



CHAPTER 1

The Sources of and Limits on Criminal Law

A. Introduction

1. The Purpose of Criminal Law

What really is criminal law and what is its purpose? Rather than something lofty and separate from people's lives, criminal law is part of our society.

Legal commentator Henry M. Hart Jr. asked, "What do we mean by 'crime' and 'criminal'?"⁴ In answering his own question, Hart declared that criminal law, "like all law, is concerned with the pursuit of human purposes through the forms and modes of social organization."⁵ Therefore, criminal law is not so much a thing as a "method or process of doing something."⁶ Hart then explained:

The method operates by means of a series of directions, or commands, formulated in general terms, telling people what they must or must not do. Mostly, the commands of the criminal law are "must-nots," or prohibitions, which can be satisfied by inaction. Do not murder, rape, or rob." But some of them are "musts," or affirmative requirements, which can be satisfied only by taking a specifically, or relatively specifically, described kind of action. "Support your wife and children," and "File your income tax return."⁷

4. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemp. Prob.* 401, 402 (1958).

5. *Id.* at 403.

6. *Id.*

7. *Id.*

Criminal law's commands are not only "binding upon all those who fall within their terms," but enforced with punishment "for disobedience which the community is prepared to enforce."⁸

a) Morality and Blame

We blame criminals for committing crimes. In arresting, charging, convicting, and punishing a criminal, we as a society express moral outrage at the wrongdoer. It is the blameworthiness of crime that allows us to take criminals' property with fines, their liberty with incarceration, and their lives with executions. Centuries ago in England, the great legal commentator of the common law, William Blackstone, expressly linked morality and criminal law. As noted by commentator Arthur Leavens:

In writing about crimes "against private subjects," the core of what we regard as common law crimes, Blackstone distinguished them from purely private wrongs for which compensation could be sought: [T]he wrongs, which we are now to treat of, are of a much more extensive consequence; 1. Because it is impossible they can be committed without a violation of the laws of nature; of the moral as well as political rules of right: 2. Because they include in them almost always a breach of the public peace: 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil society. Upon these accounts it is, . . . the government also calls upon the offender to submit to public punishment for the public crime.⁹

Chief Judge Posner declared that there was an "important moral difference between criminals and noncriminals" which permitted our legislatures to make law "with regard to morality."¹⁰ In fact, a "traditional purpose of criminal punishment is to express moral condemnation of the criminal's acts."¹¹

Legal commentator Arthur Leavens explained that, in common law, "criminal punishment was reserved for the morally blameworthy."¹² Leavens noted that, at common law,

When common law judges applied *** the criminal law ***, they saw themselves as doing nothing more than giving formal recognition to behavioral norms already operative as a matter of societal consensus. Those who acted contrary to those norms were behaving at once immorally and unlawfully; the common law made no distinction between these two concepts. One who breached such a norm was by definition morally blameworthy and thus merited the formal censure of criminal conviction and punishment.¹³

Some have even seen blame as the essence of criminal law. One commentator has declared:

The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a court-room; a prisoner of war camp

8. *Id.*

9. Arthur Leavens, *Beyond Blame—Mens Rea and Regulatory Crime*, 46 U. Louisville L. Rev. 1, 8 n. 36 (2007), citing 4 William Blackstone, *Commentaries on the laws of England* 176–77 (1765).

10. *Milner v. Apfel*, 148 F 3d 812, 814 (1998). Otherwise, asked Posner, "How else to explain prohibitions against gambling, prostitution, public nudity, and masturbation, fornication, sodomy, the sale of pornography, sexual intercourse with animals, desecration of corpses, and a variety of other 'morals' offenses?" *Id.*

11. *Id.*

12. *Id.* at 8.

13. *Id.* at 9–11.

may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.¹⁴

If criminals are therefore “deserving” of punishment, what is the purpose of that punishment beyond simple vengeance?

b) The Principle of Legality and the Rule of Law

When Guantanamo Bay detainees challenged their confinement before the United States Supreme Court in the case, *Rasul v. Bush*, 175 members of both houses of the “Parliament of the United Kingdom of Great Britain and Northern Ireland” filed an amicus curia (“friend of the court”) brief in support of the detainees.¹⁵ Before weighing in on the particulars of the detainees’ concerns, the members of Parliament emphasized the need for governments to adhere to “the rule of law” as the “keystone of our existence as nations.”¹⁶ These members harkened back to April 1689, when, “almost a century before the Framers gathered in Philadelphia,” England crowned William and Mary king and queen after they swore “obedience to the laws of Parliament” and read “the Bill of Rights as part of their oaths.”¹⁷ This “English Bill of Rights,” as a “precursor to the American Bill of Rights,” created “strict limits on the Sovereign’s legal prerogatives,” and made the existence of any government power “a matter of law.”¹⁸ The amici asked the Supreme Court to recognize “the need for independent judicial examination of the factual and legal bases justifying the indefinite confinement, without trial, of the detainees in Guantanamo.”¹⁹ The members of Parliament beseeched the court to “vindicate the rule of law under the Constitution and preserve the role of the courts in ensuring that the exercise of executive power over the detainees in Guantanamo will not be above the law.”²⁰

The members of Parliament purposely focused on the rule of law, for the United States has prided itself on being “a government of laws and not of men.”²¹ Unlike France in the age of Louis XIV, who famously proclaimed, “I am the State,” America is the nation where no one is above the law. The rule of law, when applied to criminal law, has led to the “principle of legality.” This doctrine of criminal law deems that “conduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal.”²² The court in *State v. Robbins* declared that the principle of legality:

is based on four interconnected rules or principles: (1) the ancient rule of *nullem crimen sine lege* (“No crime without law”); (2) the prohibition of retroactivity criminalizing conduct

14. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 403–05 (1958), quoting Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 Bu.U.L. Rev. 176, 193 (1953).

15. Brief of 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Petitioners 2003 U.S. Briefs 334 (2004)(hereinafter Parliament’s Brief).

16. *Id.* at 2.

17. *Id.* at 18.

18. *Id.*

19. *Id.* at 3.

20. *Id.* at 28.

21. John Adams, *The Novanglus Letters*, No. vii, at: <http://learning.hccs.edu/faculty/robert.tierney/govt2302/substantive-course-materials/unit-ii/readings-handouts/john-adams-government-of-law-not-men>, and <http://www.john-adams-heritage.com/quotes/>.

22. *State v. Robbins*, 986 So. 2d 828, 835 (2008).

(e.g. *ex post facto* laws); (3) the ancient rule of *nullem poena sine lege* (“no punishment without law”)(This principle operates to prevent a heavier penalty than that authorized by statute); and (4) the prohibition against imposition of more severe penalties than previously authorized.²³

As suggested by the above passage, the principle of legality actually combines several concepts into one doctrine. The *ex post facto* prohibition mentioned by *Robbins* is fully discussed in the “Limits on Criminal Law” section below. The principle of legality also has been interpreted to mean, “conduct may not be treated as criminal unless it has been so defined by [a competent authority . . . before it has taken place.]”²⁴ This in turn brings up the notion of fair notice and the need to avoid vague laws because “fair warning . . . in language that the common world will understand . . . of what the law intends to do if a certain line is passed” is a fundamental requirement of fairness.²⁵ The court’s rejection of vague laws is also discussed in the “Limits on Criminal Law” section below.

In “*A Man for All Seasons*,” the play and movie about the life of Sir Thomas More, the impetuous Roper urges More to make an arrest despite that fact that there has been no violation of the law, because there has been a violation of “God’s law.” Roper contended, “I’d cut down every law in England” to arrest the Devil. Thomas More vehemently rejected such reasoning, basing his argument on the principle of legality. More declared:

Oh, and when the last law was down, and the devil turned on you, where would you hide, Roper, all the laws being flat? This country is planted thick with laws from coast to coast, man’s laws not God’s, and if you cut them down—and you’re just the man to do it—do you really think that you could stand upright in the winds that would blow then?

Yes, I’d give the devil the benefit of the law, for my own safety’s sake.²⁶

Once the principle of legality is abandoned, how can one know what the law is or how to avoid violating it? “Hitler and Stalin were notorious for achieving terror partly by flouting the principle of legality.”²⁷ Instead of legality, the Nazis promulgated “the principle of analogy” as follows:

Whoever commits an act which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal law and sound perception of the people, shall be punished. If no determinate penal law is directly applicable to the action, it shall be punished according to the law, the basic ideal of which fits best.²⁸

Disguised within the lofty language of the “sound perception of the people” is the government power to criminalize conduct it deems “deserving of punishment” even though no law exists prohibiting

23. *Id.*

24. *United States v. Lanier*, 520 U.S. 259, 265, n. 5 (1997).

