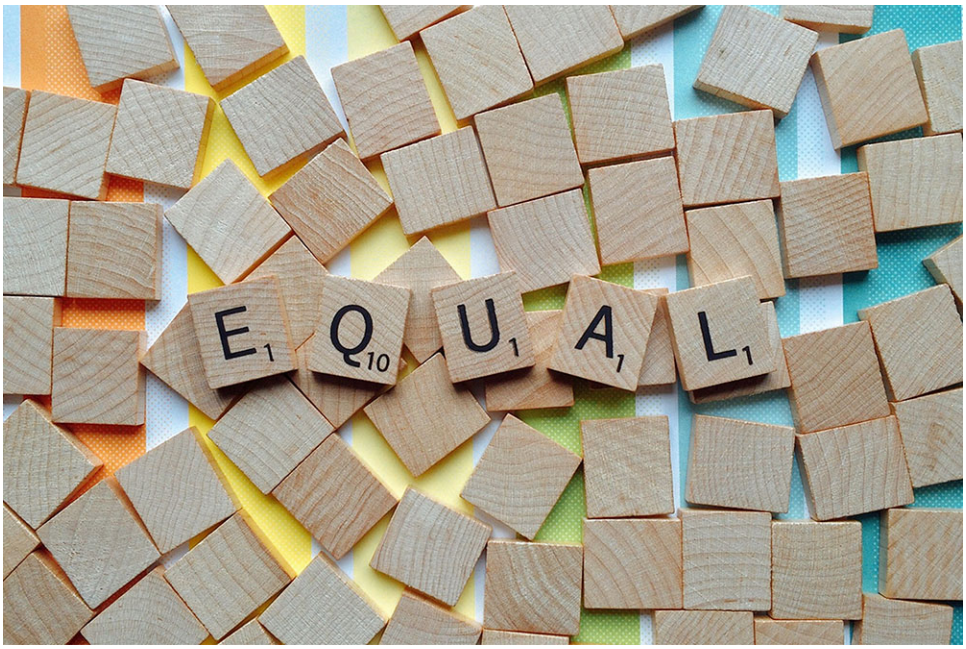


Figure 13.3.1: Employees are protected against discrimination by employers by a number of laws enacted at both the federal and state level. (Credit: Wokandapix/ pixabay/ License: CC0)

Sexual harassment is also protected under Title VII. This type of harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Two types of sexual harassment are recognized. **Quid pro quo** occurs when a manager makes a sexual demand on a worker, and this demand is perceived as a condition of employment. Actions that create a **hostile work environment** are another type of sexual harassment. These issues have been used in cases of discrimination based on race and religion as well as sex. Since the 1997 case *Oncale v. Sundowner Offshore Services Inc.*, it has been established that sexual harassment undertaken by a member of one sex against a member of the same sex is actionable under Title VII. In some limited circumstances, employers may also be liable for harassment of employees by non-employees, e.g., customers. The employer is liable if it does nothing to prevent and remedy harassment targeted at one of its employees. **The Pregnancy Discrimination Act** of 1987 expanded the definition of sex discrimination to include discrimination based on pregnancy, childbirth, or medical conditions related to the same.

Defenses to Title VII Claims

Table 13.3.2

Defense	Description
The Bona Fide Occupational Qualification Defense (BFOQ)	Using this defense, the employer can discriminate if it is deemed to be necessary for the performance of the job. Necessity, however, must be determined on the basis of actual qualifications, rather than stereotypes about the abilities of a certain class. For example, an employer is not expected to hire a man as a model for women's clothes. Hires on the basis of sexual privacy are covered under BFOQ. However, there are no BFOQs for discrimination on the basis of race or color.
The Merit Defense	This defense is used when decisions pertaining to hiring or promotion are made on the basis of the results of test scores. However, tests must be validated in accordance with professional standards and must be manifestly related to job performance.
The Seniority Defense System	This defense system occurs when employees are given preferential treatment because of their length of tenure. As long as the system does not have its genesis in discrimination, and is not used to discriminate and applies to all persons equally, it is lawful.

The Equal Pay Act

The Equal Pay Act (EPA) is a United States federal law that seeks to equalize the salaries and wages paid to employed women with the levels paid to men for work of an equal nature and quantity. The Act amended the Fair Labor Standard Act of 1938 and was a key element of President F. Kennedy's New Frontier program. Under the terms of the EPA, women and men performing jobs that demand "equal skill, effort, and responsibility, and which are performed under similar working conditions" must be paid the same. The Act protects the rights of both sexes. An individual who seeks to establish a case under the Act must demonstrate that:

1. An employer pays one sex more than another
2. Both sexes perform an equal amount of work that demands equal levels of skill, effort and responsibility
3. Working conditions for both sexes are equivalent

An employer that is accused of discrimination under the EPA can present one of four **affirmative defenses**. An employer may legally pay employees of one sex more than another sex if wages are based on a system of seniority, a system of merit, a system that distinguishes payment on the basis of quality and quantity of production (e.g., certain piece rates), or if payment is differentiated on "any other factor other than sex." Of these four defenses, the "factor other than sex" defense has been invoked most frequently and has been the subject of intense debate and controversy. Critics have argued that this defense enables employers to fabricate other reasons for the wage gap.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prevents employers from discriminating against workers on the basis of their physical or mental disabilities. In addition, employers are required to make reasonable accommodations to known disabilities, as long as such accommodations do not impose an undue burden on the business. To bring a successful ADA claim, the plaintiff is required to demonstrate that he or she:

- Has a disability
- Suffered an adverse employment decision because of that disability
- Was otherwise qualified for the position

ADA is enforced in a similar way to Title VII, and remedies for ADA violations are also similar.

Age Discrimination Act

Passed in 1967, this Act prohibits employers from making discriminatory employment decisions against people age **40** or older. This Act applies to all employers with **20** or more employees.

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SECTION OVERVIEW

14.1: Immigration and Immigrant Policy- Barriers and Opportunities for Families

14.1.1: Immigration Policy

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14.1.1: Immigration Policy

Immigration Policy

Purposes of Immigration Policy

There are five primary purposes of immigration policy (US English Foundation, 2014; Fix & Passel, 1994).

1. Social: Unify citizens and legal residents with their families.
2. Economic: Increase productivity and standard of living.
3. Cultural: Encourage diversity, increasing pluralism and a variety of skills.
4. Moral: Promote and protect human rights, largely through protecting those feeling persecution.
5. Security: Control undocumented immigration and protect national security.

Tug-of-War in Immigration Policy

There are many ideological differences among the stakeholders in immigration policy, and many different priorities. In order to meet the purposes listed above, policy-makers must balance the following goals against one another.

Provide refuge to all versus recruit the best. Some stakeholders desire to provide refuge for the displaced (Permanently stamped on the Statue of Liberty are the words, “Give me your tired, your poor, your huddled masses yearning to breathe free”). These stakeholders seek to welcome all who are separated from their families or face economic, political, or safety concerns in their current locations. Others aim to recruit those best qualified to add to the economy.

Meet labor force needs versus protect current citizen employment. Immigrant workers are expected to make up 30-50% of the growth in the United States labor force in the coming decades (Lowell, Gelatt, & Batalova, 2006). In general, immigrants provide needed employment and do not impact the wages of the current workforce. However, there are situations (i.e., during economic downturns) where immigration can threaten the current work force’s conditions or wages.

Enforce policy versus minimize regulatory burden and intrusion on privacy. In order to enforce immigration policy away from the border, the government must access residents’ documents. However, this threatens citizens’ privacy. When employers are required to access these documents, it also increases regulatory burden for the employers.



BBC World Service – Border fence – CC BY-NC 2.0.

