Reading

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***CRMIPOL 123* Module 8** Reading

***Ethics***

***Reading***

**For this module, you are required to read the following:**

* Chapter II (pp. 52-88)

In this chapter, we will explore the relationship between law, the legal system, and ethics. The study of ethics concerns itself with morality; that is, what conduct is right and what conduct is wrong. Ethics is a branch of philosophy, and this chapter discusses the various schools of thought on morality.

# Case Analysis Assign ment [**http** ://webup](http://webup/)loadcontent.next.eco11ege.com/pu *bl*content/ 5d 745f8f-fe...

***CRMIPOL 123* Module 8** Case Analysis Assignment

***Ethics***

**Case *Analysis Assignment***

In this assignment, you will prepare three case analyses based on hypothetical fact patterns. These fact patterns all deal with the topic of due process.

**Step 1:** Download and thoroughly read the Case Analysis instructions .

**Step 2:** Download the Case Analysis 5 Fact Patterns. Prepare your responses to each fact pattern based on the instructions.

Submit this assignment to the Dropbox **no later than Sunday 11:59 PM EST/EDT.** (This Dropbox basket is linked to Turnitin.)

**CRM 123 - Case Analysis Instructions**

**Purpose**

The goals of this assignment are to provide a valuable skill and to assess your ability to comprehend and apply case lav,. Reading, briefing, and applying what you are reading in your textbook and learning in the modules are effective ways to become literate in the process of the U.S. legal system.

**Conducting an Analysis**

Before making and defending a decision , you must be familiar with the relevant law. For our purposes, your textbook and course material provide all the legal concepts needed to apply the law to a factual situation. Once you are familiar with the general content of the chapter , you shouid be abie to recognize the issue involved in a case and find the legal concepts that will help you decide the case. For your reference , a sample analysis is provided at the end of this document.

First, you will read the assigned **fact patterns** (provided via a link in the module). Then, you will complete an analysis for all fact patterns presented. Each analysis should contain the following:

1. **The main issue.** Identify and write (in your own words , at least 50% original) the central issue to be decided. As much as possible, set the issue in legal terms and concepts.
2. **Relevant legal concepts** quoted from textbook court opinions . Search the assigned chapter for legal concepts that will help you decide and justify your decision. Once you find the quotations you wish to use, copy them into the appropriate places in your analysis .
3. . **Relevant case law** quoted from the textbook.

**4. Rationale.** Write (in your own words , at least 50% original) a complete explanation about how you used the legal concepts you cited to make a decision about how the case should be resolved.

5 . **Ruling.** Describe (in your own words , at least 50% original) what should happen to the parties involved as a result of your decision.

Submit your Case Analysis to the Dropbox **no later than Sunday 11:59 PM EST/EDT** of the assigned module. (The Dropbox baskets for these assignments are linked to Turnitin .)

**Grading Rubric**

Ratings:

**Exceptional** corresponds to an A (90-100) . Performance is outstanding ; significantly above the usual expectations .

**Proficient** corresponds to a grade of B- to B+ (80-89%) . Skills are at the level of expectation .

**Basic** corresponds to a C- to C+ (70-79%). Skills are acceptable but improvements are needed to meet expectations well.

**Novice** corresponds to a D to D+ (60-69%) . Performance is weak; the skills are not sufficiently demonstrated at this time.

**O** This criterion is missing or not in evidence.

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| --- | --- |
| **Criteria** | **Ratinqs** |
| **0** | **Novice** | **Basic** | **Proficient** | **Exceptional** |
| Correctly framing the specific legal question to be decided |  | 12-13 | 14-15 | 16-17 | 18-20 |

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|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Identifying and quoting relevant material from the assiqned chapter |  | 12-13 | 14- 15 | 16- 17 | 18-20 |
| Correctly applying the cited legal concepts to your decision |  | 12-13 | 14- 15 | 16-17 | 18-20 |
| The insightfulness and organization of your rationale |  | 12-13 | 14-15 | 16- 17 | 18-20 |
| Originality and writing quality |  | 12-13 | 14-15 | 16-17 | 18-20 |
| **Total** | **100** |

**Academic Honesty**

This assignment should include your original work and be treated as a take-home examination. You may copy legal concepts and case law from the textbook into the "Relevant legal concepts" and "Relevant case law" sections, but the rest should be written "in your own words" (at least 50% original). The Dropboxes for all Case Analyses are linked to Turnitin , and each submission will be scanned for originality. Substantial overlap with the writing of other students constitutes academic dishonesty and will result in appropriate sanctions .

**Sample Analysis Using Headings Main Issue** (your own words)

##### Has the State of Kentucky violated procedural due process by depriving inmates of a protected liberty

right to prison visitors with our a hearing to challenge a visitor who is banned?

**Relevant Legal Concepts From Text** (quoted from textbook opinions)

##### Procedural Due Process - 14th Amendment - *Section 1.* "...nor shall any state deprive any person of life, liberty , or property , without due process of law; ..." (pp. 28 & 671)

Relevant Liberty Definition: "...a vast scope of personal rights. !t also infers *the absence of arbitrary and unreasonable government restraints.* (p. 29)

##### "The due process guarantee protects people from unfairness in the operation of both substantive and procedural law." Procedural law prescribes the method used to enforce legal rights. It provides the machinery by which individuals can enforce their rights or obtain redress for the invasion of such rights." (p. 29).

Since procedural due process rights cost the government time and money: "Courts generally therefore generally try to balance accuracy against its cost on a case-by-case basis."

**Relevant case law from text:**

*Melinda Speelman v. Bellingham Housing Authority* "Finally, .. . both the parties and the public have an interest in ensuring that BHA administers its programs lawfully, Contrary to ... contention, Speelman is not asking for an exception to be applied to her case. She is asking that she be given the process due her and everyone else in her situation. Therefore , the equities favor granting Speelman a preliminary injunction." (p.38)

**Rationale** (your own words) :

##### Since BHA was aware that Speelman was in jail , they had an obligation to do more, even though they reasonably attempted to reach Speelman. She was entitled to more due to the unusual set of circumstances presented in the case and the failure to take additional action to properly serve Speelman

###### deprived her of her constitutionally guaranteed due process rights and she was put in a position of facing eviction without benefit of a hearing.

**Ruling** (your own words)

###### The State of Kentucky need not provide hearings for denial of inmate visitors .

**Sample Case Analysis in Essay Style**

The main issue in this case is whether the State of Kentucky violated procedural due process by depriving inmates of a protected liberty right to prison visitors , without a hearing to challenge a visitor who is banned.

This is a due process case. Procedural Due Process is in the 14th Amendment - Section 1. "...nor shall any state deprive any person of life, liberty, or property, without due process of law..." (pp. 28 & 571). The relevant definitions here is the definition of liberty: "...a vast scope of personal rights. It also infers the absence of arbitrary and unreasonable government restraints. (p. 29)

"The due process guarantee protects people from unfairness in the operation of both substantive and procedural law." Procedural law prescribes the method used to enforce legal rights. It provides the machinery by which individuals can enforce their rights or obtain redress for the invasion of such rights." (p.29) Since procedural due process rights cost the government time and money: "Courts generally therefore generally try to balance accuracy against its cost on a case-by-case basis.

The Court examined this issue in *Connecticut Depa,tment of Public Safety v. John Doe,* stating "In cases such as *Washington v. Constantineau* (1971) and *Goss v. Lopez* (1975) we heid that due process required the government to attord the p1amt1ff a hearing to prove or disprove a particular set of facts ." However, "...a convicted offender has already had a procedurally safeguarded opportunity to contest." ''Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme." (p. 46 )

Since the State of Kentucky harl "...established regulations to guide prison officials in making visitation **decisions/' one could argue that an inmate1 s liberty lo have 1Jisitors has been recognized . it could be** furthe: argueti ihc1t denial of a h•c1ring to ci .:;illenge the finding that a specific visitor could be barred is protected by due proc·"ss. Howev"'r, conducting court hearings requiring an adversary proceeding could be unduly b1H dens0me of the stat"! v nd the liberty of an inmate has been deprived initially in a procedura!!y s::;feJuardecl he8nng. Der.,.-ivat1on of ti1c ilber.y 01' convict cl i11111cN:s to helve $pcific viiiors is outweighed by the burden of e;unducting such hec:1 ings.

The court should rul€! in f,wor of ti 10 Staie or Kntr icky.

**CRM 123 - Case Analysis 5 Fact Patterns**

Write an analysis for each scenario below. See the **Case Analysis Instructions** for further information about completing the assignment.

### Jonas is 18 and recently finished high school. He lives at home with his mom and dad. While collecting dirty laundry in his room one day, Jonas' mother discovered some of Jonas' clothing with dried blood on them. She also found a bloody survival knife and muddy boots under his bed, as well as a bracelet that said "Lynn." A few days earlier, police had discovered the missing body of Jonas' high school sweetheart , Lynn, in the woods. Lynn had recently broken up with him. The medical examiner had determined that Lynn had died from repeated stabbing. When Jonas had been questioned by the police at the station, he claimed he knew nothing of the incident, and the police have no evidence tying Jonas to the disappearance or murder. Analyze these facts using ethical concepts or concerns from Module 8. (You are not evaluating elements of murder, or due process issues for example.)