25. *Robbins*, 986 So. 2d at 835.

26. Robert Bolt, “*A Man for All Seasons*,” at: <http://www.geoffreylandis.com/quotes/allseasons2.html>, “*Arms and the Man, a Man for All Seasons, Play of Man and Conscience, Directed and Acted Admirably*,” *The Harvard Crimson*, July 15, 1966, at: <http://www.thecrimson.com/article/1966/7/15/arms-and-the-man-a-man/>. See the movie clip at: <http://www.youtube.com/watch?v=NUqytjHNMIM>.

27. Douglas N. Husak and Craig A. Callender, “*Wilful Ignorance, Knowledge, and the ‘Equal Culpability’ Thesis: A Study of the Deeper Significance of the Principle of Legality*,” 1994 Wisc. L. Rev. 29, 30 (1994).

28. *Id.*

such behavior. People could be arrested, prosecuted, and punished even if “no determinate penal law is directly applicable to the action.” Instead of people living their lives secure in the knowledge that their conduct need only fall within clear, public, and already-established rules, the Nazis could arrest on a whim anyone for anything. Such is the cost of ignoring the principle of legality.

c) Punishment

Punishment has been understood to serve four goals: (1) retribution, (2) deterrence, (3) incapacitation, and (4) rehabilitation.²⁹ “Deterrence, incapacitation, and rehabilitation are prospective and societal—each looks forward and asks: What amount and kind of punishment will help make society safe?”³⁰ Retribution, in contrast, solely focuses on the past,³¹ imposing punishment “based upon moral culpability and asks: What penalty is needed to restore the offender to moral standing within the community?”³²

1) Retribution

Retribution is essentially vengeance. This purpose of punishment:

involves the calculation of moral culpability, with society gauging the seriousness of the offense and the response that society believes an appropriate response to the offense. In general, retribution imposes punishment to reflect respect for the dignity of the victim. Stated otherwise, society stands with victims and exacts punishment in rough approximation to the detriment caused by the defendant. Retributive or “just deserts” theory considerations study the defendant’s past actions and the effect of these actions on the victim or victims of the crime, not the defendant’s probable future conduct or the effect that his or her punishment might have on others in society. In recent years, retribution has played a more important, if not dominating, role in sentencing determinations.³³ The judiciary has spoken of the public having a “legitimate interest in retribution.”³⁴

2) Deterrence

Deterrence aims to protect society by dissuading persons from committing crime. There are two kinds of deterrence: specific deterrence and general deterrence.

Deterrence has both a specific and a general function. Specific deterrence dissuades the particular defendant from engaging in criminal conduct. In contrast, general deterrence discourages others from engaging in similar criminal conduct.³⁵

29. *United States v. Cole*, 622 F. Supp. 2d 632, 637 (2008).

30. *Id.*

31. *United States v. Campos*, 1992 U.S. Dist. LEXIS 4005, 3 (1992).

32. *Cole*, 622 F. Supp. 2d at 637.

33. *Id.*

34. *State v. Pettit*, 661 P. 2d 767, 769 (1983).

35. *Cole*, 622 F. Supp. 2d at 638.

Deterrence rests “upon the assumption that rational consequences will result from the disincentives created by criminal laws and their enforcement.”³⁶ Since many criminal acts might be the result of impulsive or unreflective behavior, this assumption might lack some validity.

3) Incapacitation

Incapacitation is essentially isolation; the criminal is warehoused in prison so that he or she cannot cause harm to society.³⁷ One court has declared that the “purpose of incapacitation alone might warrant imposition of consecutive terms of imprisonment.”³⁸ This purpose seems particularly hopeless and harsh. However severe, there might be positive results of incapacitation. As explained by Professor Gray Sweeten in an April 16, 2013, article posted on Arizona State University’s website entitled *ASU News: Age and the Decline in Crime*, “Probation officers see firsthand the effect age has on crime. Typically, an offender will commit fewer crimes as he or she ages.”³⁹ The inevitable result of incapacitation is the passage of time, allowing an offender to age and therefore mature.

4) Rehabilitation

The punishment of imprisonment is meant to rehabilitate the prisoner. Many prisons, after all, are managed by a “Department of Corrections,” which aim to “correct” the behavior of inmates. Thus, “Rehabilitation, generally, endeavors to turn one person’s path.”⁴⁰ Courts are sometimes cautious about the potential for rehabilitation. In particular, the Court of Appeals of Idaho has noted in *State v. Pederson*, 857 P.2d 658 (1993),

The primary consideration is, and presumptively always will be, the good order and protection of society. All other factors are, and must be subservient to that end. Important as are the humanitarian considerations affecting the accused, his family and other relatives, and the importance to society of rehabilitation itself, such considerations cannot be allowed to control or defeat punishment, where other factors are ignored or subordinated to the detriment of society.⁴¹

In any given case, a sentencing judge should “balance the goals of retribution, protection of society (incapacitation), and deterrence against the defendant’s potential for rehabilitation.”⁴²

2. The Distinctions between Crimes and Torts

Criminal law is actually quite a small part of all law. All law that is not criminal is called civil law. In the long list of civil law are included such kinds as property law, contract law, and tort law. It is relatively easy to distinguish between criminal law and the civil law subjects of property law and contract law. Property law often involves a previously established relationship between the parties (such as buyer v.

36. *United States v. Campos*, 1992 U.S. Dist. LEXIS 4005, 3 (1992).

37. “The purpose of incapacitation is to protect society from further harm.” James Drago, *One for my Baby, One More for the Road: Legislation and Counseling to Prevent Prenatal Exposure to Alcohol*, 7 *Cardozo Women’s L.J.* 163 (2001).

38. *United States v. Spiers*, 82 F.3d 1274, 1281 (1996).

39. https://asunews.asu.edu/20130416_agefactors_crime.

40. *Cole*, 622 F. Supp. 2d at 638.

41. *State v. Pederson*, 857 P. 2d 658, 660–61 (1993).

42. *State v. Douglas*, 798 P. 2d 467, 469 (1990).

seller or landlord v. tenant) that provides a context in which to decide the disputants' rights. Contract law involves the contract—an agreement containing mutual promises between the parties—which again provides guidance in the dispute. In contrast, it is not always so easy to distinguish between crimes (public wrongs) and torts (private or civil wrongs). In fact, a particular wrongful act might be addressed in the courts as both a crime and a tort. For example, when O.J. Simpson's wife, Nicole Simpson, and her acquaintance, Ronald Goldman, were found killed, O.J. Simpson faced accusations in both criminal and civil court. The criminal case, which ended in acquittal, charged O.J. Simpson with the crime of murder of the two victims, while the civil case, which ended in a verdict finding Simpson liable, pursued him for money damages for the tort of "wrongful death."

While some overlap can occur, crimes and torts are two different kinds of wrong. Consider two hypothetical scenarios:

1. After visiting a bar where she drank heavily, Ann drives drunk on the wrong side of the freeway at speeds of 90 miles per hour. Her outrageous driving causes her to collide with Bud's car, killing him instantly. Ann is charged with the crime of murder.
2. Carl, driving in a parking lot, rear ends another driver's car because, in changing the radio station to which he was listening, he failed to pay adequate attention to his driving. Carl is sued civilly for the damage he caused to the other driver's car bumper. Carl has committed a tort.

Crimes involve such a serious tear in the social fabric that they are considered a wrong not just against the individual victim, but also against all of society. Therefore, crimes are known as "public offenses" and are vindicated by lawsuits brought by a prosecutor, who represents the "State" or the "People." In contrast, torts are private wrongs in which an individual is harmed. The stakes are so high with crimes that criminal law often employs greater procedural safeguards than does civil law. Thus, juries cannot reach a verdict in criminal trials unless they are convinced "beyond a reasonable doubt," the highest level of certainty which applies to human affairs relying on the frailties of individual perception and memory. With civil cases, juries can reach a verdict with the less demanding standard of "preponderance of evidence." (These differing levels of proof are fully discussed in the "Limits on Criminal Law" section below.) Likewise, the higher dangers facing the criminal defendant, who could in some cases be facing loss of liberty or even life, allow the accused the privilege against self-incrimination under the Fifth Amendment. With only money at stake, no such comparable right exists to protect civil defendants from civil liability. Finally, criminal law focuses on the criminal defendant, spending valuable resources determining what the defendant did and thought and weighing the purposes of his or her punishment (whether, as noted above, the penalty is meant to further retribution, deterrence, incapacitation, or rehabilitation). The focus in torts is on the victim because much time is spent determining the harm the victim has suffered and the various means to make him or her whole.