Key Stakeholders in Policy

There are many groups who are deeply invested in immigration and immigrant policy; their fortunes rise or fall with the policies set. These groups are called "stakeholders." Key stakeholders in immigration and immigrant policy in the United States include the federal government, state governments, voluntary agencies, employers, families, current workers, local communities, states, and the nation as a whole.

Families. As we described in the introduction, one of the most common motivations for immigration is to provide a better quality of life for one's family, either by sending money to family in another country or by bringing family to the United States (Solheim, Rojas-Garcia, Olson, & Zuiker, 2012). Immigration policy impacts these families' abilities to migrate to access safer living conditions and seek economic stability. Further, immigration policy impacts a family's opportunity for reunification. Reunification means that immigrants with legal status in the United States can apply for visas to bring family members to join them. Approximately two-thirds of the immigrants in the United States were sponsored by family members who migrated first and became permanent residents (Kandel, 2014).

"My goals are to offer my family a decent life and economic stability, to guarantee them a future without serious problems, with a house, a means of transport… things that sometimes you can't achieve in Mexico. Our goal must be for our family's welfare, as much for my family here as for my family back there" – Mexican Immigrant, Solheim et al., 2012 p. 247.

Federal government. The federal government is currently solely responsible for the creation of immigration policies (Weissbrodt & Danielson, 2004). In the past, each state determined its own immigration policy according to the Articles of Confederation because it was unclear whether the United States Constitution gave the federal government power to regulate immigration (Weissbrodt & Danielson, 2011). A series of Supreme Court cases beginning in the 1850s upheld the federal government's right to create immigration policies, arguing that the federal government must have the power to exclude non-citizens to protect the national public interest (Weissbrodt & Danielson, 2004). The Supreme Court has determined that the power to admit and to remove immigrants to the United States belongs solely to the federal government (using as precedents the uniform rule of Naturalization, Article 1.8.4, and the commerce clause, Article 1.8.3). In fact, there is no area where the legislative power of Congress is more complete (Weissbrodt & Danielson, 2004).

Immigration responsibilities were originally housed in the Treasury Department and the Department of Labor, due to its connection to foreign commerce. In the 1940s, the immigration office (now called the "INS") was moved to the United States Department of Justice due to its connection to protecting national public interest (USCIS, 2010). The federal departments and agencies that implement immigration laws and policies have changed significantly since the terrorist attacks of 2001. In 2001, the United States Commission on National Security created the Department of Homeland Security (DHS), which absorbed and assumed the duties of Immigration and Naturalization Services (INS).

Three key agencies within DHS enforce immigration and immigrant policy (see Figure 1):

- **United States Citizenship and Immigration Services (USCIS):** USCIS provides immigration services, including processing immigrant visa requests, naturalization petitions, and asylum/refugee requests. Its offices are divided into four national regions: (1) Burlington, Vermont (Northeast); (2) Dallas, Texas (Central); (3) Laguna Niguel, California (West); and (4) Orlando, Florida (Southeast). The director of USCIS reports directly to the Deputy Secretary of Homeland Security. It is important to note that immigration officers, who traditionally hold law degrees, have broad discretion in deciding whether an application is complete and accurate (Weissbrodt & Danielson, 2011).
- **Immigration and Customs Enforcement (ICE):** ICE is primarily tasked with enforcing immigration laws once immigrants are inside the United States' ICE is responsible for identifying and fixing problems in the nation's security. This is accomplished through five operational divisions: (1) immigration investigations; (2) detention and removal; (3) Federal Protective Service; (4) international affairs; and (5) intelligence.
- **United States Customs and Border Protection (CBP):** USCBP includes the Border Patrol, which is responsible for identifying and preventing undocumented aliens, terrorists, and weapons from entering the country. In addition to these responsibilities, USCBP is responsible for regulating customs and international trade to intercept drugs, illicit currency, fraudulent documents or products with intellectual property rights violations, and materials for quarantine.

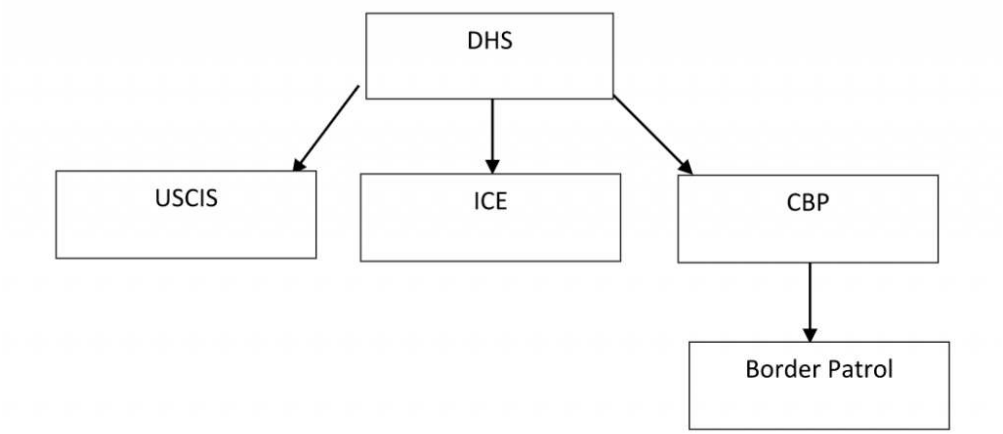


Figure 1: Federal Immigration Organizations

State governments. Although states have no power to create immigration policy, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA, 1996) enabled the Secretary of Homeland Security to enter into agreements with states to implement the administration and enforcement of federal immigration laws. States are also responsible for policy regarding immigrant and refugee integration. There is wide variation in how states pursue integration. Not all policies are welcoming. For example, several have passed legislation that limits access of public services to undocumented immigrants (e.g., Alabama, Georgia, Indiana, South Carolina, and Utah). In contrast, states such as Minnesota, have sought to expand immigrant access to public services. These drastically different approaches have promoted consideration of this critical important task at the federal level. In late 2014, President Obama formed the "White House Task Force on New Americans" whose primary purpose is to "create welcoming communities and fully integrating immigrants and refugees" (White House, 2014). This is the first time in United States history that the executive branch of the government has undertaken such an effort.

Employers. Employers have high stakes in policy that impact immigration, particularly as it impacts their available labor force. United States employers who recruit highly skilled workers from abroad typically sponsor their employees for permanent residence. Other employers who need a large labor force, particularly for low-skill work, often look to immigrants to fill positions.

Employers are also impacted by requirements to monitor the immigrant status of employees. Following the Immigration Reform and Control Act (IRCA) of 1986, it became illegal to knowingly employ undocumented immigrants. Many employers are now required by state law or federal contract to use the e-verify program to confirm that prospective employees are not undocumented immigrants. Such requirements aim to reduce incentives for undocumented immigration, but also pose burdens of liability and reduced labor availability for employers. The National Council of Farmer Cooperatives (2015) and the American Farm Bureau Federation oppose measures that could constrict immigration such as the E-Verify program, stating that it could have a detrimental impact on the country's agriculture.



Migrant worker.

Bread for the World – Migrant Worker and Cucumbers, Blackwater, VA – CC BY-NC-ND 2.0.

Current workforce. Overall, research demonstrates that immigration increases wages for United States-born workers (Ottaviano & Peri, 2008; Ottaviano & Peri, 2012; Cortes, 2008; Peri, 2010). Estimated increases in wages from immigration range from .1 to .6% (Borjas & Katz, 2007; Ottaviano & Peri, 2008; Shierholz, 2010). However, these wage increases are not unilaterally and consistently distributed across time, skill and education levels of workers. Some researchers have found that low-education workers have experienced wage decreases due to immigration, as large as 4.8% (Borjas & Katz, 2007). However, other researchers have found that among those without a high school diploma, wages decreased by approximately 1% in the short run (Shierholz, 2010; Ottaviano & Peri, 2012) but were increased slightly in the long run (Ottaviano & Peri, 2012).