1. District Attorney Schultz has brought charges against three players of the University football team. They have been charged with raping a stripper at a party attended by team members. The case has received much publicity and the media have discovered that the three players have a history of violence towards women. (Last year, two other women claimed they had been raped, but the cell phone video showing the forced sex had been excluded based on an illegal police search, and the players were found "not guilty.") Shultz believes these players are guilty, and has given approximately 60 media interviews on the case. Schultz has also been campaigning for reelection, and a conviction here would go a long way. Unfortunately for Schultz, the DNA tests he ran do not match any of the three players to the victim's assault. When he questioned her about this, the victim made contradictory statements, and she had no other evidence to corroborate the events. In fact, while her statements confirm that they raped her, she admitted to having consensual sex with two other men at the party, which weakens the case. Schultz decides to not tell anyone about the DNA results unless asked, and instructs the victim/witness to deny the other sexual encounters at trial. Analyze these facts using ethical concepts or concerns from Module 8. (You are not evaluating elements of rape or due process issues for example .) Assuming that Schultz had a strong belief that the defendants were guilty , include in your analysis whether this affects the moral and legal permissibility of his conduct.
2. Michelle worked two jobs as a security guard in Phoenix, Arizona . She was walking outside the building where she works at 6:30 AM, Monday, when two bundles of money fell out of an armored truck en route to a bank. Inside the bundles was approximately $500,000. Michelle had an inheritance that would post to her bank account on Wednesday . She decides to take the day off and head to Las Vegas to play poker. Unfortunately, Michelle lost all of the money she gambled , but luckily, as expected , on Wednesday, her inheritance was paid. Michelle turned all of the $500,000 in to the FBI on Thursday morning, three days after finding it. Analyze these facts using ethical concepts or concerns from Module 8. (You are not evaluating elements of theft, conversion, or torts.) Include in your analysis whether Michelle was morally obligated to return the money. Should Michelle be penalized for using the money or for waiting three days to return the money?

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**Ethics**

## C HA PT E R O B J E CT IV E S

* 1. *Increase all'are11ess c!f t/,e co1111ectio11 bet111ee11 et/,ics a11d fall'.*
1. *E11ro11m/,?C studc11ts to uud ersta11d 11,/1 y t/1erc are d{tferwt 11,a ys f t/,i11ki11g about 111oral questio11s.*
2. . *Build 011 t/1e111es add ressed* i11 *t/,e p/,i /osop/, y f /m ,, disrnssio 11* i11 *Clwpter I (especiall y*

*11at11ml la11,, uti!itaria11is111 a11d a11a lyti ca l positivis111 ).*

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1. *E11coumge st11d e11ts to t/,i11k about rnrre11t /,ig /1 / y ro11tro 11ersial 111oral issues (sue!, as same-sex 111arriage, abortio11 1 p/,y sicia11-ass isted s11icid e, 111edical 111arijuaua, a11d wpital p1111is/1111e11t) J,-0111 d[ffer i11i; et/1i wl perspectiv es.*

##### his chapter builds on themes i ntroduced in the philosophy section of Chapter l. It shows readers why people n eed to be sensitive to ethical issu es a nd illustra tes some of the problems that a rise when members of our complex a nd diverse society disagree as to t h e proper bou ndaries of eth ics a nd law. Because of the limitations of space, it is only possible to give th e reader a taste of th e ways la w a nd ethics inter­ t\vin e. However , this discu ssion can expand interest and u nderstandi ng and stimulate

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think ing about th is rich and intricate subj ect.

All huma n beings face ethical challenges in their personal, profession a l , and public lives. Eth ical qu estions permea te our society. In charti n g pu blic poli cy, for exam ple, legisla tors choose from among alternative courses of action as part of the l a wmakin g process. Similarly, when appella te judg es constru e constitutions a nd sta tutes a nd review the decisions of lower courts in contract and tort cases, they also m a ke choices about pu blic policy. Is it morally right for the Supreme Ju dicial Court of Maine to rule in a medica l malpractice u nintended pregna ncy

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##### case that "a parent cannot be said to ha ve been damaged by the birth and rearing of a healthy, normal ch ild?"1

I s the Massach usetts legisla ture morally justified in enacting an extremely short statute of limita tions for the commencement of skiers' personal inju ry actions against ski area operators, to th e detriment

of inju red skiers? 2 Some states ha ve enacted laws

that perm it health care professionals in certain cir­ cumstances to refuse to fill a customer's prescription if doing so would viola te the professional 's moral beliefs. Others have sta tutes that focus specifically on pharm acists, like the following la w from South Dakota :

South Da kota Codified La ws 36-1 1 -70 .

##### Refusal to dispense medication.

No pharmacist may be required to dispen se medication if there is rea son to

believe that the medication wou ld be used to:

1. Cause an abortion; or

1. Destroy an unborn child as defined in subdivision 22-1-2(50A); or

##### Cau se the death of any person by means of a n assisted suicide, euthana sia, or m ercy killing.

No such refusal to dispense m edica­ tion pursuant to this section may be the basis for a ny claim for damages aga i n st the pharmacist or the pharn1acy of the phar­ macist or the basis for any disciplina ry, recriminatory , or discriminatory action against the pharmacist .

Other states have statutes that immu n ize all health ca re professionals and their employers who refuse to provide health care that wou ld violate the provider's conscience . These statutes typically bar su ch providers from criminal prosecution s, civil lit­ igation, or administrative sanction s.

Should h ealth care professional s be l egally per­ mitted to refuse to fulfill their pa tients' *I*customers' lawful requests because of the provider 's deeply held moral beliefa? If so, do provid ers exercismg

this legal right ha ve a ny moral obligation to i nform their potentia l customers of this fact?

Reasonable people can differ about whether the ethica l judgments embodied in these legislative a nd ju dicial decisions should be legally sanctioned as the public pol icy of the state. It is no wonder that great pu blic concern about the morality of govern­ mental policies exists regarding such topics as capi tal punishmen t , abortion , assisted suicide, same-sex marriages, homosexuality , in terracial adoptions, the rights of landowners versus environ mental pro­ tection , the meani ng of cmel a nd u n usual pu nish­ ment, a nd the right of indigents to appellate cou nsel in capita! cases.

**Introduction to *Gregg v. Georgia***

##### The followin g case is a n example of a n eth i ca l deba te over p u blic policy. The petitioner was a convicted robber a nd m urderer who was sen­ tenced to dea th pursuant to a Georgia statu te. He fa iled to con vince the courts in Georgia to overtu rn his sentence, bu t he did successfu lly peti­ tion the U.S. Supreme Court for certiora ri . In the case of *Greg(! v. Geo1gia,* the Supreme Court jus­ tices debated the ethics a nd the legali ty of capital punish men t . The case of *Gregg v. Geo1g ia* was decided in 1 976. I n tha t case, seven justices ru led that G eorgia 's sta tu te au thorizing ca pital pu n ish ­ men t was not i n herently cru el a nd u n usual u nder the Eigh th a n d Fourteenth Amen dmen ts to the

U.S. Constitution. The following excerpts from *Gregg* ha ve been edited to focus on the a rgu men t about the morality of capital pu n ishment. ln the opinions bel ow, you wil1 find several referen ces to a n earlier case, *F11n11a 11 1;. Geoi (!ia . Fun11a11* was a 1972 case i n which the Supren1e Court proh i bited states from imposi ng the death penalty in an arbitrary ma n ner. The ju stices wrote exten si vely on the eth i cal issue of capital pu nish m ent i n *Fur111a11 ,* a nd only su m marized thei r views in *Gregg.* Beca u se of limita tions of space, *Gregg* has

been excerpted below . H owever, you a re encou r­ aged to read the *F11rma11* case on the I n ternet.3

You will better u ndersta nd the followi ng discus­ sion of *Gregg* if you do so.

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Gregg v. Georgia

*428 U.S. 153*

*Supreme Court of the United States July* 2, *1976*

**Opinion of Justices Stewart, Powell, and Stevens.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal j ustice serves an impor­ tant purpose in promoting the stability of a soci­ ety governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown

the seeds of anarchy-of self-help, vigilante jus­ tice, and lynch law. *Furman v. Georgia* . .. (STEW­ ART, J., concurring).

"Retribution is no longer the dominant objective of the criminal law," *Williams v.* New *York* ... but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men.... Indeed, the decision that capital pun­ ishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so griev­ ous an affront to humanity that the only ade­ quate response may be the penalty of death.

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

... In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations

of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe . . ..

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

**Mr. Justice Brennan, dissenting.**

. .. In *Furman v. Georgia,* ... I said:

From the beginning of our Nation, the punish­ ment of death has stirred acute public contro­ versy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated contro­ versy cannot be explained solely as the result of differences over the practical wisdom of a partic­ ular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, with­ out a fundamental inconsistency, follow the prac­ tice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, 'the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an under­ standing of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries.' It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime.

That continues to be my view. For the Clause for­ bidding cruel and unusual punishments under our constitutional system of government embodies in unique degree moral principles restraining the punish­ ments that our civilized society may impose on those persons who transgress its laws. Thus, I too say: "For myself, I do not hesitate to assert the proposition that

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the only way the law has progressed from the days of the rack, the screw, and the wheel is the development of moral concepts, or, as stated by the Supreme

Court ... the application of 'evolving standards of decency ."' ..

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

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

punishment ....

The fatal constitutional infirmity in the punish­ ment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and

discarded. [It is] thus inconsistent with the fundamen­ tal premise of the Clause that even the v ilest criminal remains a human being possessed of common human dignity ." ... As such it is a penalty that "subjects the individual to a fate forbidden by the principle of c ivi­ lized treatment guaranteed by the [Clause]." I there­ fore would hold, on that ground alone, that death is today a cruel and unusual punishment prohibited by the Clause. "Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first."

I dissent from the judgments in ... *Gregg v.*

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

**Mr. Justice Marshall, dissenting.**

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

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

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

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

The available evidence, I concluded . . . was con­ vincing that "capital punishment is not necessary as a deterrent to crime in our society ." ... The evidence I

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reviewed in *Furman* remains convincing, in my view, that "capital punishment is not necessary as a deter­ rent to crime in our society." ... The justification for the death penalty must be found elsewhere ....

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

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

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

'The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an impor­ tant purpose in promoting the stability of a soci­ ety governed ... by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy-of se lf-help, vig ilante justice, and lynch law.' ...