3. Law as Constant Change

Change in law is constant. Each day, with the legislature's passage of a new law, the prosecution's choice to file a case, and a court's handing down of a decision, law is created. Some changes can be dramatic, as when the Congress passes a new law, a state implements a new initiative approved by the voters, or a high court overturns a case. Yet, even on the slowest days and in the smallest cases, every time a court reaches a conclusion, law is created by increments. Because of this constant and inevitable change, students of law must be familiar with legal analysis, which allows adaption to any change in the law.

B. Legal Analysis

My favorite professor in law school told us that we were not in “law school,” but in “thinking school.” We were going to master the ability to think for ourselves, judge the merits of any argument, and effectively persuade others. The tool for accomplishing all of these tasks was legal analysis. Every student of law, lawyer, judge, and supreme court justice employs legal analysis. This thinking tool is vital to understanding law and its continuing evolution. Therefore, this book explains the law by using legal analysis.

Legal analysis employs “IRAC” or “FIRAC:” “F” for Facts, “I” for Issue, “R” for Rule, “A” for Analysis, and “C” for Conclusion.⁴³ When a lawyer reads a case, explains a matter to a client, or argues to a jury, he or she applies FIRAC. Legal analysis’ component parts can be explained more fully as follows:

1. Facts

Facts are the story or narrative of relevant events that create the setting of the crime or dispute. For example, in the hypothetical case of *People v. Ann*, where Ann killed Bud, the facts could be that Ann, angry at Bud for being promoted before her at work, came to work the next day with the intent to kill Bud. To carry out her plan, Ann, while still at home, hid a gun, which she made sure was loaded, in her purse. Ann then drove to work carrying the gun in her purse, sought out Bud in his office, and shot and killed him, yelling, “You may have gotten an early promotion, but I am giving you an early retirement!”

2. Issue

The issue is the legal question presented in the case. It is often said that the issue is the most important part of legal analysis because which question you ask determines which answer you get. Parties will frame issues so that courts will answer a case in their favor. With Ann, the issue is: “Is Ann guilty of murdering Bud?”

3. Rule

The rule is the tool that judges and lawyers use to answer the issue or question presented in the case. Without a rule, there can be no answer. Rules come from the following sources: (1) Statutes passed by legislatures, (2) Case law written by judges, (3) Administrative regulations promulgated by administrative agencies, and (4) Constitutions of states and the federal government. For criminal law, although administrative regulations and constitutions are certainly important, much of the law comes from statutes and case law, which will be discussed in “sources of law” below. For the case of Ann killing Bud, a statute, such as California’s Penal Code 187: Murder, could be used to see if Ann is guilty of murder for killing Bud. This statute defines “murder” as the “unlawful killing of a human being or fetus with malice aforethought.” Moreover, previous cases that have interpreted this statute for earlier killings could shed light on its meaning in this case.

43. One legal commentator has found that the “I.R.A.C. method is very familiar and comfortable to students.” Scott A. Schumacher, *Learning to Write in Code the Value of Using Legal Writing Exercises to Teach Tax Law*, 4 Pitt. Tax Rev. 103, 120 (2007).

4. Analysis

Analysis involves taking a rule of general application (such as Penal Code Section 187, which applies to all murders), and applying it to the individual case (such as Ann's shooting of Bud). Comparing the facts in Ann's case against the definition of murder in Penal Code 187 and the various cases with similar facts will allow the courts to determine if Ann is guilty of murder.

5. Conclusion

The conclusion is nothing more than the decision reached in the case. Instead of "concluding" that Ann is guilty of murder, courts say that they "hold" that Ann is guilty of murder. Thus, a court's conclusion is called its "holding." For example, in Ann's case, an appellate court might hold that, "the evidence is sufficient to support the jury's conviction of Ann for murder."

C. The General Principles of Criminal Liability—Elements of Crime

1. "Elements" as Necessary Ingredients to Crimes

Chances are that you have a favorite meal or dessert, which is based on a particular recipe. The recipe provides a specific list of ingredients and instructions for how to combine and prepare them. Any substitution of ingredients or any change in preparation, and you no longer have the original meal or dessert. To have the particular dish, one needs to faithfully stick to the specific recipe.

A criminal committing a crime is under the same mandate; to commit a specific crime, the criminal has to commit all the "elements"—the necessary ingredients—of that particular crime. If the criminal fails to commit even one of the required elements, he or she has failed in committing that particular crime. Likewise, prosecutors presenting a case to a jury must prove, beyond a reasonable doubt, that the defendant committed every element of the charged crime in order to prove guilt.

Both parties, aware of criminal law's requirement that each element of a crime must be established, often plan their strategies accordingly. Prosecuting attorneys, often called district attorneys, build their cases element-by-element just as a mason builds a wall brick-by-brick. Prosecutors will plan their cases by creating a witness list to ensure that they have a witness or a piece of physical evidence (an item such as a gun or fingerprint) to prove each element of the crime. As each witness testifies, the prosecutor can check off the element or elements the witness's testimony helped prove. If a witness is weak on a particular element, the prosecutor can call an additional witness to help establish that element or ingredient of the crime. Defense counsel, whether public defenders or private attorneys, are keenly aware that prosecutors must prove each element of a crime in order to gain a conviction of their client. A defense lawyer, therefore, plans a case by looking for the weakest link in the prosecution's proof. The defense attorney then hones in on and exploits this weakness by testing the witnesses that are called to establish this element. Defense attorneys can also call witnesses to disprove or cast doubt on a particular element. Many successful defenses are built not on proving the defendant's innocence (which is not required under our Constitution), but on establishing reasonable doubt as to any element of the charged crime. Even if the prosecution establishes four out of five elements needed for a crime, the case will end in acquittal if he or she failed to prove the fifth and last element.

A crime's elements, along with proof of the defendant's identity as the person committing those elements, form the crucial battleground in criminal cases. To fully understand a particular crime, and

the war waged in the courtroom regarding that crime, one must know the elements that make up the crime. Most of criminal law in trials, appellate courtrooms, and in this book amounts to an examination of the elements of crime and the defenses used to block them.

2. “Elements” as Fundamental Aspects of Crime

As noted above, crime is a unique behavior in society. All three branches of our federal and state governments treat crimes—the most extreme and blameworthy acts in our communities—as fundamentally different from all other wrongful acts. The term, “element,” is often used to identify those fundamental aspects of crime that together cause it to differ from all other activity. The fundamental elements of crime in this general sense are the evil or criminal act, known as “*actus reus*,” the evil or criminal intent, called “*mens rea*,” and causation. Although not all crimes need each of these elements (“strict liability” crimes, for instance, do not have a *mens rea* element in their definitions), and other kinds of behavior besides crime have wrongful intent and actions and can cause harm, these basic elements are often seen as distinguishing crime from other actions. The fundamental elements of crime—*actus reus*, *mens rea*, and causation, will be fully explored in Chapters 2, 3, and 4.

D. Sources of Criminal Law

1. Common Law Origins

When English colonists came to the New World to create their “City on a Hill,” they had trouble enough in carving out safety and sustenance from the wilderness. The colonists certainly did not have the luxury to reinvent the wheel when it came to law. They therefore employed the “Common Law” they brought with them from England. Thus, the common law that judges had created and gradually changed over centuries in England was the starting point for criminal law in the United States.

Many of the wrongs that are considered criminal today were first defined as crimes centuries ago in England. English judges, hearing individual cases in towns and shires, would decide cases by applying the customs and norms of the realm. Judges would write down their decisions, and the reasons for them, to explain their conclusions and to guide future courts. These cases came to form the case law of common law.

The California Supreme Court, in *People v. Williams* (2013) 57 Cal.4th 776, has explained the difference between the common law of England and the current law of statutes as follows:

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.” ***

Common law is significant not only because it provided the original substantive rules of our nation's criminal law, but also because it has influenced our law's structure and evolution.

**a) Common Law's Contribution to Our Law's Substance:
"Common Law" Crimes**

If you went up to someone and asked that person to name a crime, chances are he or she would name a crime that was created centuries ago at common law. Thus, when the person responded by saying, "Murder, rape, or robbery," he or she would be listing crimes that judges created in England. Although most of the crimes that leap to our mind when we hear "criminal law" are of ancient origin, states have now specifically defined these offenses in statutes passed by legislatures and signed into law. Still, if courts have questions about how to interpret these laws, the common law cases provide them a wealth of guidance. Further, many of the defenses to crime also have a common law origin, so that common law concepts are still important today.

b) Common Law's Contribution to Our Law's Structure: *Stare Decisis*

In the law, "as Justice Oliver Wendell Holmes, Jr., observed, 'a page of history is worth a volume of logic.'"⁴⁴ While lawyers pride themselves on presenting reasoned arguments and judges exalt logic in deciding cases, many of the legal decisions that are made daily are arrived at not by some brilliant proof of reason but simply because a judge follows a rule that some earlier jurist already created. Due to a doctrine known as *stare decisis*, the best judges do not set out to "make law" but simply apply earlier rules to today's cases. (Of course, even the most straightforward application of a past rule to current facts results in a slight change in the law, and therefore "makes law.") While this promotes consistency, and therefore reliability, in the law, it also brings truth to the idea that, "The past is never dead. It's not even past."⁴⁵ The doctrine of *stare decisis* is a legacy of the common law.