Immigration generally does not decrease job opportunities for United States-born workers, and may slightly increase them (Peri, 2010). However, during economic downturns when job growth is slowed, immigration may have short-term negative effects on job availability and wages for the current workforce (Peri, 2010). Immigrants create growth in community businesses (see Textbox 1, “Did you know”). It is nonetheless important to emphasize that the fear of non-citizens taking away employment opportunities from citizens is a primary driver for immigration laws (Weissbrodt & Danielson, 2011).

Communities. United States communities must provide education and health care regardless of immigration status (i.e., Plyer v. Doe, 1982). In areas with rapidly increasing numbers of immigrant workers and their families, this can tax local communities that are already overburdened (Meissner, Meyers, Papademetriou & Fix, 2006). The Congressional Budget Office found that most state and local governments provide services to unauthorized immigrants that cost more than those immigrants generate in taxes (2007). However, studies have found that immigrants may also infuse new growth in communities and sustain current levels of living for residents (Meissner, Meyers, Papademetriou & Fix, 2006).

Country. Immigrants provide many benefits at a national level. Overall, immigrants create more jobs than they fill, both through demand for goods and service and entrepreneurship. Foreign labor allows growth in the labor force and sustained standard of living (Meissner, Meyers, Papademetriou & Fix, 2006). Even though immigrants cost more in services than they provide in taxes at a state and local governments level, immigrants pay far more in taxes than they cost in services at a national level. In particular, immigrants (both documented and undocumented) contribute billions more to Medicare through payroll taxes than they use in medical services (Zallman, Woolhandler, Himmelstein, Bor & McCormick, 2013). Additionally, many undocumented immigrants obtain social security cards that are not in their name and thereby contribute to social security, from which they will not be authorized to benefit. The Social security administration estimates that $12 billion dollars were paid into social security in 2010 alone (Goss et al., 2013).

Textbox 1

Did you know?

While immigrants make up 16% of the labor force, they make up 18% of the business owners

Between 2000 and 2013, immigrants accounted for nearly half of overall growth of business ownership in the United States (Fiscal Policy insitute, 2015).

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14.1.2: Current Immigration Policy

Current Immigration Policy

Although the decision to migrate is generally made and motivated by families, immigration policy generally focuses on the individual. For example, visas are granted to individuals, not families. In this section, we will describe the immigration policies that are most influential for today's families. For an overview of all immigration policies and their historical context, please see Appendices 1-4 (The History of Documented Immigration Policy 1850s-1920s, 1920s-1950s, 1950s to Present, and the History of Undocumented Immigration Policy, respectively).

In the landmark decision of Arizona et al. v. United States (2012), Associate Justice Anthony Kennedy remarked that "The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here."

1952 McCarran-Walter Act: This act and its amendments remains the basic body of immigration law. It opened immigration to all countries, establishing quotas for each (US English Foundation, 2014). This act instituted a priority system for admitting family members of current citizens. Admission preference was given to: (1) unmarried adult sons and daughters of United States citizens; (2) spouses and unmarried sons and daughters of United States citizens; (3) professionals, scientists, and artists of exceptional ability; and (4) married adult sons and daughters of United States citizens. This meant that more families from more countries had the opportunity to reunite in the United States.

1965 Hart-Celler Immigration Act or Immigration and Nationality Act and 1978 Amendments. In this act, the national ethnicity quotas were repealed. Instead, a cap was set for each hemisphere. Once again, priority was given to family reunification and employment skills. This act also expanded the original four admission preferences to seven, adding: (5) siblings of United States citizens; (6) workers, skilled and unskilled, in occupations for which labor was in short supply in the United States; and (7) refugees from Communist-dominated countries or those affected by natural disasters. This expanded the opportunities for family members to reunite in the United States.

1990 Immigration Act. This act eased the limits on family-based immigration (US English Foundation, 2014). It ultimately led to a 40% increase in total admissions (Fix & Passel, 1994).

Deferred Action for Childhood Arrivals. The Dream Act, proposed in the Senate in 2001, would allow for conditional permanent residency to immigrants who arrived in the United States as minors and have long-standing United States residency. While this bill has not been signed into law, the Obama administration has created renewable two-year work permits for those who meet these standards. This has the largest impact on undocumented families. Many children travel to the United States without documents to be with their families, and then spend most of their lives in the United States. If the bill passed, these children would have new opportunities to pursue higher education and jobs in the land they think of as home, without fear of deportation.

2000 Life Act and Section 245(i). This allowed undocumented immigrants present in the United Sttes to adjust their status to permanent resident, if they had family or employers to sponsor them (US English Foundation, 2014).

2001 Patriot Act: The sociopolitical climate after the September 11, 2001 terrorist attacks drastically changed immigrant policies in the United States. This act created Immigration and Customs Enforcement (ICE) and Citizenship and Immigration Services (CIS), greatly enhancing immigration enforcement.

2005 Bill. The House of Representatives passed a bill that increased enforcement at the borders, focusing on national security rather than family or economic influences (Meissner, Meyers, Papademetriou & Fix, 2006).

2006 Bill. The Senate passed a bill that expanded legal immigration, in order to decrease undocumented immigration (Meissner, Meyers, Papademetriou & Fix, 2006).

As these policies indicate, it is currently very difficult to enter the United States without documentation. There are few supports available to those who do make it across the border (see Table 1). However, the 2000 Life Act and the Dream Act provide some provisions for families who live in the United States to obtain documentation to remain together, at least temporarily.

For families who want to immigrate with documentation, current policy prioritizes family reunification. Visas are available for family members of current permanent residents, and there are no quotas on family reunification visas (See Textbox 2, "Process for

Becoming a Citizen). Even when family members of a current permanent resident are granted a visa, they are a long way from residency. They must wait for their priority date and process extensive paperwork. If a family wants to immigrate to the United States but does not have a family member who is a current permanent resident or a sponsoring employer, options for documented immigration are very limited.

Table 1

Supports available to documented and undocumented immigrants

What supports are available?	Documented Immigrants	Undocumented Immigrants
Free public education	X	X
Medical Services	X	X
Authorization to live and work in the United States	X	
Travel documents	X	
Social security	X	
Application for a driver's license	X	
Ability to request visas for spouse or unmarried child	X	
Ability to apply for welfare benefits	X	

Taken from US Citizenship and Immigration Services, 2010

Textbox 2

Process of Becoming a Citizen, also called "Naturalization"

File a petition for an immigrant visa. The first step of documented immigration is obtaining an immigrant visa. There are a number of ways this can occur:

- **For family members.** A citizen or lawful permanent resident in the United States can file an immigrant visa petition for their immediate family members in other countries. In some cases, they can file a petition for a fiancé or adopted child.
- **For sponsored employees.** United States employers sometimes recruit skilled workers who will be hired for permanent jobs. These employers can file a visa petition for the workers.
- **For immigrants from countries with low rates of immigration.** The Diversity Visa Lottery program accepts applications from individuals in countries with low rates of immigration. These individuals can file an application, and visas are awarded based on random selection.

If prospective immigrants do not fall into one of these categories, their avenues for documented immigration are quite limited. For prospective immigrants who fall within one of these categories, their petition must be approved by USCIS and consular officers. However, they are still a long way from residency.

Wait for priority date. There is an annual limit to the number of available visas in most categories. Petitions are filed chronologically, and each prospective immigrant is given a "priority date." The prospective immigrant must then wait until there is an available visa, based on their priority date.

Process paperwork. While waiting for the priority date, prospective immigrants can begin to process the paperwork. They must pay processing fees, submit a visa application form, and compile extensive additional documentation (such as evidence of income, proof of relationship, proof of United States status, birth certificates, military records, etc.) They must then complete an interview at the United States. Embassy or Consulate and complete a medical exam. Once all of these steps are complete, the prospective immigrant received an immigrant visa. They can travel to the United States with a green card and enter as a lawful permanent resident (US Visas, n.d.).