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

In a related vein, it may be suggested that the expression of moral outrage through the imposition of the death penalty serves to reinforce basic moral values-that it marks some crimes as particularly offensive and therefore to be avoided. The argument is akin to a deterrence argument, but differs in that it contemplates the individua l's shrinking from antisocial

conduct, not because he fears punishment, but because he has been told in the strongest possible way that the conduct is wrong. This contention, like the previous one, provides no support for the death pen­ alty. It is inconceivable that any individual concerned about conforming his conduct to what society says is "right" would fail to realize that murder is "wrong" if the penalty were simply life imprisonment.

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

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

They state:

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

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

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

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

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The mere fact that the community demands the mur­ derer's life in return for the evil he has done cannot susta in the death penalty, for as Justices Stewart, Powell, and Stevens remind us, "the Eighth Amend­ ment demands more than that a challenged punish­ ment be acceptable to contemporary society ." ... ; To be susta ined under the Eighth Amendment, the death penalty must "compor[t] with the basic concept of human dignity at the core of the Amendment," ... the objective in imposing it must be "[consistent] with our respect for the dignity of [other] men." ... Under these

standards, the taking of life "because the wrongdoer deserves it" surely must fall, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth .

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

Case Questions

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

People also are affected by ethical considerations

111 their professional interactions with others. Although we may not realize it at the time, our ac­ tions and inactions at work and school are often in­ terpreted by others as evidence of our personal values and character-who we are and what we stand for. A person whose behavior is consistent with moral p1inciples is said to have integrity. It is common for people to try to create at least the illu­ sion that they have integrity. Integrity is p1ized by employers, who try to avoid hi1ing persons known to lie, cheat, and steal. Many companies also try to avoid doing business with firms that are repu ted to engage in fraudulent practices, who try to take u nfair advantage of those with whom they contract, who negotiate in bad faith, or who are otherwise unscru­ pulous to their business partners. Students applying to professional schools quickly learn that integrity is important to members of admissions committees. Such committees generally require recomm.enders to include an evaluation of an applicant's character in their letters. People also are concerned about ethical behavior in their personal lives. They worry about whether a person with whom they have shared a confidence is trustworthy .

But it is often difficult to k now the param.ete of ethical behavior in particular situations. Is it ever permissible to break a promise not to tell? Are there any rules about lying? Who determines the rules? How are they enforced? Under what circumstances is it morally permissible to lie to a total stranger? A farn.ily member? A best friend? A business part­ ner? When is it acceptable for other people to lie to you? What are the social and legal consequences of lying?4

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

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### would you think about some other student who did tell? What is the basis for you r position?

Who makes the rules for you? Is it up to you to decide, your peer group, your parents, or other sig­ nificant people in your life? Perhaps you look to religious leaders for guidance. Religious groups historically have assumed a major role in setting moral standards, a nd religious leaders frequently take fi1111 positions on contemporary ethical issues. How can a nyone tell who is "tight"' Thomas Jefferson in the Declaration of Independence said, "We hold these truths to be self-evident . . .." Is that sufficient proof of the proposition that all people are created equa l?

Philosophers have argued for centmies about the answers to questions such as those raised above. The following discussion will help to provide some backgrou nd and structure for the discussion of the cases that follow.

**Metaethics** Theoretical foundations of ethics

**Normative ethics** Applied ethics

**F I G U R E 2.2** Ethics

### **Metaethical** scholars have centered on defin­ mg ethical terms and developing theories . They have tended to focus on abstract topics, such as identifying the fundamental charactetistics of moral behavior. These discussions have tend ed to be extremely theoretical and often have been criticized

for not having many practical applications. 6

The following example is intended to raise philo­ sophical questions about the essential nature of integriry u nder circumstances when it is acknowl­ edged that all of the actors have engaged in "cor­ rect'' actions.

'-.. ,

## E T H ICS

**Karen, Keisha, and Kelly**

### Assume that Karen is a "goody-goody" and always

**Ethics,** which is the study of morality, is one of the

five traditional branches of study within philosophy, as can be seen in Figure 2.1 . Ethicists are concerned with what makes conduct morally right or wrong and the essen tial nature of moral responsibiliry. They also investigate the application of ethical prin­ ciples to the practice of professions such as law, medici ne, a nd business.

We see in Figure 2.2 that ethical theories are often classified as being either metaethical or nor­ mative in their approach .5

**Ethics** The study of morality

**Metaphysics** The study of the nature of reality or being

**Aesthetics** The study of beauty

**Logic** The study of correct reasoning

**Epistemology** The study of knowledge

**F I G U R E 2.1** Branches of Philosophy

### tries to do the "right" thing in order to comply with what she perceives to be her moral dury. Assume that Keisha also does the "right" thing, but does so at least in part for selfish reasons (being seen doing the right thing will make the newspapers and will be good for business) . What if Kelly selectively does the "tight" th ing only when she feels a personal connec­ tion with some other person in need, u nder circum­ stances when she feels she can help without putting herself at risk' Does Karen have more integriry than Keisha or Kelly?

**Nonnative** ethicists have been more concerned with answering practical questions such as "Is killing in self-defense wrong?" or "What should a physician do when a patient dying of a terminal disease asks for assistance in committing suicide?" Modern ethicists ptimarily focus on normative moral issues rather

than metaethical ones, although this tendency is of recent otigin and ptimarily began in the 1970s.7

Philosophers disagree about whether ethical jud gments about right and wrong can be conclu­ sively proven .8 Some have argued tha t ethical

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### judgmen ts can be scientifically proven . Others ha ve rejected science and insisted th a t su ch jud gmen ts be based on natural law, sounding intuitive notions of

ti ght a nd wrong, 9 or based on the\_ logical sound1Jgss of th e reasons underlying the ethical J udgment.

Another a rea of disagreemen t i n volves where

**Law and Morality**

One of the u nresolved debates revolves arou nd wha t role law should play in ma king ethical rules. Should law supply the enforcement mecha nism for enforcing moral norms? What should an eth ical

those makin g ethical judgment s should focus their

person do when confron ted

wi.t 11 "bad" laws.?

a ttention. Some philosophers believe tha t whether an action is "good" or "bad " can be determin ed only after an act has occurred, by examining the outcomes. Only by looking ba ckward can the rela­

tive costs and benefits of a n action be weighed and its worth assessed . 1 1

**Utilitarianism,** which was discussed in Chap­ ter I , is such a theory. Th u s, from a utilitarian per­ spective, pu blicly and brutally ca ning one prisoner for a given criminal offense would be moral if it could be proven l a ter that it ha s deterred thousa n ds of others from engaging in tha t sam e offense.

*Deo11tolog ists* would reject a focus on afterma ths in fa vor of studying the role of moral du ty. Imman­ u el Ka nt, for example, argued th a t, to be ethical , an actor's deeds shou ld be evaluated based on the rea­

### son ina that l ed to the act .12 Ka n t believed that

::,

in tent mattered and tha t an ethical actor should be motiva ted only by a desire to comply with a u niversally accepted moral du ty. He did not view actions motivated by feeli n gs of love or

sympa th y or by the potential for personal gain as being th ically piincipled. 13 Caning a con victed person could not be a moral act if it a mounted to

torture. **Egoists** had yet a different approach. They believed that individuals were ethically "righ t " to act in th eir own self-interest, without regard for

the conseq uences to other people. 1 4 Ma ny tl1eonsts

h ave argued tha t conduct is moral only if it coin­ cides with religious mandates such as the Ten Commandments or the Golden Rule. Society, however, has been u nable to agree on any sin gle, u niversall y acceptable ethical theory. Seriou s dis­ agreemen ts exist about wh a t constitu tes ethical conduct in specific contexts . "R.ight" a n swers are not always obvious, and rules, interpreti ve opinions, and gu idelines a re needed to direct individu als toward "good" conduct.

Should decisions about morality in some con texts

be reserved to the individuaP

Althou gh law can con tribute rules tha t embody moral norms, law in our democracy is not expected to play the primary role in promoting ethical beh avior in society. Parents, ch u rch es, schools, youth orga n iza tions, a thletic teams, and business, professional, an d fraternal groups of a ll types a re expected to fill th e void . They often establi sh eth ical codes, rules (such as those proh1b1tmg "unsportsman like conduct" or "conduct u nbecom­ ing a n officer"), and discipline a nd e\_ven expel members who violate th eir terms. A precise calculus of law's relationship to morality, h owever, remains elusive.

You may recall reading in Chapter I about th funda mental and u nresolved disagreement between philosophers who a re natural law adherents a nd those who are *a11al ytiral positivi s ts* rega rdmg the true nature of law. From the positivist point of view, laws are merely the rul es tha t political super­ iors develop pursuant to duly established procedures tha t a re imposed on the rest of th e polity . Laws are viewed as bein g intrinsically neith er good nor bad. They do establish norms oflegal beh avior, but such efforts sometimes amou nt to little more th an arbi­ trary lin e dra wing. Positivists would poin t out th a t law establish es a floor but not a ceiling. Individuals who sa tisfy th eir legal obliga tions always retain the right to self-impose additional restriction s on their conduct in order to satisfy a deeply felt moral duty. But law does not depend for its a uthority on an ad hoc assessment of whether th e government ought to follow a differen t policy. It is clear, however, that defying th e la w can result in state-imposed sanc­ tions. Assu me, for example, that a taxpayer tak es an una uthorized "deduction" off her income tax obligation a n d makes an equivalent dolla r donation

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### to a cha1ity ra th er than to the In tern al Revenue S rvice. Th e fact that her conscience tells h er that it is self-eviden t that the U.S. governm ent i s mor­ ally wrong to spen d our dollars on some disfavored program is u nlik ely to save h er from crimina l a nd ci vil sanctions.

In th e following passage, M a rtin Luth er Kin gJr. distinguishes between ju st a n d u njust laws a nd argu es that immoral laws should be civilly disobeyed .