Stare decisis is defined in Black's Law Dictionary as Latin for:

To stand by things decided. The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.⁴⁶

Since the Common Law grew each day through the addition of ad hoc decisions in whatever cases happened to come before judges, it was not known for being systematic and organized. The common law received some clarification in the eighteenth century when William Blackstone published his treatise on the law, known as Blackstone's *Commentaries*. This work had an enormous influence not only in England, but also in the United States. Future presidents John Adams and Thomas Jefferson read Blackstone when studying to become lawyers. To this day, the United States Supreme Court quotes from Blackstone as one of the definitive sources regarding historical questions of law. Of particular interest to criminal law is the fourth volume of Blackstone's commentaries, entitled "Of Public Wrongs," meaning public offenses or crimes, which was published in 1769.⁴⁷

44. *People v. Williams*, (2013) 57 Cal. 4th 776, 790; *New York Trust Co. v. Eisner* 256 U.S. 345, 349 (1921).

45. William Faulkner, *Requiem for a Nun*.

46. *Black's Law Dictionary*, Ninth Edition (2009), edited by Bryan A. Garner.

47. William Blackstone, Esq., *Commentaries on the Laws of England*, Book the Fourth (Vol. IV), Oxford, 1769

(All quotations in this book from Blackstone's *Commentaries* will have updated spelling) (Hereinafter Blackstone's *Commentaries*).

2. Statutes

Although our nation first relied on England's common law as its starting point for criminal law, eventually the states passed statutes defining the crimes recognized in each jurisdiction. These statutes were collected, organized, and thus "codified" into "codes" such as the penal code. "American criminal law is codified in fifty-two criminal codes": the fifty states, the District of Columbia, and the federal law.⁴⁸ Statutes provide an effective vehicle for determining and defining which behavior should be "criminal." Statutes are passed by legislatures and signed by executives (the president or governor) into law. The legislatures and executives, being voted into office for relatively short terms, are the most representative branches of government and are therefore best positioned to speak for "society" in determining what behavior is so blameworthy as to be criminal. For most political scientists, the judiciary, which is either appointed to office or voted in for long terms, is too insulated to speak with authority as to what conduct should be deemed criminal. Furthermore, the passage of a statute provides every citizen with notice about what behavior should be avoided as criminal. (This process promotes the "principle of legality" discussed above.) In contrast, judges, in writing judicial opinions, often have an audience limited only to the parties in the particular case.

One example of a statute that vests the power to define what is a crime is California's Penal Code Section 6:

California Penal Code § 6 Effect of code upon past offenses

No act or omission, commenced after twelve o'clock noon of the day on which this code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this code, or by some of the statutes, which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township regulation, passed or adopted, under such statutes and in force when this code takes effect. Any act or omission commenced prior to that time may be inquired of, prosecuted, and punished in the same manner as if this code had not been passed.⁴⁹

3. Case Law

Statutes are notoriously hard to read. Legislators, in trying to predict the future, aim for precision regarding the minutest detail. They attempt to cover each and every outcome that could occur due to the new law, and therefore write laws that are filled with clauses and technical language. Also, try as they might, legislators cannot predict everything that might be relevant about new laws. The job of interpreting the statutes in individual cases and of clarifying language falls to judges. Being in the judiciary, a branch of government separate from the legislature, judges do not know what the lawmakers were intending when they created the law. So, they do their best to divine legislative intent by studying the language of the statutes, looking at them in the bigger context of other laws, and considering the facts of the particular case. In doing all of this, judges, tasked only with interpreting law, cannot help but

48. Paul H. Robinson and Markus Dirk Dubber, *An Introduction to the Model Penal Code*, at 1: <https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf>.

49. From *Deering's California Codes Annotated*. Copyright © 2014 by Matthew Bender & Company, Inc., a member of the LexisNexis Group. Reprinted with the permission of LexisNexis.

create law when writing the decisions in their cases. This case law is then read, interpreted, and followed by future judges and litigants. Over time, a large body of useful case law is therefore created.

Most of this case law comes from appellate courts. The federal government and nearly all states have a three-tiered system of courts with trial courts at the bottom and two levels of appellate courts (an intermediate “Court of Appeals” and the highest court, typically known as the “Supreme Court”) above. The trial courts, over which preside a single judge, try the “facts” of a case. In criminal cases, facts are the circumstances relevant to guilt. Examples of facts that a prosecutor might need to prove are the identity of the defendant as the criminal (the defendant was the one who committed the crime), the defendant’s actions (he or she killed someone or stole something), and the defendant’s mental state (he or she did something on purpose or recklessly). A jury or a judge⁵⁰ listens to witnesses, observes the exhibits, and decides what really happened—in other words, “finds the facts.” Since the jury finds the facts, it is called the “fact finder.” The jury is best placed to decide the facts because it sits nearest the witness stand, sees the trial as it unfolds, and physically handles the exhibits. Therefore, higher (appellate) courts “give deference to,” or respect, a jury’s factual determinations. It is not the appellate court’s job to find facts. Instead of hearing witnesses, they hear only the arguments of lawyers.

If appellate courts do not determine the facts in a case, what is left for them to do? Appellate courts decide the law, creating rules by writing “opinions.” Appellate courts are said to be “collegial bodies” because they have more than one judge (or, as they are known at the appellate level, “justice”). Most intermediate courts of appeal decide a case as a three-justice panel, while the United States Supreme Court has nine justices. The number of justices is odd so that the members of an appellate court can reach an agreement even in the most contentious of cases. For example, the closest ruling on the United States Supreme Court would be a 5 to 4 decision.⁵¹ Those justices voting with the larger number are among the “majority” and write the “majority opinion,” which has the force of law under *stare decisis*. The justices voting with the fewer number are left to write a “dissenting,” or disagreeing opinion, which does not have the force of law. A dissenting opinion can foreshadow a rule at some time in the future when the law evolves to recognize that its position was the right one all along. Since this book aims to teach the law, it is filled with appellate opinions, because it is the appellate court that gives the law instead of the facts. Rarely, a trial court opinion, such as a federal district court opinion, might be in the reading, but this is the exception.

4. Regulations

Laws limiting criminal behavior can also come from federal regulatory agencies, such as the Internal Revenue Service, the Environmental Protection Agency, and the Securities Exchange Commission. To empower these agencies with lawmaking authority, legislatures pass enabling legislation allowing agencies to fill in the many details needed to fulfill policy goals, such as effective collection of taxes (IRS), clean water, land, and air (EPA), and fair and honest trading of stocks (SEC). Although regulations are an important source of law, they tend to offer insight into narrow and technical issues. These rules are, therefore, not typically the focus of criminal law and will receive only brief treatment in this book.

50. A judge will decide the facts at a “court trial” or “bench trial” if the defendant has waived the right to a jury.

51. “Plurality” and “concurring” opinions are beyond the scope of this book.

5. Constitutions

The most powerful and fundamental laws of any nation or state are constitutions. Criminal laws must abide by the limits of constitutions and, therefore, constitutions affect the substance and scope of criminal laws. Constitutional law, however, is such a rich field in its own right that it is typically addressed in books focused exclusively on this subject. This book will consider constitutional issues only as they affect the criminal law.

6. The Model Penal Code

There is no single code of criminal law that applies to every state in the nation. The closest the law has come to creating a universal code is the American Law Institute's (ALI) Model Penal Code (MPC), originally drafted in 1962.⁵²

The ALI describes itself on its website as follows:

The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The Institute (made up of 4000 lawyers, judges, and law professors of the highest qualifications) drafts, discusses, revises, and publishes Restatements of the Law, model statutes, and principles of law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education. ALI has long been influential internationally and, in recent years, more of its work has become international in scope.