A lawful permanent resident is entitled to many of the supports of legal residents, including free public education, authorization to work in the United States, and travel documents to leave and return to the United States (Refugee Council USA, 2014). However, permanent resident aliens remain citizens of their home country, must maintain residence in the United States in order to maintain their status, must renew their status every 10 years, and cannot vote in federal elections (USCIS, 2015).

Apply for citizenship. Generally, immigrants are eligible to apply for citizenship when they have been a permanent resident for at least five years, or three years if they are married to a citizen. Prospective citizens must complete an application, be fingerprinted and have a background check, complete an interview with a USCIS officer, and take an English and civics test. They must then take an Oath of Allegiance (USCIS, 2012).

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14.1.3: Opportunities and Barriers for Immigrant Families

Opportunities and Barriers for Immigrant Families

The United States gives priority to family reunification, and has made great efforts to make the process of reunification accessible to immigrants. This provides new opportunities and security for immigrant families. However, there are still substantial challenges and barriers to families. In the sections below, we will describe the opportunities and barriers available to families in different configurations, including families seeking reunification, families living together in the United States without documentation, and couples in international marriages.

Reunification

As we outlined in the policy section, United States policy prioritizes family reunification, and immigrant and refugees' spouses and children are eligible to immigrate without visa quotas. The majority of current immigrants are family members being reunited with United States citizens or permanent residents.



USCIS providing answers about citizenship and immigration for soldiers and families at Army Community Services in Seoul.

US Army Garrison Red Cloud – U.S. Embassy answers immigration questions – CC BY-NC-ND 2.0.

In addition to these policies that promote family reunification, there are now more accepting policies to support reunification of gay citizens and their immigrant spouses. Historically, United States immigration policy has denied immigration to same-sex orientation applicants. Under the 1917 Immigration Act, homosexuality was grounds for exclusion from immigration. In 1965, Congress argued that gay immigrants were included in a ban on "sexual deviation" (Dunton, 2012). The ban against gay immigrants continued until 1990, when the Immigration and National Act was amended, removing the homosexual exclusion. Moreover, asylum has been granted for persecution due to sexual orientation (Dunton, 2012). Until 2013, immigrants and refugees could apply for residency or visas for their opposite-sex spouses. There was no provision made for same-sex partners. Following the overturn of the Defense of Marriage Act (DOMA), citizens and permanent residents can now sponsor their same-sex spouses for visas. United States citizens can also sponsor a same-sex fiancé for a visa (USCIS, 2014).

Despite these advances, there are two large challenges faced by immigrants seeking reunification. First, it requires substantial time and resources, including legal counsel, to navigate the visa system. Adults can petition for permanent resident visas for themselves and their minor children, but processing such applications can take years. Currently, children of permanent residents can face seven-year wait times to be accepted as legal immigrants (Meissner, Meyers, Papademetriou & Fix, 2006).

In some cases, children can age out of eligibility by the time the application is processed and the visa is granted. Such children then go to the end of the waiting list for adult visa processing (Brown, 2014). The 2002 Child Status Protection Act is designed to protect children against aging out of visa eligibility when the child is the primary applicant for a visa, but the act does not state if it applies if a parent was applying on behalf of their family (Brown, 2014). In the 2014 ruling to Cuellar de Osorio v. Mayorkas, the Supreme Court found that the child status protection act does not apply for children when a parent is applying on behalf of their family. Such young adults have already generally been separated from family for many years, and will now be separated for years or decades more.

Undocumented Families

For families who do not have a sponsoring family member, have a sponsoring employer, or originate from a country with few immigrants, the options for legal immigration to the United States are very limited. Those families who choose to travel to the United States face substantial barriers, including a perilous trip across the border, few resources, and constant threat of deportation.

One of the most dangerous times for undocumented families is the risky trip across the border. In order to avoid border patrol, undocumented immigrants take very dangerous routes across the United States border. The vast majority of all apprehensions of undocumented immigrants are on the border (while the remainder is apprehended through interior enforcement). For example, in 2014 ICE conducted 315,943 removals, 67% of which were apprehended at the border (nearly always by the Border Patrol), and 33% of which were apprehended in the interior (ICE, 2014). The trip and efforts to avoid Border Patrol can be physically dangerous and in some cases, deadly. The acronym ICE symbolizes the fear that immigrants feel about capture and deportation. A deportee in Exile Nation: The Plastic People (2014), a documentary that follows United States deportees in Tijuana, Mexico, stated that ICE was chosen as the acronym for the Immigration and Customs Enforcement agency because it "freezes the blood of the most vulnerable."

Even after arrival at the interior of the United States, undocumented immigrants feel stress and anxiety relating to the fear of deportation by ICE (Chavez et al., 2012). This impacts their daily life activities. Undocumented parents sometimes fear interacting with school, health care systems, and police, for fear of revealing their own undocumented status (Chavez et al., 2012; Menjivar, 2012). They may also avoid driving, as they are not eligible for a driver's license.

Since 2014, the Department of Homeland Security has placed a new emphasis on deporting undocumented immigrants. Department efforts generally prioritize apprehending convicted criminals and threats to public safety, but recent operations have taken a broader approach. In the opening weeks of 2016, ICE coordinated a nationwide operation to apprehend and deport undocumented adults who entered the country with their children, taking 121 people into custody in a single weekend. The majority of these individuals were families who applied for asylum, but whose cases were denied. Similar enforcement operations are planned (DHS press office, 2016). In many cases, the parents' largest concern is that immigration enforcement will break up the family. Over 5,000 children have been turned over to the foster care system when parents were deported or detained. This can occur in three ways:

- when parents are taken into custody by ICE, the child welfare system can reassign custody rights for the child,
- when a parent is accused of child abuse or neglect and there are simultaneous custody and deportation proceedings, and
- when a parent who already has a case open in a child welfare system is detained or deported (Enriquez, 2015; Rogerson, 2012).

"One of my greatest fears right now is for anybody to take me away from my baby, and that I cannot provide for my baby. Growing up as a child without a father [as I did], it's very painful… I felt like there was no male to protect them." – Mexican Immigrant describing how his fear of deportation grew after his baby daughter was born (Enriquez, 2015, p. 944)

Although the perilous trip and threat of deportation are significant challenges for undocumented immigrant families, there are two recent policy changes that offer new opportunities and protections for undocumented families. First, some states have sought to expand the educational supports available to undocumented immigrants. The State of Minnesota, for example, enacted the "Dream Act" into law (2013). This unique act, which is also known as the "Minnesota Prosperity Act," makes undocumented students eligible for State financial aid (State of Minnesota, 2014; Chapter 99, Article 4, Section 1).



Protesting for immigration reform.

Peoplesworld – CC BY-NC 2.0.

Second, there are now greater protections for unaccompanied children. In some cases, children travel across the border alone, without their families. They may be travelling to join parents already in the United States, or their parents may send them ahead to try to obtain greater opportunities for them. As a result of human rights activism, unaccompanied and separated immigrant children are now placed in a child welfare framework by licensed facilities under the care of the Office of Refugee Replacement (Somers, 2011). They provide for education, health care, and psychological support until they can be released to family or a community (Somers, 2011). Each year, 8,000 unaccompanied immigrant children receive care from the ORR (Somers, 2011).

Mixed Status Families

Some members of the family may have documentation, while the others do not. There may be cases where a United States citizen has applied for a visa for his family members, but they live without documentation while they wait for their priority date. Alternatively, there may be children who are born in the United States to undocumented parents. These children are entitled to benefits that their undocumented parents are not, such as welfare benefits (Peterson Institute for International Economics, 2005).