*Lctter.fiolll Bi rllli11g lia111 J ail\**

You express a great deal of a nxiety over our willingn ess to break laws. This is certain ly a legitima te concern. As we so diligently u rge people to obey the Supreme Court's decision of 1 954 out­

lawing segregation in th e pu bli c schools, i t is ra ther stra n ge an d pa rad oxical to find us consciousl y brea king la ws. One may well ask, "How can you a dvoca te breaking some laws a n d obeying others?" The a n ­ swer is fou n d in th e fact that there a re two types of laws: th ere are ju st a nd there a re u njust l aws.. . .

. . . A ju st law is a man-m a de code th a t squares with the moral l aw or the law of God . An u njust law is a code th a t is out of harmony with th e moral law. To put i t in th e terms of Sai ne Thom as Aquinas, a n

u njust law i s a human law th a t is not

rooted in eternal and n atu ra l la w . Any la w tha t uplifts h u man person a lity is ju st. An y law that degrades huma n personality is

u njust. All segregation statu tes are u njust because segrega tion distorts th e soul

and damages th e persona lity . lt gives

the segregator a false sen se of supe1iority, and the segregated a false sen se of infe1iority . . . .

So segregation is not on ly politically, economically a nd sociol ogi cally unsou nd , but it is morally wrong a n d sinful. . . .

. . . I subm it that an ind ividual who breaks a law th at conscience tells him is

u njust and willingly accepts th e penalty by staying in j a il to arouse the conscien ce of the comm u n i ty over its inju sti ce, is in

rea lity expressing the ve1y h ighest respect for law... .

We can never forget tha t eve1ythin g Hitler did in Germany was "legal" and eve1ything that H u ngarian freedom

figh ters did in Hun ga1y was "ill egal." It was "illegal" to a id a n d com fort a Jew, in Hitler's Germa ny . Bu t I a m su re tha t if I h ad lived in Germa ny drning t h at time

I would have a ided and comforted my Jewish broth ers even though i t was

ill egal.. . .

**Positive Law Rules**

In ou r republi c, th e people are sovereign, bu t there is no law hi gher tha n th e U.S. Constitu ­ tion. 1 5 We ha ve adopted the a nalytical positivist v iew that bill s th at ha ve been en acted in con for­ mity with consti tutional requirem en ts are th e l a w . In dividuals, for reason s of conscien ce, may defy these duly enacted laws, but th ey are la wfully sub­ ject to prosecution .

It is importa n t to note, however, that politi cal m ajoriti es i n federal a nd sta te l egislatu res often en act sta tutes th a t reflect widely h eld mora l belief, in th e el ectora te. Exa m pl es include th e Civil Righ ts Act of 1964, the Am eri ca ns with Disa bilities Act, the Cl ean Air Act, th e Clean Wa ter Act, a nd th e Sherman Act , to n am e ju st a few. Legisla tive bodi es have a l so taken th e ethical views of political minor­ ities in to consideration wh en drafting legisla ti on. Congress, for exampl e, exem pted conscien tiou s objectors from ha ving to register with th e Selective Service System . Simila rly, Congress's 1 998 omnibus spen ding bill conta ined a provision th at permitted

\* ***l...t:' /Tcr jl'om Bir111i11 f.! ht1111 Jaif,* rep1i11ted by :i.rrangement ,,·irh thl' E,r.m> of Marrin Lurher King. Jr. ,** c/o **Writns l-l ou,;c\_ I nc. as**

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**Corctt;i Scott King.**

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##### doctors opposed to birth control to refuse on moral grounds to write prescriptions for contraceptives requested by federal employees. 1 6 But one need only look at Article I , Section 9, of the U.S. Con­ stitution to see an example of political expediency taking precedence over moral considera tions. In

that article, antislavery founders compromised their moral principles in order to win ratification of the Constitu tion in sou thern sta tes.

Federal a nd state judicial bodies also impart moral views when they construe constitutions and statutes. Examples include the U.S. Supreme Court's interpretations of the Fourteenth Amendment in *Lawrence v. Texas* (the right of two same-sex, consenting adults, while at home, to determine the nature of their sexual intimacy) , *Loving v. Virginia* (an individual's right to marry a person of a different race) , and *Moore v . City of East Cleveland* (in which the court broadened the meaning of the tern1 "family"), three famous cases involving interpretation s of the Due Process Clause, which are included elsewhere in this textbook.

It is obvious that moral rules and legal rules often overlap . Our criminal laws severely pu nish persons convicted of murder , rape, and robbery, and they ought to do so. Such acts simultaneously violate legal and moral principles. Tort law provides another exam ple. Damages in negligence cases should be borne by the parties ba sed on the extent to wh i ch each was responsible for the damages. Because this decision is, with some exceptions, based on the relative fault of the parties, it also can be argued both on teleological and on deonto­ logical grounds to be an ethical rule. We see another example of legal and ethical harmony in the *Iaco111ini* case (Chapter VII). In that case the court ruled that the law would permit a mecha nic to claim a n equitable lien against a motor vehicle that he had repaired, under circumstances when no other relief was possible. The court said that such a remedy was legally appropriate in proper circum­ stances to prevent u njust enrichment. The follow­ ing materials raise interesting legal and moral questions about legal and moral duties as they relate to members of one's family .

**Aiding and Abetting, Misprision, Informing, and the Family**

Imagine how difficult it must be for a person who, after acquiring bits and pieces of informa tion from various sources, ultimately con cludes tha t a mem­ ber of his or her family is probably involved in criminal activity. Suppose further that the crimes involved a re a series of premedita ted murders, and that the offen der will probably be sentenced to the death penalty upon conviction of the charges. Assume further that you have to admit tha t, u nless you inform a u thorities, other innocent persons may well become additional victims . Suppose a million-dolla r cash a ward will be paid to the per­ son who provides the informa tion tha t ultima tely leads to th conviction of the offender. Wha t would you do if you were tha t family member? Would you tell a u thorities a nd run the risk of being viewed as being disloyal to your family? Would you stay silent and hope that nobody else

is harmed? 1 7

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

*New Mexico Statutes Annotated 30-22-4 . Harboring or Aiding* 11 *Felon.*

Harboring or aiding a felon consists of any person, not standing in the relation of husban d or wife, parent or grandparent, child or grandchild, brother or sister, by consa nguinity or affin ity , who knowingly conceals any offender or gives such offender any other aid, knowing that he has committed a felony, with the intent that he escape or avoid arrest, t1ial con­ viction or punishment. Whoever commits harboring or aiding a felon is guilty of a fourth degree felony. In a prosecution

under this section it shall not be necessary to aver, or on the uial to prove, that the principal felon has been either arrested, prosecuted or tried.

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### Do you agree with the way the legisla tu re defined the scope of the legal duty? Should the scope of the moral duty be the same as the scope of the legal duty?

The above statute has its roots in the common law crime of accessory after the fact. With the exceptions indica ted above, it creates a legal duty

on everyone else to refrain from helping a known felon escape apprehension by authorities. You can see how this statute was applied in the following case. Read the case and think about whether you agree with the opinion of the court majority or the dissenting jud ges. Wha t is the basis for your choice?

**State v. Mobbley**

*650 P.2d 841*

*Court of Appeals of New Mexico August 3, 1982*

**Wood, Judge.**

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

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

The power to define crimes is a legislative function ....

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

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

answers to this contention.

First, where the meaning of the statutory language is plain, and where the words used by the Legislature are free from ambiguity, there is no basis for interpreting the statute .... Section 30-22-4,

*supra,* applies to "any person" not within the rela­ tionship exempted by the statute. Defendant is such a person.

Second, if we assume that the statute should be interpreted, our holding that § 30-22-4, *supra,* applies to the agreed facts accords with legislative intent.

Statutes proscribing harboring or aiding a felon grew out of the common law of accessories after the fact . LaFave & Scott, Cr iminal Law § 66 (1972). However:

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

LaFave & Scott, *supra,* at 523-24.

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

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

§ 30-22-4, *supra,* applies to that aid.

Except for one fact, there would have been no dispute as to the applicability of § 30-22-4, *supra.* That one fact is that defendant could not have revealed Needham without also revealing her husband. The

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statute does not exempt a defendant from prosecution when this fact situation ar ises; to judicially declare such an additional exemption would be to improperly add words to the statute .... Also, such a judicial declaration would be contrary to the rationale for this type of statute; it is unrealistic to expect persons to be deterred from giving aid to their close relations.

Lafave & Scott, *supra.*

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

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

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

It is so ordered ....

**Lopez, Judge (dissenting}.**

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

dant would have had to turn in Needham to escape being charged under § 30-22-4, which would have been tantamount to turning in her husband.

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

The practical effect of the majority opinion, which requires a wife to turn in her husband if he is with a

co-suspect, is to deny the wife's exemption in § 30-22-4. The reasons for refusing to force a wife to inform on her husband are the same whether or not he is alone. The statute should not be construed so narrowly as to frustrate the legislative intent to exempt a wife from turning in her husband .... Although the court should not add to the provisions of a statute, it may do so to prevent an unreasonable result.... Given the wife's exemption from turning in her husband contained in

§ 30-22-4, it would be unreasonable to require her to do just that by revealing Needham.

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

**Case Questions**

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

### Misprision of a felony is another common law oime. It makes it criminal for a person to fail to tell authorities of the commission of a felony of which he or she has knowledge. The histmy and rationale for this oime are explained in the following excerpt from the case of *Holland v. State.* In *Hol/a11d,* the court had to decide whether misp1ision is a crime in Flmida. At the

present tim.e, the federal government (see Title 18, Section 4, United States Code) and the State of South Dakota (see Title 22-11-12) are the only American jmisdictions that can prosecute oiminal misp1ision. Ironically, because federal prosecu tors initiate mispri­ sion prosecutions in federal comts throughout the count1y, it is still deserving of academic attention.