To learn more about the ALI, visit its website at:

<http://www.ali.org/index.cfm?fuseaction=about.overview>

The ALI often will offer “restatements” of a particular subject area of law, such as torts, which is meant to explain and “rationalize” the law.⁵³ The ALI, however, found the criminal law of all the states and federal government to be “too chaotic and irrational to merit ‘restatement,’” instead requiring the major overhaul of an entirely new model code—the Model Penal Code.⁵⁴

The MPC has enjoyed considerable success, influencing legislation in thirty-four states.⁵⁵ Courts have referred to the MPC to interpret various criminal law doctrines.⁵⁶ The MPC, however, did not affect every law involving crimes. Major jurisdictions, such as California and the federal system, have chosen not to accept the MPC.⁵⁷ Further, most states have elected to retain the power to reject some MPC innovations, such as MPC's general rejection of the felony murder rule.⁵⁸ Still, the MPC has made such a significant impact that this book will refer to it repeatedly.

52. “(T)he Model Penal Code, more than any other code, is the closest thing to being an American criminal code.” Paul H. Robinson and Markus Dirk Dubber, *An Introduction to the Model Penal Code*, at 1, 5, <https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf>.

53. *Id.* at 3.

54. *Id.*

55. *Id.* at 5.

56. *Id.* at 6.

57. *Id.*

58. *Id.* at 1.

Want to Join the ALI? Not Just Anyone Can

To become a member of the ALI, one must be an expert in his or her field, be ready to work in improving the law, and know someone in the institute. The ALI describes election to the ALI as follows:

Election of an individual to the ALI begins with a confidential nomination by an ALI member that is supported by two additional ALI members. In sponsoring a candidate for membership, the ALI member affirms his or her personal assessment that the candidate has demonstrated excellence in the law, is of high character, will contribute to the work of the Institute, and is committed to its mission to clarify and improve the law.

For more information on ALI members, visit:

<http://www.ali.org/index.cfm?fuseaction=membership.membership>

7. Legal Commentary

Legal commentators offer insight on legal issues in law review articles, treatises, or books. Although some judges or attorneys have been known to write law review articles or books while they are still in practice, many of these commentators often do not hold positions in the legislative, executive, or judicial branches of government. Their articles are not binding on courts or legislatures, but can offer persuasive authority to decision makers. Moreover, their analysis can bring clarity, perspective, or insight on the law, and so commentators will be considered in this book.

8. Jury Instructions

Lawyers, judges, and legislators try so hard to be precise that their language frequently bogs down in arcane terminology dealing with seemingly inconsequential details. Such gobbledygook is called “legalize.” While this language might suit lawyers and judges, it could be dangerous if misunderstood by juries deciding the fate of their fellow citizens. Further, since juries focus on deciding the facts—what happened in a particular case—they leave the decisions about the law to the trial judge. However, when jurors enter the deliberation room to decide guilt in a trial, they must apply the law to make sure they properly find the facts. The jurors obtain the law they will apply in the case from the trial judge, who “charges the jury” by reading the law to them in “jury instructions.” To ensure that jurors can properly apply the law, the jury instructions are stripped of all unintelligible legalese. The instructions are written in “plain language” so that all laypeople can understand them. These jury instructions are so informative that this book includes many of them in the web links at the end of chapters.

E. Limits on Criminal Law

1. Criminal Cases Must Be Proved Beyond a Reasonable Doubt

What if, as a juror, you thought it more likely than not that the defendant in a criminal case had committed a crime. However, you were not convinced “beyond a reasonable doubt” that he or she was guilty; you still had doubts as to his guilt that were reasonable, as opposed to imaginary or fanciful. What should you, as a juror, do? The criminal law requires that the prosecutor prove every element of his or her case “beyond a reasonable doubt” for conviction, and therefore you must vote to acquit. This is required even though you think that the defendant “probably” committed the crime. This result might seem contrary to common sense or efficiency—why allow a criminal to escape conviction and punishment even when you believe he or she likely is guilty?

The answer to this question mandates inquiry into the values at play in a criminal trial. The stakes in a criminal case are of the highest importance; the wrong to the victim is so egregious and awful that society demands justice, while the consequences facing the accused are so dire (loss of reputation, property, liberty, or even life) that the decision in the case must be checked by procedural safeguards. Therefore, the “more likely than not” level of certainty, which essentially amounts to the “preponderance of evidence” standard of proof where the side having to prove the case must convince the jury to a degree of certainty exceeding 50 percent, is simply not good enough for criminal cases. While civil cases can be decided by the “preponderance of evidence” standard, criminal trials must be proven “beyond a reasonable doubt.”

The United States Supreme Court, in the case, *In Re Winship*, 397 U.S. 358 (1970), held that the requirement that each element of a criminal case be proven beyond a reasonable doubt was a constitutional right. Justice Brennan, writing for the Court, explained:

The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The “demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula ‘beyond a reasonable doubt’ seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.” *** Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does “reflect a profound judgment about the way in which law should be enforced and justice administered.” ***

Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required. *** Mr. Justice Frankfurter stated that “it is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of ‘due process.’” *** In a similar vein, the Court has said *** that “guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust

convictions, with resulting forfeitures of life, liberty and property.” *** “No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.” ***

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock “axiomatic and elementary” principle whose “enforcement lies at the foundation of the administration of our criminal law.” *** “(A) person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.” ***

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. *** “There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.” To this end, the reasonable-doubt standard is indispensable, for it “impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.” ***

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the 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.

Justice Harlan, who wrote a concurring opinion, honed in on the purpose behind the constitutional “beyond a reasonable doubt” standard. He quoted the legal commentator, Wigmore, as follows:

The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be no successful method of communicating intelligibly . . . a sound method of self-analysis for one’s belief.

However vague the standards of proof are, Justice Harlan argued that, “the choice of the standard for a particular variety of adjudication does, I think, reflect the very fundamental assessment of the comparative social costs of erroneous factual determinations.” Justice Harlan recognized that,

(I)n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead all the factfinder can acquire is a belief of what *probably* happened.

Therefore, “There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account.” The two basic mistakes that can occur are “conviction of an innocent man” and “acquittal of a guilty man.” Justice Harlan urged that, “Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder . . . of his guilt beyond a reasonable doubt.” Justice Harlan thus concluded that, “In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as 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.”

2. Vagueness

How can a person abide by a law if he or she cannot figure out what it prohibits? How can police enforce such a law? These questions arise when a statute is so poorly written that courts deem it “**void for vagueness**.” As noted by LaFave and *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”⁵⁹ The classic case on this issue is *Kolender v. Lawson*, which is so significant, it has been cited in law reviews over 850 times.

Look for the court’s mention of a “**facial challenge**,” meaning that the defendant argues that the statute is so poorly written that just reading the statute, or looking at its “face,” reveals a constitutional flaw in the law.⁶⁰ Consider if the language, “credible and reliable” is so **vague that citizens cannot understand it** and so do not have **adequate notice** to conform their conduct to the law. Also think about whether **police might exploit such vagueness to arbitrarily apply** the law.

Legal Analysis

Kolender, Chief of Police of San Diego v. Lawson

461 U.S. 352 (1983).

Justice O’Connor delivered the opinion of the United States Supreme Court.

Facts

This appeal presents a facial challenge to a criminal statute that requires persons who loiter or wander on the streets to provide a “credible and reliable” identification and to account for their presence when

59. LaFave, *Criminal Law*, Fifth Edition at 109 (2010) (hereinafter *LaFave Criminal Law*).

60. *Black’s Law Dictionary*, Ninth Edition (2009) at 261, edited by Bryan A. Garner. In contrast, an “as-applied challenge” contends that the law is constitutional on its face but is applied to a particular matter in an unconstitutional way. *Id.*

requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio*, 392 U.S. 1 (1968).

[California Penal Code Ann. § 647(e) (West 1970) provides:

“Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.”⁶¹

Appellee Edward Lawson was detained or arrested on approximately 15 occasions between March 1975 and January 1977 pursuant to Cal. Penal Code Ann. § 647(e). Lawson was prosecuted only twice, and was convicted once. The second charge was dismissed.

[(The) trial transcript contains numerous descriptions of the stops given both by Lawson and by the police officers who detained him. For example, one police officer testified that he stopped Lawson while walking on an otherwise vacant street because it was late at night, the area was isolated, and the area was located close to a high crime area. *** Another officer testified that he detained Lawson, who was walking at a late hour in a business area where some businesses were still open, and asked for identification because burglaries had been committed by unknown persons in the general area. *** The appellee states that he has never been stopped by police for any reason apart from his detentions under § 647(e).]