Children are subject to "multigenerational punishment," where they are disadvantaged because of their parents' undocumented status (Enriquez, 2015). As in undocumented families, parents fear interacting with school, health care, or police (Chavez et al., 2012; Menjivar, 2012).These children have limited opportunities to travel domestically (due to risks of driving without a license) or internationally (due to lack of travel papers) (Enriquez, 2015). When parents' employment opportunities are limited due to their lack of documentation, the children share in the economic instability (Enriquez, 2015).

"I'm still [supposed to be] perceived as this male provider… [but] we lost our place [after my job found out about my status], and now I'm [living] with my in-laws, and it's hard to find a great-paying job… It makes you feel like [people are saying]. 'How dare you do that to a little child.' It's hard because you do feel guilty, you feel that you're punishing someone that shouldn't be punished." –Mexican immigrant (Enriquez, 2015, p. 949)

International Marriages



Spouses of United States service members in Italy take the oath of allegiance to become United States citizens.

felicito rustique, jr. – CC BY 2.0.

In our increasingly global world, more couples are meeting and courting across national borders. Many of these couples ultimately seek to live together in the same country. In some cases, an immigrant travels to the United States and obtains citizenship, but still hopes to marry someone from their home country and culture. Under current United States policy, there are visas available for fiancés to immigrate to the United States. However, these relationships are screened. There are strict requirements to prove that the marriage is "bonafide." If a marriage is considered "fraudulent," the immigrant spouse can be detained and the native spouse can be fined. There are also limits to how many fiancé visas can be filed within a certain time frame, so that the same person cannot repeatedly apply for a fiancé visa with different partners (USCIS, 2005).

Regulations are in place to protect the non-citizen fiancés. In some cases, the United States citizen has much greater power than the non-citizen fiancé, and may exploit their lack of knowledge of English, local customs, and culture. The United States Government is required to give non-citizen fiancés information about their rights and resources, in an effort to prevent or intervene in cases of intimate partner violence (USCIS, 2005). A citizen can use an international marriage broker (IMB) to connect with a partner from their home country or another desired country. The International Marriage Broker Regulation Act of 2005 (IMBRA) states that the government must conduct criminal background checks on prospective citizen clients, in order to protect the welfare of the fiancés who will enter the United States (USCIS, 2005).

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14.1.4: Future Directions

Future Directions

There are two shifts in immigration policy that are critical for the well-being of families. First, policy should shift to accelerate family reunification for those families whose visas have been accepted. Families are currently separated from their children for years, caught in a holding pattern of waiting. This leads to stress, grief, and difficulty building relationships during key developmental times in a child's life. Accelerating processing applications and shorter wait times would facilitate greater family well-being.

Second, policy could provide greater protection for vulnerable children in undocumented or mixed-status families. In cases where a parent is deported, the child's welfare should be carefully considered in whether to leave the child in the care of a local caregiver or provide the option to send the child to the home country with their parent.

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14.1.5: Conclusion

Conclusion

Though there are substantial barriers to family reunification and well-being, there are also great opportunities. Never before has policy been so inclusive or aimed so intensely on family reunification. The case studies below outline different paths to immigration and family reunification. They demonstrate the opportunities and assistance which are available, as well as the challenges faced.

Case Study 1: Becoming a Citizen

Mr. and Mrs. Addisu, both in their early 70s, immigrated to the United States from Ethiopia nearly 15 years ago with sponsorship from their daughter and her United States-born husband. The couple was eager to learn English and embrace the different cultural values, which meant becoming citizens. They wanted to join the country that their child and grandchildren called home.

After filing the appropriate documentation, paying related fees, and waiting for several years, both Mr. and Mrs. Addisu were scheduled for their naturalization test. The Addisu's daughter helped them study the material. They particularly hoped that their parents could obtain citizenship so that the Addisus could take a long trip home to see their friends in Ethiopia, which they had not been able to do since moving to the United States with strict residency requirements.

But it quickly became apparent that Mr. Addisu had trouble learning English, which was primarily age-related. With assistance from a local church, Mr. Addisu applied for an English Language Exemption. This enabled him to exempt from the English language requirement and take the civics test in Oromo with the assistance of an interpreter.

Case Study 2: Family Reunification

Matias, a United States citizen, filed a petition to request a green card for his daughter Victoria who still lived in Mexico. Victoria had a 15-year old son and a 14-year daughter, who were listed on the petition as "derivative beneficiaries", eligible to receive a visa if their mother received one. Their petition was approved, and they waited for their priority date. Victoria and her son and daughter continued living in Mexico, they lived on a low income and in a violent neighborhood. They communicated regularly with Matias, and Victoria repeatedly expressed how excited she was to see her dad again, and to be able to provide a better life for her kids. She regularly checked on her application and the priority date, excited for its arrival.

The priority date arrived 7 years later. Victoria's children were now 22 and 21, and so they were no longer eligible to be derivative beneficiaries on Victoria's visa. When Victoria learned, she was distraught. She talked to every advocacy group she could find, but there were no options. There would have been services available to expedite their petition as the children approached adulthood, but she and Matias had been unaware.

Victoria talked with her children about the options; they could all remain together in Mexico, or she could travel to the United States and apply for them to join her. One of her children as now working, and the other was attending a technical school. They decided together that it would be best for Victoria to go on to the United States. Once she arrived and became a lawful permanent resident, she filed a petition for her kids to get a visa. It was approved. Once again, the family waited for their priority date. Now, Victoria was with her father, but separated from her kids. It was now her kids she was calling, saying, "I miss you, I am excited to see you, I hope we can be together soon, soon, soon." After 8 years, the priority date arrived. Victoria's children, now ages 29 and 30, joined their mother in the United States.

Discussion Questions

1. Think back on your own family history. If you had family immigrate to the United States, what policies were in place when they arrived?
2. What would motivate a family to immigrate without documentation? What might make them decide against it?
3. What challenges does a child face if their parents do not have documentation?
4. What are the arguments for making family reunification quicker and more accessible? What are the arguments against it?
5. What barriers did the families in the case studies have to reunification? What supports did they receive?

Helpful Links

Migration Policy Institute

- http://www.migrationpolicy.org/
- The Migration Policy Institute is “an independent, nonpartisan, nonprofit think tank in Washington, DC dedicated to analysis of the movement of people worldwide”. They have regular publications and press releases about trends in migration, both to the United States and internationally.

Statue of Liberty Oral History

- www.libertyellisfoundation.org/oral-history-library
- The Statue of Liberty – Ellis Island Foundation, Inc. keeps a database of oral histories of immigrants who came through Ellis Island during their migration to America between 1892 to 1954.

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SECTION OVERVIEW

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14.2.1: Fleeing Persecution and Separation from Family

Fleeing Persecution and Separation from Family

During those times everyone was afraid, and we taught the children very young to be afraid, so at the age of one or two, they already learned to be afraid and did not cry either.

-Mai Vang Thao, Hmong refugee

All refugees have experiences of loss and/or exposure to traumatic events, either personally or within their communities. Such experiences might include systematic discrimination and intimidation, civil war, ongoing military conflicts, forceful government expulsion from the country, ethnic cleansing, and even genocide. Families living in these contexts often experience violence, or they hear about it in their communities and have reason to fear it. Families' top priority is to find safety. However, even after they relocate, some families will experience the long-term effects from the traumatic stress they have experienced.



Kosovar refugees fleeing their homeland. [Blace area, The former Yugoslav Republic of Macedonia]

United Nations Photo – Kosovo refugees – CC BY-NC-ND 2.0.

"[The children's father] was hardly with us. He went off with the men and left us hiding in the jungles. In fact he had prepared that in the event that we could no longer stay, he would leave to Thailand, and the children and I, if captured by the communists, would stay behind since the communist soldiers would not kill us because we are only women and children."