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**Holland v. State of Florida**

*302 So.2d 806*

*Supreme Court of Florida November 8, 1974*

**McNulty, Chief Judge.**

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

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

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

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

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

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

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

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

Misprision of felony as defined by Blackstone is merely one phase of the system of communal responsibility for the apprehension of criminals which received its original impetus from William I, under pressure of the need to protect the invading Normans in hostile country, and which endured up

to the Seventeenth Century in England. In order to secure vigilant prosecution of criminal conduct, the viii or hundred in which such conduct occurred was subject to fine, as was the tithing to which the criminal belonged, and every person who knew of the felony and failed to make report thereof was subject to punishment for misprision of felony.

Compulsory membership in the tithing group, the obligation to pursue criminals when the hue and cry was raised, broad powers of private arrest, and the periodic visitations of the General Eyre for the purpose of penalizing laxity in regard to crime, are all suggestive of the administrative background against which misprision of felony developed.

With the appearance of specialized and paid law enforcement officers, such as constables and jus­ tices of the peace in the Seventeenth Century, there was a movement away from strict communal responsibility, and a growing tendency to rely on professional police....

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

Many courts faced with this issue have also found, though with varying degrees of clarity, that the rea­ sons for the proscription of this crime do not exist.

Moreover, as early as 1822 in this country Chief Justice John Marshall states in *Marbury v. Brooks:*

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

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

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traditional concepts of peace and quietude guarantee freedom. We cherish the right to mind our own business when our own best interests dictate.

Accordingly, we hold that misprision of felony has not been adopted into, and is not a part of, Florida substantive law.

**Case Questions**

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

## Good Samaritan Laws

### Traditionally individuals have not been legally obligated to intervene to aid other persons in the absence of a judicially recognized duty owed to that person. Courts have recognized the existence of a duty where a special relationship exists. The special relationships generally fall within one of the follow­ ing categories: (a) where a statutory duty exists (such as the obligation parents have to support their children), (b) where a contractual duty exists (life­ guards are employed to try to make rescues on the beach), or (c) where a common law duty exists (such as when an unrelated adult has volu ntarily assumed primary responsibility for bringing food to an isolated, incapacitated, elderly neighbor and then stops without notifying authorities) . In the absence of a legal duty to act, the law generally has left the decision as to whether or not to be a Good Samaritan up to each individual's conscience. Many people feel tha t Americans today are less willing than in times past to play the role of Good Samaritan. But do bystanders, who have no special relationship to a person in need , have a moral obli­ gation to intervene? Should they have a legal duty either to intervene or to inform authorities, if they can do so without placing themselves in jeopardy? Consider the 1997 Las Vegas case in which an eighteen-year-old young man enticed a seven­ year-old girl into a ladies' room stall in a Las Vegas casino and sexually assaulted and murdered her.

The attacker had a male friend who allegedly watched some of the events in that stall and pre­ sumably knew that the little girl was in danger. The friend made no attempt to dissuade the attacker, save the girl, or tell authorities. He was not subject to prosecution under the laws of Nevada.

Should a person who is a passive observer, as i;, the above situation, be subjected to criminal prose­ cution for failing to act? The following Massachu­ setts statute was enacted in 1983 in response to a brntal rape at a tavern . This crime was the basis for the movie *The Accused .*

*Massachusetts General Law Chapter 268, Section 40. Reports of Crimes to Law Enforcement Qfficials.*

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

Why do you believe the Massachusetts legis­ lature limited the scope of this duty to only these

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### five crimes? Do you see any potential problems that may result because of this statute? Do you think that such laws will influence more bystan­ ders to intervene? Should society enact legisla tion primarily to make a moral statement and put soci­ ety on record as expecting citizens to act as mem­ bers of a larger community? Do you agree with Lord Patrick Devlin that our society would disin­ tegrate if we didn't criminalize immoral conduct? Devlin argues tha t such statutes encourage citizens to think similarly about questions of right a nd wrong, and that this helps to bind us together as

a peop1e. 18

The following discussion focuses on the society's right to promote a common morality by enacting statutes that prohibit certain types of private sexual conduct between consenting adults.

**Individual Choice Versus Social Control: Where Is the Line?**

'------Members of our society often disagree about the extent to which the states are entitled to promote a "common morality" by criminalizing conduct that the proponents of such legislation believe to be morally offensive. When such statutes are en­ acted into law, those prosecu ted for alleged viola­ tions often ask the courts to rule that the state has crossed an imprecise constitu tional line separating the la wful exercise of the state's police power from the constitutionally protected privacy rights of individuals to engage in the prohibited conduct . State legislatures and supreme courts during the last forty years have confronted this issue with respect to the constitutionality of their respective deviant sexual intercourse statutes. Kentucky and Pennsyl­ vania are examples, because their state supreme courts accepted the argument that it was up to indi­ vidual adults to determine for themselves the nature of their volu ntary, noncommercial, consensual, intimate relationships. The state, through the exer­ cise of the police power, should not use the crimi­ nal law to "protect" such adults from themselves where the conduct in question doesn't harm any other person. The supreme courts in these states

declared statutes unconstitu tional that made it a crime for consenting adults to engage in prohibited sexual conduct that the legislature deemed to be morally reprehensible.

The constitutional right of the federal and state legislatures to enact laws is discussed more thor­ oughly on pages 91-99; however, before reading *Lawrence* 1;. *Texas* it is necessa1y that readers know more about a legal concept known as the **police power.**

In general, the police power is a term that refers to each sta te's inherent right as a sovereign (autonomous) government to enact laws to pro­ tect the public's health, welfare, safety, and mor­ als. You will recall tha t the sta tes were in existence prior to the adoption of the U.S. Constitu tion, and that they had traditionally exercised broad law1naking powers to protect the citizens of their states. Congress's right to legislate, however, has no such historical u nderpinnin g. Congress does not have the right to legislate based on the police power beca use i t derives all its authority from powers granted 111 the federal constitu tion. Because the states retained their right to exercise the police power when the U.S. Constitu tion was adopted, they continue to enact laws pursuant to this right today.

**Introduction to *Lawrence v. Texas***

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

In *Lawrence* 1;. *Texas,* the U.S. Supreme Court had to determine whether the Texas deviant sexual intercourse statute's restrictions on the behavior of same-sex adults constituted a lawful exercise of the police power or a constitutionally invalid infringe­ men t of individual liberty rights.

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**John Geddes Lawrence v. Texas**

*539 U.S. 558*

*Supreme Court of the United States June 26, 2003*

**Justice Kennedy delivered the opinion of the Court.** Liberty protects the person from unwarranted govern­ ment intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond

spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more tran­ scendent dimensions.

*I.*

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

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

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

1. "any contact between any part of the geni­ tals of one person and the mouth or anus of another person; or
2. the penetration of the genitals or the anus of another person with an object." 2

§21 .01(1).

The petitioners exercised their right to a trial de novo in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution . Tex . Const., Art. 1,

§3a . Those contentions were rejected. The petitioners, having entered a plea of *nolo contendere,* were each fined $200 and assessed court costs of $ 141.25 ....

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

We granted certiorari ... to consider three questions:

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

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

*II.*

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

In *Griswold* the Court invalidated a state law pro­ hibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of con­ traceptives . The Court described the protected interest as a right to privacy and placed emphasis on the mar­ riage relation and the protected space of the marital bedroom....

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After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt*

*v. Baird ...* (1972), the Court invalidated a law prohi­ biting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protec­ tion Clause ... but with respect to unmarried persons, the Court went on to state the fundamental proposi­ tion that the law impaired the exercise of their per­ sonal rights.... It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship .... If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion

into matters so fundamentally affecting a person as the decision whether to bear or beget a

child....

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

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

The facts in *Bowers* had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hard­ wick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in

violation of a Georgia statute making it a criminal offense to engage in sodomy . One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in fed­ eral court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law....

The Court began its substantive discussion in *Bowers* as follows : "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invali­ dates the laws of the many States that still make such conduct illegal and have done so for a very long time."

... That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching conse­ quences, touching upon the most private human con­ duct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

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

The liberty protected by the Constitution allows homosexual persons the right to make this choice .

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

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

At the outset it should be noted that this country has no longstanding history of laws directed at homo­ sexual conduct as a distinct matter. Beginning in colo­ nial times, prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibi­ tion was understood to include relations between men and women as well as relations between men and men.... Nineteenth-century commentators similarly read American sodomy, buggery, and crime­

against-nature statutes as criminalizing certain rela­ tions between men and women and between men and men.... The absence of legal prohibitions focusing on homosexual conduct may be explained in part by not­ ing that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century .... Thus early American sodomy laws were not directed at homosex­ uals as such but instead sought to prohibit nonpro­ creative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

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

To the extent that there were any prosecutions for the acts in question, 19th-century evidence rules imposed a burden that would make a conviction more difficult to obtain even taking into account the prob­ lems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony,

however, was admissible if he or she had not con­ sented to the act or was a minor, and therefore inca­ pable of consent ....

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

It was not until the 1970s that any State singled out same-sex relations for criminal prosecution, and only nine States have done so.... Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. See, e.g., *Jegley v.*

*Picado,* 349 Ark. 600 ... (2002); *Gryczan v. State,* 283

Mont. 433 ... (1997); *Campbell v. Sundquist,* 926 5. W. 2d 250 (Tenn. App. 1996); *Commonwealth v. Wasson,* 842 5. W. 2d 487 (Ky. 1992); see also 1993 Nev. Stats.

p. 518 (repealing Nev. Rev. Stat. §201.193).

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

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

In all events we think that our laws and traditions in the past half century are of most relevance here.

These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "History and tradition are the start­ ing point but not in all cases the ending point of the substantive due process inquiry." ...