Lawson then brought a civil action in the District Court for the Southern District of California seeking a declaratory judgment that § 647(e) is unconstitutional, a mandatory injunction to restrain enforcement of the statute, and compensatory and punitive damages against the various officers who detained him. *** The District Court enjoined enforcement of the statute. ***

*** The Court of Appeals affirmed [that § 647(e) was unconstitutional, determining that the statute contained] a vague enforcement standard that is susceptible to arbitrary enforcement, and it fails to give fair and adequate notice of the type of conduct prohibited. ***

Issue

Whether California’s loitering statute, which requires a suspect provide “credible and reliable” identification to an officer to avoid arrest, is so vague that it violates Fourteenth Amendment Due Process.

Rule and Analysis

*** Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. ***

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *** Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine “is not actual notice, but the other

61. From *Deering’s California Codes Annotated*. Copyright © 2014 by Matthew Bender & Company, Inc., a member of the LexisNexis Group. Reprinted with the permission of LexisNexis.

principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.” *** Where the legislature fails to provide such minimal guidelines, a criminal statute may permit “a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.” ***

Section 647(e), as presently drafted *** contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a “credible and reliable” identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets “only at the whim of any police officer” who happens to stop that individual under § 647(e). Our concern here is based upon the “potential for arbitrarily suppressing First Amendment liberties. . . .” *** In addition, § 647(e) implicates consideration of the constitutional right to freedom of movement.***

Section 647(e) is not simply a “stop-and-identify” statute. Rather, the statute requires that the individual provide a “credible and reliable” identification that carries a “reasonable assurance” of its authenticity, and that provides “means for later getting in touch with the person who has identified himself.” *** In addition, the suspect may also have to account for his presence “to the extent it assists in producing credible and reliable identification.” ***

At oral argument, the appellants confirmed that a suspect violates § 647(e) unless “the officer [is] satisfied that the identification is reliable.” *** In giving examples of how suspects would satisfy the requirement, appellants explained that a jogger, who was not carrying identification, could, depending on the particular officer, be required to answer a series of questions concerning the route that he followed to arrive at the place where the officers detained him, or could satisfy the identification requirement simply by reciting his name and address.***

It is clear that the full discretion accorded to the police to determine whether the suspect has provided a “credible and reliable” identification necessarily “[entrusts] lawmaking ‘to the moment-to-moment judgment of the policeman on his beat.’” *** Section 647(e) “furnishes a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,’” *** and “confers on police a virtually unrestrained power to arrest and charge persons with a violation.” *** Although the initial detention (might be) justified, the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement.

Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity. *** Section 647(e), as presently construed, requires that “suspicious” persons satisfy some undefined identification requirement, or face criminal punishment. Although due process does not require “impossible standards” of clarity, *** this is not a case where further precision in the statutory language is either impossible or impractical. ***

Conclusion

We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by

the requirement that a suspect provide a “credible and reliable” identification. (And we) conclude § 647(e) is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute. * Accordingly, we affirm the judgment of the court below.**

It is so ordered.

Note

Jeffrey Skilling of Enron infamy challenged his conviction relying in part on a vagueness challenge. The United States Supreme Court in *Skilling v. United States*, 561 U.S. 358 (2010) described the case as follows:

Founded in 1985, Enron Corporation grew from its headquarters in Houston, Texas, into one of the world’s leading energy companies. Skilling launched his career there in 1990 when Kenneth Lay, the company’s founder, hired him to head an Enron subsidiary. Skilling steadily rose through the corporation’s ranks, serving as president and chief operating officer, and then, beginning in February 2001, as chief executive officer. Six months later, on August 14, 2001, Skilling resigned from Enron.

Less than four months after Skilling’s departure, Enron spiraled into bankruptcy. The company’s stock, which had traded at \$90 per share in August 2000, plummeted to pennies per share in late 2001. Attempting to comprehend what caused the corporation’s collapse, the U. S. Department of Justice formed an Enron Task Force, comprising prosecutors and FBI agents from around the Nation. The Government’s investigation uncovered an elaborate conspiracy to prop up Enron’s short-run stock prices by overstating the company’s financial well-being. In the years following Enron’s bankruptcy, the Government prosecuted dozens of Enron employees who participated in the scheme. In time, the Government worked its way up the corporation’s chain of command: On July 7, 2004, a grand jury indicted Skilling, Lay, and Richard Causey, Enron’s former chief accounting officer.

These three defendants, the indictment alleged, “engaged in a wide-ranging scheme to deceive the investing public, including Enron’s shareholders, . . . about the true performance of Enron’s businesses by: (a) manipulating Enron’s publicly reported financial results; and (b) making public statements and representations about Enron’s financial performance and results that were false and misleading.” ***

Skilling and his co-conspirators, the indictment continued, “enriched themselves as a result of the scheme through salary, bonuses, grants of stock and stock options, other profits, and prestige.” ***

Upon conviction, Skilling appealed, arguing the law under which he was convicted was unconstitutionally vague. The Supreme Court disagreed, noting:

Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague. Recall that the void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions. See *Kolender*, 461 U.S., at 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903. A prohibition on fraudulently depriving another of one’s honest services by accepting bribes or kickbacks does not present a problem on either score.

3. *Ex Post Facto* Laws

Suppose you walk across the lawn in front of the courthouse. The next day, the government passes a law making it a felony to walk on the courthouse lawn and then police arrest you for violating the law before it was even passed. Such an unfair law is forbidden by the U.S. Constitution's *Ex Post Facto* prohibition.

The United States Supreme Court, in *Peugh v. United States*, 133 S. Ct. 2072 (2013), has recently discussed *Ex Post Facto* laws. *Peugh* noted:

The Framers considered *ex post facto* laws to be “contrary to the first principles of the social compact and to every principle of sound legislation.” The Federalist No. 44, *** (J. Madison). The Clause ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action.

The United States Supreme Court, in *Calder v. Bull*, 3 U.S. 386, 1 L. Ed. 648 (1798), discussed *ex post facto* laws. This case is particularly important because it was handed down in 1798, when most of the framers (who wrote the Constitution and therefore had a good idea of the “framer’s intentions”) were still alive. Justice Chase of the Supreme Court explained *ex post facto* laws as follows:

The Constitution of the United States, article 1, section 9, prohibits the Legislature of the United States from passing any *ex post facto* law; and, in section 10, lays several restrictions on the authority of the Legislatures of the several states; and, among them, “that no state shall pass any *ex post facto* law.” ***

I shall endeavour to shew what law is to be considered an *ex post facto* law, within the words and meaning of the prohibition in the Federal Constitution. ***

The plain and obvious meaning and intention of the prohibition is this; that the Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition considered in this light, is an additional bulwark in favour of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. ***

I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws, and retrospective laws. Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: The former, only, are prohibited. Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule, that a law should have no retrospect: but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning, and after, the facts committed. But

I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or encrease the punishment, or change the rules of evidence, for the purpose of conviction. ***

In other words, if a law acts retrospectively but also *helps or favors* a criminal defendant, such as pardoning him for a crime he has committed or reducing a sentence for a crime, it will not be forbidden as *ex post facto*, because it does not *take away rights or impose penalties* for past behavior, as do *ex post facto* laws do.

4. Bills of Attainder

Some conflicts are so painful and divisive that the victors find it difficult to forgive the vanquished. The victorious that hold power after rebellion or subversion might seek to punish a person or group of people by passing a law that applies penalties against persons without the protection of a trial. For instance, after the tragedies of September 11, should Congress pass a law punishing, without trial, all “known” terrorists? There are precedents for such legislation.

As seen below in *Cummings v. Missouri*, 71 U.S. 277 (1867), the state of Missouri, during Reconstruction after the Civil War—the bloodiest conflict the United States has ever endured—mandated that those wishing to practice a profession take a loyalty oath that, “he had never given aid or comfort to persons engaged in hostility to the United States” and had never “been a member of, or connected with, any order, society, or organization, inimical to the government of the United States . . .” As noted in *United States v. Lovett*, 328 U.S. 303 (1946) below, in the 1940s, Congress, in the thrall of the red scare, passed legislation cutting the pay of named individuals “found guilty of disloyalty.” The Supreme Court found the laws in both cases unconstitutional as bills of attainder.

In *Cummings v. Missouri*, Missouri’s Reconstruction Constitution required anyone practicing a profession take an “Oath of Loyalty” requiring him or her to:

deny not only that he has ever “been in armed hostility to the United States, or to the lawful authorities thereof,” but, among other things, that he has ever, “by act or word,” manifested his adherence to the cause of the enemies of the United States, foreign or domestic, or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in rebellion, or has ever harbored or aided any person engaged in guerrilla warfare against the loyal inhabitants of the United States, or has ever entered or left the State for the purpose of avoiding enrolment or draft in the military service of the United States; or, to escape the performance of duty in the militia of the United States, has ever indicated, in any terms, his disaffection to the government of the United States in its contest with the Rebellion.