-Mai Vang Thao, Hmong refugee

The conflicts and situations that cause people to flee their home countries often separate families. Families can become separated in the midst of a conflict or during the process of fleeing or migrating (families can also be separated during the resettlement process, see below). Even if parents and children are kept together through this arduous process, resettlement of an entire family unit (in many cultures, the family unit includes grandparents, aunts and uncles and their families) would rarely occur.

Separation from family members can be a source of guilt, loss, and added pressure. These losses of family ties and community support can often be characterized as ambiguous (Boss, 2006). When a family member dies, the loss is concrete, and the family can mourn. When family members are separated, there can be great ambiguity. Separated loved ones are physically absent but very present in the minds of their family members. Families have difficulty determining who is in the family, and what roles they play. This ambiguity can add to the stress of an already stressful migration. For example, youth separated from their parents during civil war wondered if their families had survived the fighting or had died. They described feelings of loneliness and intense depression. One child described, "The kids were most thinking – Are they alive or are they not alive?" (Luster, Qin, Bates, Johnson, & Rana, 2008, p. 449).

Wondering whether certain family members are alive or dead can cause individuals and families to become stuck with mixed feelings of hope, loss, guilt, and grief. These ambiguous losses compound the concrete losses of homes and family members. The impact of loss and traumatic events can be seen at both the individual and family level. In fact, one study found that the statistical

relationships between traumatic events, grief, depression, and PTSD are stronger at the family level than they are at the individual level (Nickerson et al., 2011). Separated individuals must find ways to accept and live with the ambiguity. As one child said of his separation from his parents, “It happened. I did not have any control over it. I just think I wish it did not happen. But it did and I could not do anything about it” (Luster et al., 2008, p. 449).

When refugees are able to remain with close family members, it can ease the strains of relocation and coping with the traumas experienced in the home country. In a study of refugees in Norway, Lie, Lavik, and Laake (2001) found that the presence of close family in Norway had a positive impact on mental health symptoms, especially for those with higher exposure to traumatic events. McMichael, Gifford, and Correa-Velez (2011) similarly found that family connection is particularly important for youth early in the resettlement process.

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14.2.2: Travel to Temporary Refuge

Travel to Temporary Refuge

"When it became so unsafe we could not stay anymore. Some of the men who had returned [from Thailand] were my uncles, and they said that if we wanted to go with them to Thailand they would help us out, so that is why we decided to leave for Thailand… I still remember lots of things about living in camp, such as the sicknesses, not enough water to drink, the very hot weather, and not enough food…Everything about it was bad. We were living on the Thai people's land, so they treated us any way they wanted. When the Hmong went to the flea market, they were beaten."

-Mai Vang Thao, Hmong refugee

In order to be a refugee, families must have traveled to a new country in order to escape persecution. Families generally cross the border into another country where they have heard that some aid is available. Charity or government organizations will set up refugee camps, which provide some shelter, medical care, and food.

Refugee camps are set up in response to a sudden and great need. Consequently, there are rarely enough resources for all of the families. Women are particularly at risk after a disaster. They may struggle to compete with men for resources (Viswanath et al., 2013). Post-disaster resources tend to have little sensitivity to needs of women, such as sanitary towels, diapers, or privacy or protection near restroom facilities (Viswanath et al., 2013; Fisher, 2010). Women experience increased sexual violence and domestic abuse following a disaster (Luft, 2008; Neumayer & Plumper, 2007; Anastario, Larrance, & Lawry, 2008; Viswanath et al., 2013).

Families can sometimes be separated during this stage of relocation. For example, children are sometimes sent ahead to another camp that is thought to be safer, leading to separation from their parents (Luster, Qin, Bates, Johnson, & Rana, 2008). This can lead to both vulnerability and feelings of loss.



Figure 1. Camp for Pakistani Refugees.

Al Jazeera English – Refugee camp – CC BY-SA 2.0.

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14.2.3: Family Admittance to the United States

Family Admittance to the United States

Once refugees have entered a new country, they can begin the road to refugee or asylee status in the United States. This process can be arduous and often takes over a year. The first step is a Refugee Status Determination, or RSD. An authorized official from the United Nations High Commissioner for Refugees will determine if an individual is considered a refugee under international, regional, or national law. The official will then determine if the person should return to their home country, resettle in the neighboring country, or resettle in a third country (such as the United States). Less than 1% of refugees worldwide are ever resettled in a third country (UNHCR, 2015).

How do you define “refugee”?

UNHCR: The UNHCR held a Council in 1951 on the Status of Refugees, and they created a definition of *refugee*. Their definition is summarized in this chapter, but the full text is included on page 14 of the Council notes: http://www.unhcr.org/3b66c2aa10.html.

United States: The full definition of *refugee* adopted by the U.S. government comes from the UNHCR definition. You can see the U.S. definition in Section 101(a)(42) of the U.S. Immigration and Nationality Act.

United States Policies about Refugee Admittance

The UNHCR or an authorized NGO can refer a refugee for admission to the United States. Each year, the United States prioritizes particular groups to be eligible for refugee status. The current priorities are:

- **Priority 1:** Cases that are identified and referred to the program by the United Nations High Commissioner for Refugees (UNHCR), a United States Embassy, or a designated non-governmental organization (NGO).
- **Priority 2:** Groups of special humanitarian concern identified by the U.S. refugee program.
- **Priority 3:** Family reunification cases (spouses, unmarried children under 21, and parents of persons lawfully admitted to the United States as refugees or asylees or permanent residents (green card holders) or United States citizens who previously had refugee or asylum status; PRM, 2014).

The United States President sets a refugee ceiling each year that identifies the number of refugees who can be granted refuge in the country (see the appendix for a brief history of United States Refugee policy). Limits for refugees allowed from particular world regions are also set. Asylees are not included in this number. These limits can be influenced by national security threats and political will. As an example, the number of admitted refugees across all refugee groups dropped from 68,925 to 26,788 following the terrorist attacks on September 11th, 2001 (Refugee Council, 2012). In recent years, the ceiling has been set at 70,000-80,000. In 2012 the refugee ceiling was set at 76,000 and a total 58,179 refugees came to the United States (Burt & Batalova, 2014). For the most up-to-date numbers of United States-admitted refugees and their countries of origin, see www.state.gov/j/prm/releases/statistics/

People who receive a referral for refugee status (not asylum seekers) work with a Resettlement Support Center to prepare their application. They then are interviewed by an officer from the United States Citizen and Immigration Services. Applying is free and applications can include a spouse, unmarried children, and occasionally other family members. All individuals approved as refugees are medically screened for infectious diseases, which could prevent entry to the United States. For a case example of this process, please see Ester’s Story.

In contrast, asylum seekers apply for asylum at a port of entry to the United States or apply within one year of arriving in the United States. There are two methods of seeking asylum: affirmative and defensive. In the affirmative asylum process, individuals file an application for asylum to the United States Citizenship and Immigration Services (USCIS). These individuals are free to live in the United States while their case is processed. In this past, a decision was required to be made within 180 days. However, due to expanding case loads, USCIS is currently unable to predict how long the process will take (USCIS, 2015). During the application processing time or the first 180 days after filing the application (whichever is shorter), these individuals are not authorized to work. In the defensive asylum process, an immigrant who is in the process of being removed from the United States may request asylum as a form of relief. This process can happen when an immigrant 1) was apprehended in or entering the United States without documentation or 2) was denied asylum after applying to USCIS asylum officers. If an immigrant requests asylum as a defense

against removal from the United States, they conduct removal proceedings in the immigrant court with the Excutive Office for Immigration Review. An Immigration Judge hears these cases and makes a final decision about eligibility for asylum (United States Immigration, 2011).