Two principal cases decided after *Bowers* cast its holding into even more doubt. In *Planned Parenthood of Southeastern Pa. v. Casey* ... (1992), the Court reaf­ firmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again

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confirmed that our laws and tradition afford constitu­ tional protection to personal decisions relating to marriage, procreation, contraception, family relation­ ships, child rearing, and education . ... In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

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

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

The second post-Bowers case of principal rele­ vance is *Romer v. Evans ...* (1996) . There the Court struck down class-based legislation directed at homo-

'---"' sexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado's con­ stitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," ... (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmen­ tal purpose....

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

Equality of treatment and the due process right to demand respect for conduct protected by the substan­ tive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its

substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to dis­ crimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

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

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

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

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

Our prior cases make two propositions abundantly clear . First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason

for upholding a law prohibiting the practice; neither history nor tradition could save a law

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prohibiting miscegenation from constitutional attack . Second, individual decisions by married persons, concerning the intimacies of their physi­ cal relationship, even when not intended to pro­ duce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment . Moreover, this protection extends to intimate choices by unmarried as well as married persons....

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

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

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether

the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The peti­ tioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government . "It is a promise of the Constitution that there is a realm of personal liberty which the government may not

enter ." ... The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual. ...

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

It is so ordered.

Case Questions

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

## Business Ethics

##### Business managers often encou nter ethical questions as they attem pt to in crease profits, lower costs, and secu re and preserve ma rk ets in th ei r never-ending qu est to maximize earn i ngs and the return that stockholders receive on their investments. One of the most inter­ esting debates presently taking place in academic and professional circles involves ethical chall enges to the traditional definition of the role of the corporation in society. The question -wh ich encom passes both legal and ethi cal dimensions-is, Do corpora tions have ethical obligations beyond increasing stockholder equity? Do corporations, for example, have any ethical obligations to such other stakeholders as employees,

suppli ers, customers, and the cornmunity' 1 9

To wha t extent shou ld Jaw a ttempt to influ-­ ence busi ness deci si on m a kers to expand their

perspectives and include in their calculus the con­ cerns of a broad ran ge of constituencies? Some a u thors a rgue tha t eth ical managers are more likel y to flourish where businesses view themselves as a "corporate commu n ity." In su ch an environment, it is suggested, the n eed to weigh and bala nce th e corporate com m u nity 's competing needs a nd inter­ ests will natu rally lead policymakers to make ethical

choices.20

Business people often employ lawyers to hel p them monitor legal developments in such highly rel evant subject a reas as contract, tort, property , and employment l a w. As you read this textbook you will become fa miliar with traditional common law doctrines such as privity of contract, caveat emptor, the preference traditionally shown to land­ lords over tena nts, and the a t-will employmen t

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doctrine. Implicit in these ju dicial doctrines are assu mptions about wha t constitu tes eth ical business conduct. The trend in recent decades has been for legislatures and courts to use la w as a ca talyst for influencing compa nies to change or modify their business practices. Their apparent goal has been to encourage businesses to become more aware of the ethical implications and the societal consequences resulting from their business choices.

Between 1 890 and 1914, Congress enacted a series of a ntitrust statu tes to counter the perceived abuses of economic power by the dominant national monopolies of that era . The Sherman Act (1890), the Clayton Act (1 91 4), and the Federal Trade Commis­ sion Act (1 91 4) were intended to redress price discrimina tion a nd other monopolistic practices. Unethical business practices in the securities industry in the early 1930s led to the creation of the Securities and Exchange Commission. More recently , legal initiatives have produced implied warranty statu tes, so-called lemon laws, strict liability in tort , state 1d federal environmental protection standards, and

i-:,rotections against discrimination in employment.

Legisla tu res a nd courts ma ke decisions about the extent to which principles of fairness and equity apply in particular circumstances. For example, each state has laws that specify how the legislature believes fina ncial responsibility should be appor­ tioned between businesses a nd their u nin tentionally injured customers. And state judiciaries often have to decide whether one party to contract has crossed a theoretica l line and "unconsciously" abused the freedom to contract. For example, courts are often asked to refuse to enforce con tractual terms tha t release one party from liability for harming another party (a "release agreement"), where to do so would be substantively unfair. For example, a release agree­ ment in a residential lease might be declared to be substantively unfair where a landlord in a very tight housing market only rents apartments to tena nts who "voluntarily agree" that they cannot sue the landlord for negligence u nder any circumstances­ even where the tenant is seriously injured and the landlord is 100% at fa ult. Customers being sued for breach of contract by a business often argue that they had signed a contract document that had been

drafted by lavvyers working for the business, and tha t the terms of the agreement were one-sided, overreaching, and exclusively for the benefit of the business. Consrnners often argue tha t the contract documents are also procedurally u nfair in tha t they typically consist of a printed form with "take it or l eave it" (nonnegotiable) terms that are often pre­ sented to the other party for signature at the last min u te-con tracts of adhesion. The consumer in the following case claimed that she was a victim of this type of abuse of the right to contract.

**Introduction to *James and Heidi Glassford v.***

***BrickKicker and GDM***

### James and Heidi Glassford contracted with Brick­ Kicker to inspect a home that the Glassfords were interested in buying . Unfortunately , these buyers concluded, after B1ickKicker completed its inspection and submitted its report, that the inspector had been negligent in pe1fonning his duties. Prospective bu yers rely on these reports when they decide whether to back out of or go forward with the purchase of an inspected dwelling. Approximately three years la ter, the Glassfords filed suit claiming that they would never have gone through with the purchase of the mspected dwelling had they been properly appraised of the house's defects. The trial coun dismissed the plaintiff's complaint. The comt decided to enforce two provisions of the contract, which had been wtit­ ten by lawyers working for B1ickKicker. One clause required that disputes between customers and Brick­ Kicker be decided by an arbitrator instead ofin a court of law. Arbitration is frequently preferred by busi­ nesses because it is often less expensive than a court trial and it eliminates the possibility that the dispu te might be decided by a ju1y (students can learn more about arbitration in Chapter XIV).

The trial judge also enforced a second clause that provided that the Glassfords would waive any rights to make cla ims against BrickKicker unless they gave the company notice of such claims within 90 days after the pe1formance of the inspection-a requirement tha t was not met by the plaintiffs. The Glassfords appealed from the trial court's decision to the Vermont Supreme Court.

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**James and Heidi Glassford v. BrickKicker and GDM**

*35 A.Jd 1044*

*Supreme Court of Vermont November 4, 2011*

**Skoglund, J.**

Plaintiffs James and Heidi Glassford, who brought suit to obtain compensation for an allegedly negligent home inspection, appeal the superior court's order granting summary judgment in favor of the home inspector based on the terms of a binding arbitration agreement in the parties' contract. In this appeal, we consider whether the superior court erred in rejecting plaintiffs' contention that the terms of the home inspection contract are unconscionable under the common law and unfair and deceptive under Vermont's Consumer Fraud Act ....

In 2005, plaintiffs contracted to buy a house in Barre Town, contingent upon a satisfactory home inspection. After being given a list of home inspection companies, plaintiffs contacted the first name on the list, defendant GDM Home Services, Inc.. a local franchisee of a national home inspection company called The BrickKicker (hereinafter collectively referred to as BrickKicker). On December 22, 2005, the date of the scheduled inspection, only Mrs. Glassford was present. Before beginning the inspection, the home inspector presented a contract for Mrs. Glassford to sign. She signed the contract and paid the $285 inspection fee.

The two-page contract was on a preprinted form drafted by BrickKicker. The back page of the contract contains ten numbered paragraphs in small print without headers. Paragraphs 5 and 6 in the middle of the back page state as follows:

Client understands and agrees that it would be extremely difficult to determine the actual da­ mages that may result from an inspector's failure to properly perform duties under this contract. As such. it is agreed that the liability of the Inspec­ tion Company arising out of this inspection and subsequent Property Inspection Report shall

be limited to actual damages, or equal to the inspection fee charged, whichever is Jess. IT IS AGREED THAT THIS IS AN ADEQUATE LIQUI­ DATED DAMAGE AND JS IN NO WAY INTENDED AS A PENALTY, ADMISSION OF NEGLIGENCE OR DEFAULT SETILEMENT . THE CLIENT UNDER­ STANDS AND AGREES THAT ACTUAL DAMAGES, OR EQUAL TO THE INSPECTION FEE PAID, WHICHEVER IS LESS, IS THE CLIENT'S SOLE AND EXCLUSIVE REMEDY NO MATIER THE THEORY OF

LIABILITY UPON WHICH THE CLIENT SEEKS RECOVERY ....

Any dispute, controversy, interpretation or claim for, but not limited to, breach of contract, any form of negligence, fraud or misrepresenta­ tion or any other theory of liability arising out of, from or related to this contract, the inspection or inspection report shall be submitted to final and binding arbitration under Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services, Inc.

Thus, the contract limited BrickKicker's liability to no more than the $285 charged for its inspection. This limitation effectively foreclosed arbitration because the "Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes." which were not set forth in the contract presented for Mrs. Glassford to sign, required the party seeking arbitration to pay, among other things, an initial arbitration fee of $1350,

$450 each day after the first day's hearing, and travel expenses for an arbitrator residing more than fifty miles from the arbitration site. In short, a homebuyer disputing BrickKicker's performance would have to pay, at minimum, a $1350 arbitration fee to recover no more than the $285 inspection fee.

The contract also required plaintiffs to pay Brick­ Kicker's costs, attorney's fees, and insurance policy deductibles in any arbitration in which BrickKicker pre­ vailed, but imposed no such reciprocal obligation on BrickKicker. Further, the contract provided that plain­ tiffs waived any and all claims against BrickKicker unless they gave BrickKicker notice of the claim "within

90 days from the date of the inspection or 30 days after taking possession of the property, whichever is later" and allowed BrickKicker to reinspect the property.