Missouri imposed a penalty for failure to take the oath as follows:

Every person who is unable to take this oath is declared incapable of holding, in the State, “any office of honor, trust, or profit under its authority, or of being an officer, councilman, director, or trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority, or of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation.”

The State convicted Cummings, “a priest of the Roman Catholic Church,” for “teaching and preaching as a priest and minister of that religious denomination without having first taken the oath.”

The Supreme Court first considered whether Cummings suffered “punishment” for purposes of a bill of attainder. It noted:

“Some punishments,” says Blackstone, “consist in exile or banishment, by adjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like.”

The court reasoned that since punishment was not restricted to “the deprivation of life, liberty, or property,” but included “deprivation or suspension of political or civil rights,” the “disabilities prescribed by the provisions of the Missouri constitution” were “in effect punishment.” Finding that Missouri’s statute created a punishment, the Court moved on to consider whether it was a bill of attainder. *Cummings* explained:

“No State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.”

A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; *** it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence.

“Bills of this sort,” says Mr. Justice Story, “have been most usually passed in England in times of rebellion, or gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others.” ***

These bills are generally directed against individuals by name; but they may be directed against a whole class. The bill against the Earl of Kildare and others, passed in the reign of Henry VIII, enacted that “all such persons which [are or were] comforters, abettors, partakers, confederates, or adherents unto the said” late earl, *** “in his or their false and traitorous acts and purposes, shall in likewise stand, and be attainted, adjudged, and convicted of high treason;” and that “the same attainder, judgment, and conviction against [the comforters, etc.], shall be as strong and effectual in the law against them, and every of them, as though they and every of them had been specially, singularly, and particularly named by their proper names and surnames in the said act.”

These bills may inflict punishment absolutely, or may inflict it conditionally. ***

“A British act of Parliament,” *** “might declare, that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury.” ***

If the clauses of *** the constitution of Missouri, to which we have referred, [had declared “Mr. Cummings” guilty by specifically mentioning his name,] and, therefore, should be deprived of the right to [preach or teach], there could be no question that the clauses would constitute a bill of attainder ***. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the Federal Constitution.

In all these cases there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.

The results which would follow from clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. *** The deprivation is effected with equal certainty in the one case as it would be in the other. *** The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. [The] rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding. ***

Our next case, *United States v. Lovett* provided the following facts:

In 1943 the respondents, Lovett, Watson, and Dodd, [were employees of] government agencies which *** were fully satisfied with the quality of their work and wished to keep them employed on their jobs. Over the protest of those employing agencies, Congress provided in § 304 of the Urgent Deficiency Appropriation Act of 1943, *** no salary or compensation should be paid respondents *** unless they were prior to November 15, 1943 again appointed to jobs by the President with the advice and consent of the Senate. [Despite the lack of reappointment,] the agencies kept all the respondents at work on their jobs *** after November 15, 1943; but their compensation was discontinued after that date. To secure compensation for this post-November 15th work, respondents [sued, arguing that § 304 was unconstitutional and void as a bill of attainder.]

The *Lovett* Court then considered if Congress, in passing Section 304, had created an unconstitutional bill of attainder. *Lovett* noted:

Our inquiry is thus confined to whether *** § 304 is a bill of attainder against these respondents, involving a use of power which the Constitution unequivocally declares Congress can never exercise. ***

In the background of the statute here challenged lies the House of Representatives' feeling in the late thirties that many "subversives" were occupying influential positions in the Government *** and that their influence must not remain unchallenged. As part of its program against "subversive" activities the House in May 1938 created a Committee on Un-American Activities, which became known as the Dies Committee, after its Chairman, Congressman Martin Dies. *** This Committee conducted a series of investigations and made lists of people and organizations it thought "subversive." *** The creation of the Dies Committee was followed by provisions *** which forbade the holding of a federal job by anyone who was a member of a political party or organization that advocated the overthrow of our constitutional form of Government in the United States. It became the practice to include a similar prohibition in all appropriations acts, together with criminal penalties for its violation. Under these provisions, the [FBI] began wholesale investigations of federal employees. *** Thousands were investigated. ***

While all this was happening, Mr. Dies [in a House speech] attacked thirty-nine named government employees [including the three respondents] as "irresponsible, unrepresentative, crackpot, radical bureaucrats" and affiliates of "Communist front organizations." [Dies said all thirty-nine employees were] unfit to "hold a Government position" and urged Congress to refuse "to appropriate money for their salaries." [He] proposed that the Committee on Appropriations "take immediate and vigorous steps to eliminate these people from public office." [Congress then amended the Treasury-Post Office Appropriation Bill to provide] that "no part of any appropriation contained in this act shall be used to pay the compensation of" the thirty-nine individuals Dies had attacked. *** All of those participating agreed that the "charges" against the thirty-nine individuals were serious. Some wanted to accept Congressman Dies' statements as sufficient proof of "guilt," while others referred to such proposed action as "legislative lynching," *** smacking "of the procedure in the French Chamber of Deputies, during the Reign of Terror." *** The Dies charges were referred to as "indictments," and many claimed this made it necessary that the named federal employees be given a hearing and a chance to prove themselves innocent. *** Congressman Dies then suggested that the Appropriations Committee "weigh the evidence and . . . take immediate steps to dismiss these people from the Federal service." *** The resolution which [passed authorized the Appropriations Committee investigate the allegations that the named employees were] unfit to continue in such employment by reason of their present association or membership or past association or membership in or with organizations whose aims or purposes are or have been subversive to the Government of the United States." ***

[The] Appropriations Committee held hearings in secret executive session. Those charged with "subversive" beliefs and "subversive" associations were permitted to testify, but lawyers, including those representing the agencies by which the accused were employed, were not permitted to be present. At the hearings, committee members, the committee staff, and whatever witness was under examination were the only ones present. The evidence, aside from that given by the accused employees, appears to have been largely that of reports made by the Dies Committee, its investigators, and [FBI] reports, the latter being treated as too confidential to be made public.

[The committee found respondents Watson, Dodd, and Lovett] guilty of having engaged in "subversive activity within the definition adopted by the committee" [and therefore] unfit

for the present to continue in Government employment.” [The committee submitted its report and Section 304 to the House.]

We hold that § 304 falls precisely within the category of congressional actions which the Constitution barred by providing that “No Bill of Attainder or ex post facto Law shall be passed.” In *Cummings*, this Court said, “A bill of attainder is a legislative act which inflicts punishment without a judicial trial. ***” On the same day the *Cummings* case was decided, the Court, in *Ex parte Garland* 4 Wall. 333, also held invalid on the same grounds an Act of Congress which required attorneys practicing before this Court to take a similar oath. Neither of these cases has ever been overruled. They stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. Adherence to this principle requires invalidation of § 304. We do adhere to it.

Section 304 was designed to apply to particular individuals [because] it “operates as a legislative decree of perpetual exclusion” from a chosen vocation. [A permanent ban on serving in government is a severe punishment.] It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, *** acceptance of bribes by members of Congress, *** or by other government officials, *** and interference with elections by Army and Navy officers. ***

Section 304 [punishes] named individuals without a judicial trial. The fact that the punishment is inflicted [by] cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal. No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson “guilty” of the crime of engaging in “subversive activities,” defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and “determined by no previous law or fixed rule.” The Constitution declares that that cannot be done either by a State or by the United States. ***

Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. *** And even the courts to which this important function was entrusted were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him. *** When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder. Section 304 is one. ***

Section 304 therefore does not stand as an obstacle to payment of compensation to Lovett, Watson, and Dodd. ***

5. Double Jeopardy

Is Charging a Defendant for Murder When the Victim Died After the Defendant Already Served a Prison Term for Assault for the Same Act a Violation of the Protection Against Double Jeopardy?

Ian Urbina reported on September 19, 2007, in the *New York Times* article, "New Murder Charge in '66 Shooting," that new charges were filed forty-one years after the original incident.

According to his sister, the victim, as a result of being shot, lived a life of pure "agony." Besides double jeopardy, a host of issues also arise regarding whether Barnes' shooting actually caused the death of the officer, who had suffered two car accidents and a hepatitis infection after the shooting.

The full article can be viewed at:

<http://www.nytimes.com/2007/09/19/us/19philadelphia.html?pagewanted=all& r=0>

In an article in "*Philly Mag*," on December 22, 2009, entitled, "William Barnes Profile: This Man Shot a Cop In a case that may change how we think of justice, the D.A. wants him to go to jail for it. Again," it was reported that double jeopardy did not apply.