Many defensive asylum seekers are held in jails or detainment centers until they are paroled or a decision is made about asylum. They typically wear prison uniforms and are separated from opposite gendered family. This practice has been discouraged by the UNHCR and criticized by Human Rights First (Human Rights First, 2012). After an asylee declares a desire for asylum, he or she is interviewed to determine the credibility of the danger threat in their home country. If officials determine that there is a credible threat, there is still a process that must be followed before they are granted asylee status.

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14.2.4: Entering the United States

Entering the United States

"In my opinion this country is even harder to adjust to, harder to live in because… because there are lots of rules and laws that bind us here. It is much harder to do things in this country. I came at an old age already, and learning English does not come easy. Everything is much harder for me."

-Mai Vang Thao, Hmong refugee

Formal Supports

When refugees have been accepted for admittance to the United States, they are provided with a cultural orientation that can include information and education on basic English phrases, how to shake hands, interviewing for a job, using a western toilet, or the experience of flying on a plane. The International Organization for Migration provides a loan to refugees to cover their airplane ticket expenses from the United States government; they must repay this loan once they are resettled in the country.

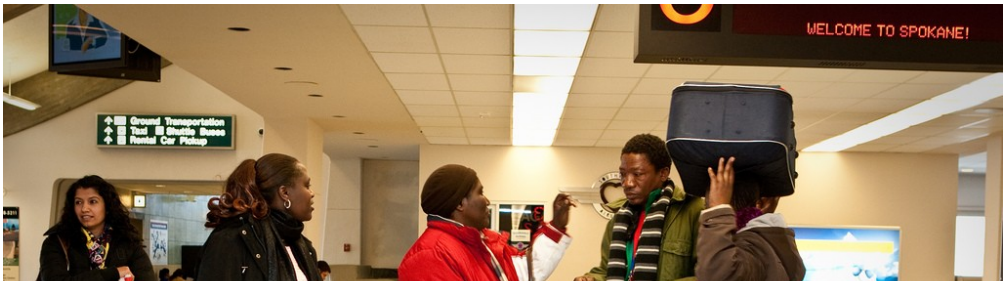
Once they arrive, the Office of Refugee Resettlement assigns a voluntary agency (VOLAG) to offer them help (see "Key Organizations in Refugee Admissions and Integration" for a full description of agencies involved in refugee resettlement and policy). These VOLAGs often meet the refugee at the airport and arrange for housing and basic furnishings. They teach the refugees how to purchase groceries and use transportation, and connect them with resources for employment and education. These services are only available for 30-90 days. Across organizations and across states, there is no consistent process for these relocation/integration services, and availability of and applications for resources may vary. In some states, refugees are also eligible for cash assistance or medical assistance beyond this 90 day period (Refugee Council USA, 2014).

Key Organizations in Refugee Admissions and Integration

The following organizations enforce refugee policy and/or help with refugee integration:

- **Bureau of Population, Refugees, and Migration (PRM):** PRM is a bureau under the U.S. Department of State, and it works internationally to develop human solutions to displacement. They provide funding to and work with international organizations such as the U.N. that operate refugee camps. The director of PRM also serves as the U.S. Coordinator for Refugee Affairs, and is responsible to the president to help develop policy relating to refugees, including admission ceilings and priorities.
- **Office of Refugee Resettlement (ORR):** ORR is an office within the Department of Health and Human Services. It works with state governments and provides funding for voluntary agencies to facilitate economic and social support to refugees.
- **Resettlement Support Centers (RSC):** These international organizations help prepare files and store data for those applying for refugee status.
- **U.S. Citizenship and Immigration Services (USCIS) and Customs and Border Protections (CBP):** USCIS evaluates applications for refugee status, and the CBP screens refugees when they arrive.
- **Voluntary Agencies (VOLAGs).** Voluntary agencies, such as Catholic Charities and Lutheran Immigrations and Refugee Services, have agreements with the State Department to provide reception and placement services for refugees. These agencies are funded through the State Department's Bureau of Population, Refugees, and Migration. VOLAGs often contract with the ORR to provide resettlement-related services.

The VOLAG works with sponsoring relatives when applicable, and will sometimes find an individual, church, or other private group that can assist with sponsorship if there is no sponsoring relative (Refugee Council USA, 2014). Refugees are eligible for all welfare benefits offered to citizens, such as Temporary Assistance for Needy Families and Medicaid.





Congolese family being met at the airport by their case worker.
World Relief Spokane - Welcome to Spokane – CC BY-NC-ND 2.0.

An Overwhelming Transition

Imagine waking up and finding that everything in your life has changed. Your bed is a different size, shared with a different number of people, and in a different location. You wake up to a new sound, and it is a different temperature than you expect. You get up and find that the only foods available are foreign to you. You try to go shopping, but you do not know how to navigate the transportation system. When you get there, the food all seem unfamiliar. You do not know how to pay for your food – the currency seems odd, and you also have a "money card" that you don't understand how to use. You cannot talk to anyone well. You come home and someone has put a piece of paper on the door, which you cannot read and do not know how to have translated.

After relocation, families must navigate a new completely new culture. Everything is new. Often, a family faces changes in every aspect of life. Betancourt, Abdi, Ito, Lilienthal, Agalab, & Ellis (2014) documented major shifts in the experiences of Somali refugee families in Boston, including:

- These Somali families lost resources during the flight from their home country, and arrived to the United States in poverty regardless of their previous status.
- Parents lost employment status, as their previous employment credentials were not accepted in the United States.
- Children were exposed to drugs, violence, and gain activity in the neighborhoods in which they were located.
- Despite this strained economic standing, families felt responsible to send money back to extended family in Somalia.
- Parent-Child authority structures shifted. Children who were more fluent in English withheld information about their situations at school.
- Children faced discrimination based on their nationality. Families were separated from extended support (Betancourt et al., 2014).

These changes, combined with encountering a completely new culture, would shake any family's coping skills. Unfortunately, the social supports available to refugees are difficult to access. Parents lack knowledge of how to navigate school systems and the health care system, and are further isolated from services by lack of transportation and financial resources (Isik-Ercan, 2012; Navuluri et al., 2014). Mental health services are frequently not culturally sensitive or geared towards refugees (Shannon et al., 2014; Weine, 2011).

After arriving in the United States, many states require or recommend that refugees receive a physical screening. In spite of the inherent exposure to potentially traumatic events, no states currently require mental health screenings. Some argue that screenings would be unethical without a referral infrastructure in place while others suggest that this is part of the process of addressing mental health concerns and working toward an infrastructure (for additional information about mental health among refugees, please see Chapter 5). After conducting focus groups with refugees about mental health needs, Shannon and her colleagues argue that existing infrastructures could be trained to be responsive to refugee needs. "Health care providers might require more training about how work collaboratively with new populations of refugees to assess the mental health effects of war" (2014, p. 13).

"Understanding and healing the symptoms of political oppression starts in the initial assessment with validating the ways that political trauma has rendered refugees 'voiceless.' Listening, documenting, and witnessing individual and community stories of exposure to human rights violations is credited as an essential component of restoring human dignity."

-Shannon, Wieling, Simmelink, & Becher, 2014, p. 11.

Applying for Citizenship

Refugee status is granted for one year. After that time, refugees are required to apply to become a permanent resident alien, which provides them with the commonly known 'green card' (Refugee Council, 2014). Asylees are also eligible to apply for permanent resident alien status, although it is not required. A permanent resident alien is entitled to many of the same supports as citizens, including free public education, authorization to work in the United States, and travel documents to leave and return to the United States (Refugee Council USA, 2014). However, permanent resident aliens remain citizens of their home country, must maintain residence in the United States in order to maintain their status, must renew their status every 10 years, and cannot vote in federal elections (USCIS, 2015). After being a permanent resident for five years, refugees and asylees can apply for citizenship (PRM, 2013).