Following his inspection of plaintiffs' prospective home, BrickKicker's inspector produced a detailed report declaring the house to be "[a] nice new home in need of routine maintenance and observation." Plain­ tiffs bought the house for $230,500. According to their complaint, after moving in they found numerous defects which should have been discovered and reported by the inspector, and which, they claim, would have caused them to break the sales contract . Nearly three years later, in December 2008, plaintiffs brought suit against BrickKicker, alleging negligence in the home inspection.

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BrickKicker moved to dismiss the suit, arguing that the complaint was barred by the contract's time­ limit waiver and binding arbitration clause. Treating BrickKicker's motion as one for summary judgment , the court invited the parties to submit statements of undisputed fact and competing memoranda. Plaintiffs opposed BrickKicker's motion and attached a copy of the arbitration rules that the contract indicated would govern any arbitration proceedings . Plaintiffs argued that the arbitration fees required by the rules, com­ bined with the contract's provision limiting liability, effectively insulated BrickKicker against any liability based on its services and assured that no arbitration proceeding would take place....

On July 2, 2009, the superior court [the trial court] dismissed the complaint, ruling that arbitration was the sole forum for plaintiffs to seek redress because the contract's arbitration clause was "utterly clear on its face." ... The [trial] court did not address plaintiffs' ... claims of unconscionability except to note that plaintiffs made "no claim that the arbitration clause itself is unconscionable" but instead directed "their 'unconscionability' arguments to other substantive terms of the contract such as the limitations on liability."

Plaintiffs moved for reconsideration, arguing, among other things, that the [trial] court ignored their claims that certain contract provisions were unconscio­ nable under the common law ... , and that the arbi­ tration clause was unenforceable due to the practical impossibility of arbitration, given that the arbitration fee exceeded any potential recovery under the liability cap in the contract. The [trial] court rejected these arguments ....

In short, according to the [trial] court, plaintiffs failed to allege procedural unconscionability , which it deemed to be a necessary predicate to their uncon­ scionability claim, and further failed to produce a record or legal authority to support their claim that the challenged contractual provisions were substan­ tively unconscionable ....

Plaintiffs appeal the dismissal of their suit.. ..

For the reasons stated below, we find unconsc io­ nable the subject contract's illusory remedy for any claim for damages resulting from its provisions limiting liability to the inspection fee and requiring binding arbitration costs that would exceed the amount of the liability limit. Because the limited liability and arbitra­ tion provisions are interconnected in creating the sub­ stantively unconscionable illusory remedy, we strike both of them .... The superior court was mistaken in assuming that the presence of procedural unconscio­ nability is required to void a contract based on it con­ taining unconscionable terms .... In any event, we also

note significant elements of procedural unfairness in the contract, as described below.

The principal barrier in the contract to the possi­ bility of any relief for plaintiffs is the provision limiting liability to the $285 inspection fee. Plaintiffs chal­ lenged this provision, among others, before the superior court ....

Notwithstanding the trial court's statement sug­ gesting otherwise, plaintiffs submitted a memorandum of law attacking the contract's limitation on liability, citing primarily this Court's decision in *Dalury v. 5-K-/, Ltd....* On appeal, plaintiffs renew their claim that the contract's limitation on liability is unconscionable, this time additionally relying upon decisions from other jurisdictions that are directly on point. See *Pitts v.*

*Watkins,* ... (Miss. 2005) ... ; *Lucier v. Williams,* ... (N.J. Super. Ct. App. Div. 2004) .... These cases are among the numerous decisions from around the country that have addressed allegedly unconscionable home inspection contracts. Typically, the challenged contracts contain provisions, as in the case before us, setting forth short notice requirements, limiting liabil­ ity to the amount of the inspection fee, and compel­ ling arbitrat ion that would incur costs exceeding the liability limit.

Here, as noted, the contract 's limitation on Brick­ Kicker's liability creates a disingenuous arbitration remedy for plaintiffs. Even standing alone, limiting liability to $285 irrespective of the actual damages incurred by the customer would be, at minimum, highly suspect. But under this contract's governing arbitration rules, plaintiffs could not recover even the cost of the filing fee much less any compensatory damages .... Thus, the liability limit in the contract is a complete impedi­ ment to any effective remedy for the home inspector's negligence or even intentional tort. As a number of courts have held, a provision limiting liability to damages that are insignificant in comparison with a customer's actual loss is really an exculpatory clause insulating the home inspector from all liability ....

Because the contract before us contains what are, in effect, exculpatory clauses in consumer transactions, we turn to *Dalury ...* for guidance. *Dalury* holds that exculpatory clauses are valid as long as they do

not violate public policy. In determining whether exculpatory clauses violate public policy, we adopted the standards from *Tunkl v. Regents of University*

*of California ...* (Cal. 1963), as "relevant considerations." ... The *Tunkl* standards provide

that an exculpatory agreement is invalid if it exhibits some or all of the following characteristics:

It concerns a business of a type generally thought suitable for public regulation. The party seeking

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exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds [it]self out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks [the party's] services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or [the seller's] agents....

Although *Dalury* has distinctive facts and does not involve a home inspection contract, the factors that were central in that case are also present here. The record in this case indicates that GDM Home Services is a local franchisee of BrickKicker, a national home inspection corporation. Its services are generally open to the public, and plaintiffs chose it as one of three home inspection services referred by the seller's real­ tor. Although Vermont is one of a minority of states that have not regulated home inspection contractors, many states have adopted regulatory schemes. See <http://www.homeinspector.org/stateregulations/> default.aspx (detailing state home inspector regulation as of Oct. 25, 2011). Thus, home inspection contracting is clearly a "business of a type generally thought suitable for public regulation," the first of the *Tunkl* factors ....

As in *Dalury,* a legitimate public interest arises "as a result of the seller 's general invitation to the public to utilize the ... services in question." ... Thus, as in *Dalury,* public policy requires consequences when home inspectors do not perform with due care. Only the inspectors are able to conform their services to their contractual obligations and the necessary quality. If the law immunizes them from liability for their neg­ ligence, it eliminates the greatest and most important incentive for proper performance.

The importance of home inspection services to consumers cannot be doubted, as explained in *Lucier:*

The foisting of a contract of this type in this setting on an inexperienced consumer clearly

demonstrates a lack of fair dealing by the profes­ sional. The cost of homes in New Jersey is sub­ stantial. It has often been said that the purchase of a home is usually the largest investment a per­ son will make in life. The purchase of a home is, for most people, a very infrequent occurrence, and a very major undertaking. People may buy a home once in a lifetime, or not very often. Home inspectors, on the other hand, conduct a volume operation . As a businessperson who possesses knowledge about and experience in the industry, [the inspector] is aware of the cost of repairing major defects. In fact, that is a major selling point of his service to residential buyers....

... [T]he home purchaser must "take the precau­ tionary steps to properly assess that the price of the residence reflects its actual value." ... Thus, a compe­ tent inspection is not only crucial to "negotiating the price for the residence," but it is normally required by the financing agency, which also relies upon it....

At the time of the home inspection, consumers have normally already decided to buy a house based on factors such as aesthetics and amenities, and "the only issue left is the integrity of the house." ... The purpose of a home inspection "is to give a consumer a rational basis upon which to decline to enter into a contract to buy, to provide lawful grounds to be relieved from a contractual commitment to buy, or to offer a sound basis upon which to negotiate a lower price." ... If home inspectors can exempt themselves from liability for their negligence, they could "walk through the house in five minutes, fabricate a report, and escape liability, without any consideration of the consequences of their conduct" on the homebuyer's decision involving hundreds of thousands of dollars.... Limiting the liability to the inspection fee does not provide a realistic incentive to act diligently, see *Lucier,*

... ("To be enforceable, the amount of the cap on a party's liability must be sufficient to provide a real incentive to act diligently."), particularly given the countervailing incentive to please the referring realtor by soft-pedaling the inspection and allowing the sale to go forward ....

The importance of home inspection services also relates to the last of the *Tunkl* factors: whether , "as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." ... The affidavit of Heidi Glassford, who was primarily responsible for the house purchase, indicates that she is a high school graduate who has no expertise or experience in housing construction and had never

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before purchased a house. The purchase and sales agreement had a provision allowing plaintiffs to back out of the contract if the house inspection revealed defects. Thus, the house purchase depended upon an acceptable inspection report, and plaintiffs' right under the contract to decline to purchase a house with major defects as set forth in an inspection also depended on a competent housing inspection. In short, plaintiffs were entirely at the mercy of BrickKicker and without other means of protection if BrickKicker was careless in its housing inspection . ...

In addition to the substantive unconscionability, this case also has elements of procedural unconsciona­ bility, particularly with respect to the limited-liability clause, which is contained in boilerplate language without a separate heading in a contract of adhesion .... The front page of the contract describes the elements and limitations of the inspection, but does not contain any of the provisions about which plaintiffs complain­ the arbitration requirement, the limit on liability, or the notice requirement and shortened limitation period.

The customer's signature line is on the front so that the customer can sign without ever turning over the docu­ ment. The reverse side of the page lists the "INSPEC­ TION CONTRACT CONDITIONS." The conditions are in eleven separate paragraphs, generally in very small print and all without separate headers. The limited liability provision is in the middle of fine print in

paragraphs five and six and is not identified by a header . Two sentences about the liability limit are in capital letters, but . .. [o)nly the second ex presses clearly that the customer's only remedy is damages, but subject to the liability limit.

... [T)he critical contractual provisions limiting the customers' liability and creating, in effect, an illusory arbitration remedy are set forth in fine print, uniden­ tified, on the back page of a standard contract of adhesion.

For the reasons outlined above, we conclude that the contract's limited liability and binding arbitration provisions are unconscionable and thus unenforceable. Although the contract contains a boilerplate sever­ ability clause, we decline to strike only the limited liability provision, considering that both clauses operate together to effectively deny plaintiffs a

forum to resolve their claims. Theoretically, we could sever just the limited liability provision and force plaintiffs to proceed to binding arbitration, recogniz­ ing that Vermont law favors arbitration .. .. But we decline to do so. BrickKicker should not benefit

from a binding arbitration clause that is a major com­ ponent of the scheme to offer plaintiffs an illusory remedy for any c laims they might have against

Brick Kicker . ...