The full article can be viewed at:

<http://www.phillymag.com/articles/william-barnes-profile-this-man-shot-a-cop/10/>

A February 1, 2012, article by *Philly Mag* and the *Associated Press*, "Man cleared of murder in '66 shooting still jailed" can be viewed at:

http://articles.philly.com/2012-02-01/news/31013307_1_murder-charges-parole-william-barnes

What if an arsonist, intending to burn only one apartment room, set a fire that actually burned down three apartment rooms? Would it be **double jeopardy** to convict him of and sentence him to three arsons? Did he suffer **multiple punishments for the same offense** in violation of the Double Jeopardy Clause to the Constitution?

Legal Analysis

Richmond v. State
604 A.2d 483 (1992).

Justice Karwacki delivered the opinion of the Court of Appeals of Maryland.

Facts

On February 5, 1987, a fire broke out in a two story apartment building. *** The building contained approximately ten units. The fire originated in the ground floor apartment of Martha Gobert and quickly spread to the apartment located across a common hallway, occupied by Wanda Pfeiffer, and to

the apartment located above the Gobert unit, occupied by Evelyn Saunders. All three apartment units were substantially damaged before the fire could be extinguished.

An official investigation of the fire disclosed that Guy L. Richmond, Jr., the appellant, had arranged for three of his confederates to set fire to Gobert's apartment. Richmond and Gobert worked for the same employer, and Richmond recently had been suspended from his job because of a work place grievance filed against him by Gobert.

On October 19, 1987, after a bench trial before the Circuit Court for Prince George's County, Richmond was convicted of three separate counts of an indictment, charging violation of Maryland Code ***Article 27, § 6 1 for procuring the burning of the "dwelling houses" of Gobert, Pfeiffer, and Saunders. Thereafter, he was sentenced to 15 years imprisonment on each count with the terms to run consecutively.

[Article 27, § 6 provides:

"Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself, or of another, shall be guilty of arson, and upon conviction thereof, be sentenced to the penitentiary for not more than thirty years.]"

***Richmond (argued that his sentences for three separate arsons from one act violated the Double Jeopardy Clause because he had) multiple sentences imposed upon him for what he asserts was a single offense. ***

Issue

Whether charging a person who has burned three residences of an apartment building by setting one fire violates the protection against double jeopardy.

Rule and Analysis

Richmond contends that the burning of three apartments was the result of one criminal act, (and so is) one offense proscribed by Art. 27, § 6, and that the imposition of multiple sentences for this one offense violates double jeopardy principles. The Double Jeopardy Clause of the Fifth Amendment protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *** Because Richmond was subjected to only one prosecution, his contention deals with the prohibition against multiple punishments for the same offense. Multiple punishment challenges generally arise in two different sets of circumstances: those involving two separate statutes embracing the same criminal conduct, and those involving a single statute creating multiple units of prosecution for conduct occurring as a part of the same criminal transaction. *** Richmond's contention in the instant case is of the second type. ***

Whether a particular course of conduct constitutes one or more violations of a single statutory offense depends upon the appropriate unit of prosecution of the offense and this is ordinarily determined by reference to legislative intent. ***

When we seek to ascertain and effectuate legislative intent, "we look first to the words of the statute. *** [The statute's language shows that the legislature] intended the unit of prosecution to be "any dwelling house" burned. The issue before us is not thereby resolved, however, because the term "dwelling house" is not defined in the statute; we must determine whether each individual apartment unit burned constitutes a separate dwelling house. ***

Maryland has retained the common law definition of arson [which defines arson as] an offense against the security of habitation or occupancy, rather than against ownership or property. *** Expounding on what constitutes a “dwelling house,” Blackstone stated that “if a landlord...sets fire to his own house, of which another is in possession under a lease from himself or from those whose estate he hath, it shall be accounted arson; for, during the lease, the house is the property of the tenant.” *** (S) ince each leased apartment is the property of a separate tenant, and a burning of that property, whether by the landlord or some other individual, constitutes arson, each separate apartment burned constitutes a separate unit of prosecution. ***

[Each] individual apartment burned constitutes a separate dwelling house and a separate offense of arson [because the statute] states that “[a]ny person who wilfully and maliciously sets fire to or burns ... any dwelling house” shall be guilty of arson (emphasis added). We have previously construed the use of the word “any” in a criminal statute to mean “every” and to support a legislative intent authorizing multiple convictions. *Brown*, 311 Md. at 435–36, 535 A.2d at 489–90. In *Brown*, the issue was whether the defendant could be sentenced for multiple counts of use of a handgun in the commission of a crime of violence arising out of a single robbery involving several victims. The statute at issue *** stated, with emphasis added, that “[a]ny person who shall use a handgun . . . in the commission of any felony or any crime of violence” is guilty of a handgun use offense. We held that the use of the word “any” before crime of violence meant “every” and indicated that the unit of prosecution was the crime of violence, not the criminal transaction. *** Thus, where there were two victims, there were two crimes of violence and two separate crimes of using a handgun to commit a crime of violence. Similarly, in the instant case, the use of the word “any” before the phrase “dwelling house” indicates that the Legislature intended the unit of prosecution to be each dwelling house burned. ***

Richmond next contends that the State was required to prove that he possessed the specific intent to burn, or *mens rea* that the act of burning shall have been “wilful and malicious” as to each apartment unit. *** The intent requirement *** undermines that proposition:

*** It is not common-law arson for a dweller to burn his own dwelling, and this has given rise to the outstanding example of unintentional arson; for if such a fire obviously creates an unreasonable fire hazard for other nearby dwellings, and any of these is actually burned, common-law arson has been committed even if the wrongdoer did not actually intend the consequence and may have hoped it would not happen. *** (“[O]n the principle that a man is presumed to have intended the natural and probable consequences of his voluntary acts, if a man does an unlawful act, the natural tendency of which is to set fire to and burn a house, and such a consequence follows, the burning is to be regarded as intentional and malicious.) ***

Conclusion

Providing for multiple punishments when there are multiple victims also comports with the notion that the punishment for criminal conduct should be commensurate with responsibility. * It makes sense that the Legislature would provide for a greater penalty for setting fire to an apartment building, containing many separate residences, than for setting fire to a single home. The language of the statute clearly reflects the legislative intention that the unit of prosecution be each dwelling house burned. Each of the separate apartments in the building, occupied by separate tenants, constituted a separate dwelling house. Thus, each apartment burning was a separate offense of arson. *****

*Judgments affirmed.*⁶²

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Discussion Questions

1. What is the purpose of criminal law?
2. How is blameworthiness relevant to criminal law?
3. What is so important about the Rule of Legality?
4. What are the four rationales for imposing punishment on a criminal? Are they fulfilled by our current forms of punishment?
5. What are the differences that distinguish crimes from torts?
6. What are the stages of legal analysis?
7. What is an element of a crime?
8. What is the common law and why is it important?
9. Does case law generally come from trial courts or appellate courts? Why?
10. What is the Model Penal Code and why is it important?
11. Why does the U.S. Constitution forbid vague laws?
12. What are *ex post facto* laws and bills of attainder?
13. What are the dangers of holding a person twice in jeopardy in violation of the double jeopardy prohibition?

Web Links

1. To fully view “*Blackstone’s Commentaries on the Laws of England*,” visit: http://avalon.law.yale.edu/subject_menus/blackstone.asp
2. To view Paul H. Robinson and Markus Dirk Dubber, “*An Introduction to the Model Penal Code*,” visit: <https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf>
3. For the *FindLaw* article, “*The Differences between a Criminal Case and a Civil Case*” visit: <http://criminal.findlaw.com/criminal-law-basics/the-differences-between-a-criminal-case-and-a-civil-case.html#sthash.wpftsKWH.dpuf>
4. Delaware’s “Pattern Criminal Jury Instructions” for “2.6 Presumption of Innocence/Reasonable Doubt” and “2.8 Defendant’s Choice Not to Testify” can be viewed at 2.6 and 2.8 of: http://courts.delaware.gov/superior/pattern/pattern_criminal_jury_rev_2012.pdf
5. Florida’s Jury instructions for “3.7 Plea of Not Guilty; Reasonable Doubt; and Burden of Proof” can be downloaded at: http://www.floridasupremecourt.org/jury_instructions/instructions.shtml#

6. Arizona's "Standard Criminal Instructions 2013 Standard Criminal 1—Duty of Jury" explains to jurors that they should follow the instructions given them (the law) in order to determine what happened in a case (the facts). In part, the instructions tell jurors:

"It is your duty as a juror to decide this case by applying these jury instructions to the facts as you determine them. You must follow these jury instructions. They are the rules you should use to decide this case."

The full instruction can be viewed at: http://www.azbar.org/media/58832/2-standard_criminal_revised_2013.pdf

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