Family Reunification

Once resettled, refugees are able to apply to bring certain family members to join them in the United States if they were not able to come together. In order to bring additional family members to the United States, refugees must apply within two years of being granted refugee or asylee status. Refugees are able to apply to bring a spouse or children who are unmarried, under 21 years old, and conceived before leaving. Only anchor or "principal applicant" refugees are allowed to apply to bring family members. A principal applicant is generally the first refugee from a family to arrive in the United States. These principal applicants then apply to bring their immediate family members. However, the family members coming to join a principle refugee will not be able to apply to bring additional family members (Refugee Council USA, 2014). For example, a refugee could apply to bring his/her parents, his/her wife, and their children to the United States. After they arrive, the wife/husband is not eligible to apply to bring her/his parents. This means that some refugees will continue to feel separated and isolated from loved ones.

The process for family reunification is onerous. Refugees currently residing in their host country and their family members awaiting permission to join them must both work through cumbersome systems in their respective countries. The anchor or principal applicant in the United States must file an application with USCIS, and must provide proof of their relationship to the family members (through birth or marriage certificates, receipts of remittances sent home, photographs, etc.). The family members in the home country must then complete visa interviews, medical examination, security background checks, and DNA testing (in the case of children).

At any stage along this process, the official can deny the application if they suspect fraud. If an adjudicator suspects fraud in the anchor refugee's application, they can request stronger evidence of the relationship. If they remain unconvinced that the refugee is telling the truth, they can deny the application. If officers suspect fraud during the visa interview process, they will decline the issue the visa. They may also decline visas for health reasons or for past criminal behavior. There are waivers available, but not all potential refugees are aware of the waivers. Denials require a written rebuttal, the processing of which can take many months. If the rebuttal is approved, the family members in the home country must complete the interviews again. Many lack the education or the resources to tackle these processes. Refugees may not even be aware that they are eligible for reunification, as there is no systematic way of informing them. Currently it is not clear how many family members eligible for reunification are able to complete the process and submit a full application (Haile, 2015).

There are supports available to help refugees through this process. The VOLAGs who assist with refugee resettlement generally have services available to assist in applications for family reunification. Local community organizations often also offer services to help prepare and complete applications. In Minnesota, for example, the Minnesota Council of Churches hosts weekly information sessions about family reunification eligibility and the application process.

Support from Afar

In cases where families cannot be or choose not to be reunited, refugees still find ways to provide support to one another. Refugees may support family and friends through remittances or may spend time and money trying to locate and bring family members to the United States. In other cases, some may forgo long terms gains, such as job training or college, to be able to immediately help others (Betancourt et al., 2014). While this may cause emotional distress for some, it can also be the source of motivation to make the most of their opportunities. Transnational family connections help refugees retain a sense of identity within their culture and family (Lim, 2009).

Resilience

Refugees are inherently survivors. They have experienced loss and traumatic events but have found ways to survive. For example, Somali refugee families in Boston used religious faith, healthy family communication, support networks, and peer talks to make new lives for themselves (Betancourt et al., 2014). Refugee youth take on new responsibilities after migration, including interpreting, providing financial support, and helping parents navigate services (Hynie, Guruge, & Shakya, 2012). The ways refugee individuals, families, and communities find and create support differ greatly. They draw on family and community resilience to find ways to continue to survive and, in many cases, thrive.

Refugee resilience is seen when they rebuild community networks in the cities to which they relocate. Others have formed organizations to protect and lobby for their communities, and others have been elected to public offices.



Keith Ellison – Congressman Ellison with Minnesota State Senator Mee Moua – CC BY 2.0.

Mee Moua: Senator Mee Moua is the first Hmong American woman to become a Minnesota State Senator. Moua came to the U.S. with her family in 1978 and has since worked her way up from the public housing projects of Appleton, Wisconsin to the State Capitol in St. Paul, Minnesota. Moua is also an accomplished attorney who lives with her mother, her husband, and their two children.

"The issue is not whether the Asian American politicians are ready, it's really whether America is ready."
For a complete interview about her path to the U.S., go to: www.pbs.org/searching/aap_mmoua.html.

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14.2.5: Future Directions in Policy and Refugee Family Support

Future Directions in Policy and Refugee Family Support

The United States is taking steps forward in its support of refugee families. For example, there previously has been no unified approach to relocating and supporting refugees. Procedures vary by state and by VOLAG. However, President Obama recently created the White House Task Force on New Americans specifically to create unified plans to “create welcoming communities and fully integrating immigrants and refugees” (White House, 2014).

However, there are more steps left to take. One international concern is the lack of protection for internally displaced persons. Those seeking a referral for refugee status complete the process from within the country to which they have fled. Internally displaced persons are not eligible for refugee status unless specifically identified by the President to be approved for refugee status. Additional steps may be necessary to protect those who face persecution but cannot, for whatever reason, flee to another country.

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14.2.6: Conclusion

Conclusion

Refugee Stories: Policy in Practice

In this chapter, we have described the policies and processes that drive refugee resettlement. In order to have a complete picture, it is important to see how these policies and processes impact the real families who experience them. The case study highlighted throughout this chapter and the case study below provide examples of the opportunities and barriers they face during their transition.

Case Study

"Ester, a refugee from the Democratic Republic of the Congo, was forcibly separated from five of her children during civil conflict in the early 2000s. She spent years in a refugee camp and was eventually resettled to North Carolina without her children. Upon arrival in the United States, she petitioned the USCIS to bring her children here. USCIS required that Esther provide birth certificates to prove her relationship to her children, all minors, but these documents did not exist. Incurring months of extra delay, Esther contacted relatives in the Congo who procured retroactive documentation of the relationship. USCIS then approved the petition and transferred the file to the United States Embassy in Kinshasa, Congo's capital. In order to continue processing, the children had to travel to Kinshasa for visa interviews. But the children lived on the other side of the country, hundreds of miles away, and the journey to Kinshasa was extremely dangerous. Esther had no choice, however, and raised money from her church to fly them to the capital in a small plane…. On the day of their interview, they were turned away from the embassy because they lacked the requisite paperwork, which was in the United States with Esther. Rescheduling the interview took months. During this time, the youngest child, Florence, went missing. She is presumed kidnapped or dead, and did not accompany her siblings to the United States to be reunited with their mother. When the remaining four children received a new interview…. Their visas were approved – nearly two years after Esther filed the petition."
-"Esther's Story" describes a true story presented in Haile, 2015.

Discussion Questions

1. Imagine you and your family were suddenly unsafe in the United States and feared for your life. What would you do? If you would leave the country, where would you go? How would you get there? How would you provide for your family in the meantime? How do you think you would be received there?
2. Why should a country receive refugee families?
3. What helps refugee families' well-being during relocation?
4. Where did Ester run into problems with the resettlement process?
5. What examples of resilience to you see in Ester's story? What is your reaction to the story's ending?
6. How might this have been avoided during the process of family reunification?
7. Are there policy recommendations you can see?

Helpful Links

Stories of Recent Immigrants and Refugees

- http://education.mnhs.org/immigration/
- This website, created by the Minnesota Historical Society, is a database of oral histories of recent immigrants. They have stories from Asian Indian, Filipino, Hmong, Khmer, Latino, Somali and Tibetan refugees and immigrants.

UNHCR Website

- http://www.unhcr.org/
- This is the website of the UN Refugee Agency. It has up-to-date news on refugee crises, needs, and resources.

USCIS United States Refugee Admissions Program Consultation & Worldwide Processing Priorities

- http://www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-worldwide-processing-priorities

- This website includes the current priorities for refugee admissions, and has links to resources to apply for travel documents, family reunification, and permanent resident status.

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