Reversed and remanded for further proceedings consistent with this opinion....

**Case Questions**

1. The trial court thought that this was not a difficult case. It was not the defendant's responsibility to make sure that the plaintiff read and understood the terms of the contract. She was not coerced into signing this agreement. In your opinion is the plaintiff more or less responsible for her own predicament than the defendant?
2. Can you make an argument from the utilitarian perspect ive that the Vermont Supreme Court was right to step in and override the contractua l terms as it did in this case?
3. . Can you make an argument from a natural law point of view that the plaintiff should have prevailed in this case?

**Professional Ethics**

### W e have l earned that law is only one of society's resources for developing sta n da rds of ethical con­ duct . Professional associa tions a l so make signi fica nt contributions. I t is comm.on for persons in a trade or profession who share a common concern about competency, qu ality, and integrity to organize an associa tion . Su ch an association typically will

develop a code of ethics to which the members will su bscribe. In this fashion , many of the dos a nd don'ts of a profession become codified, at least as fa r as the members a re concerned. Theoreti­ cally, a member who fails to comply with the code will be expelled from membership . This process has the twin advantages of distinguishing the membership from predatory competitors a nd

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### enabling the n1embers to establish and maintain a positive image with consumers. Real estate brokers , undertakers , social workers, engineers, doctors, police chiefs, and lawyers, to name bu t a few, have formed associations, at least in part, to establish and maintain standards of ethical behav­ ior for their memberships. In some of the regu­ lated professions, membership in a n association is required as a condition of licensure. This is true in the legal profession , where thirty states require attorneys to be dues-payin g members of the state's

bar association. 21

The American Bar Association and many state bar associations have standing committees on ethics tha t issue advisory opinions a t the request of mem­ bers. These opinions are often highly respected and ca n be influential when used in conjunction with disciplinary proceedings. Ba r associations also are heavily involved in developing proposed rules for consideration by the state supreme courts, and they often sponsor courses in continuing legal education for the benefit of the membership .

**Ethics and Professional Responsibility Codes for Lawyers and Judges**

The supreme court of each state is normally respon­ sible for overseeing the practice of law within its jurisdiction . It fulfills this obligation in pa1t by pro­ mulgating standards of professional conduct to pro­ tect the public from incompetent and/ or unethical lawyers and from judges who prove to be unsuited or u nfit to remain on the bench. Supreme courts also create administrative boards to investigate com­ plaints and enforce rules, and increasingly require that all attorneys and judges participate in contin u­ ing legal education programs .

Typical codes of conduct for lawyers a nd judges will express concerns about competency, confidenti­ ality, loyalty, honesty, candor, fairness, and avoiding conflicts of interest.

The West Virginia Supreme Court of Appeals, for example, has promulgated such codes of con­ duct for its lawyers and judges. It has established a special commission to investigate complaints against

judges and to "detern1ine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct ."

The West Virginia Code of Judicial Conduct, in Canon 3E(1), prohibits any judge from partici­ pating in any proceeding where "thejudge's impar­ tiality might reasonably be questioned .. . ."

West Virginia is one of thirty-nine states that elect rather than appoint some or all of their judges . Judges everywhere appreciate that the only power they possess is the right to make decisions. They depend on the executive branch of govern­ ment to enforce their orders and on the legislative bra nch of government to provide funding. Judges who are not fair a nd impartial threaten public sup­ port for the judiciary as an institution and poten­ tially undermine respect for all other judges. It is u nusual for a ju dge to refuse to volu ntarily remove (in legal jargon, "recuse") himself or herself from a proceeding that fairly or unfairly involves circum­ stances that could be perceived as raising questions

about whether that judge is biased or has a conflic of interest. It is even more rare for a sitting judge to deny three separate recusal motions brought by one of the parties to a highly pu blicized and contentious case, which is the issue in the following U.S. Supreme Court opinion.

**Introduction to *Caperton v. Massey Coal Co.***

### In our country, whenever it appears that a federal or state court trial has been fundamentally unfair for procedural reasons, an aggrieved party, after exhausting all other available sources of relief, has the right to petition the U.S. Supreme Court for a writ of certiorari. This is what happened in the case of *Caperton v. Massey Coal Co.* The U.S. Supreme Court granted certiorari and thereby agreed to decide this case, in part because the facts were so con1pelling . However, by accepting this case the Court was also reminding the lower courts, political operatives, and the country that the protections of the Due Process Clause can be invoked to remedy a procedural wrong, if it is necessary to the preserva­ tion of judicial integrity.

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**Hugh M. Caperton v. A. T. Massey Coal Company, Inc.**

*129 S. Ct. 2252*

*Supreme Court of the United States June 8, 2009*

**Justice Kennedy delivered the opinion of the Court.** In this case, the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had

entered a jury verdict of $50 million. Five justices heard the case, and the vote to reverse was 3 to 2. The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion. The basis for the motion was that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages ....

*I.*

In August 2002 a West Virginia jury returned a verdict that found respondents A. T. Massey Coal Co. and its affiliates (hereinafter Massey) liable for fraudulent misrepresentation, concealment, and tortious interfer­ ence with existing contractual relations. The jury awarded petitioners Hugh Caperton, Harman Devel­ opment Corp., Harman Mining Corp., and Sovereign Coal Sales (hereinafter Caperton) the sum of

$50 million in compensatory and punitive damages.

In June 2004 the state trial court denied Massey's post-trial motions challenging the verdict and the damages award, finding that Massey "intentionally acted in utter disregard of [Caperton's] rights and ulti­ mately destroyed [Caperton's] businesses .... In March 2005 the trial court denied Massey's motion for judg­ ment as a matter of law.

Don Blankenship is Massey's chairman, chief executive officer, and president. After the verdict but before the appeal, West Virginia held its 2004 judicial elections. Knowing the Supreme Court of Appeals of West Virginia would consider the appeal in the case, Blankenship decided to support an attorney who sought to replace Justice McGraw. Justice McGraw was a candidate for reelection to that court. The attorney who sought to replace him was Brent Benjamin.

In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blan­ kenship donated almost $2.5 million to "And For The Sake Of The Kids," a political organization formed under 26 U. S. C. §527. The §527 organization opposed McGraw and supported Benjamin.... Blankenship's donations accounted for more than two-thirds of the total funds it raised.... This was not all. Blankenship

spent, in addition, just over $500,000 on independent expenditures-for direct mailings and letters soliciting donations as well as television and newspaper adver­ tisements-" 'to support ... Brent Benjamin."'...

To provide some perspective, Blankenship's

$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee ....

Benjamin won. He received 382,036 votes (53.3 percent), and McGraw received 334,301 votes (46.7 percent) ....

In October 2005, before Massey filed its petition for appeal in West Virginia's highest court, Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct, based on the conflict caused by Blankenship's campaign involvement. Justice Benjamin denied the motion in April 2006 .... In December 2006 Massey filed its petition for appeal to challenge the adverse jury verdict . The West Virginia Supreme Court of Appeals granted review.

In November 2007 that court [consisting of "then­ Chief Justice Davis and joined by Justices Benjamin and Maynard"] reversed the $50 million verdict against Massey .... Justice Starcher dissented, stating that the "majority's opinion is morally and legally wrong ...."

Caperton sought rehearing, and the parties moved for disqualification of three of the five justices who decided the appeal. Photos had surfaced of Justice Maynard vacationing with Blankenship in the French Riviera while the case was pending.... Justice Maynard granted Caperton's recusal motion. On the other side Justice Starcher granted Massey's recusal motion, apparently based on his public criticism of Blankenship's role in the 2004 elections. In his recusal memorandum Justice Starcher urged Justice Benjamin to recuse himself as well.... He noted that "Blanken­ ship's bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this Court." ... Justice Benjamin declined Justice Starch­ er's suggestion and denied Caperton's recusal motion.

The court granted rehearing. Justice Benjamin, now in the capacity of acting chief justice, selected Judges Cookman and Fox to replace the recused justices . Caperton moved a third time for disqualifica­ tion.... Justice Benjamin again refused to withdraw, noting that the "push poll" was "neither credible nor

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sufficiently reliable to serve as the basis for an elected judge 's disqualification ."... In April 2008 a divided court again reversed the jury verdict, and again it was a 3-to-2 decision. Justice Davis filed a modified version of his prior opinion, repeating the two earlier holdings. She was joined by Justice Benjamin and Judge Fox. Justice Albright, joined by Judge Cookman, dissented: "Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority ...." The dissent also noted "genuine due process implications arising under federal law" with respect to Justice Benjamin's failure to recuse himself ....

Four months later-a month after the petition for writ of certiorari was filed in this Court-Justice Benjamin filed a concurring opinion. He defended the merits of the majority opinion as well as his decision not to recuse. He rejected Caperton's challenge to his participation in the case under both the Due Process Clause and West Virginia law. Justice Benjamin reiter­ ated that he had no '"direct, personal, substantial , pecuniary interest' in this case."'

We granted certiorari. 555 U. 5.\_ (2008).

*II.*

It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." ... The early and leading case on the subject is *Tumey* v. *Ohio,* 273 U. 5. 510 (1927)....

To place the present case in proper context, two instances where the Court has required recusal merit further discussion.

*A.*

The first involved the emergence of local tribunals where a judge had a financial interest in the outcome of a case, although the interest was less than what would have been considered personal or direct at common law.

This was the problem addressed in *Tumey.* There, the mayor of a village had the authority to sit as a judge (with no jury ) to try those accused of violating a state law prohibiting the possession of alcoholic bev­ erages. Inherent in this structure were two potential conflicts. First, the mayor received a salary supplement for performing judicial duties, and the funds for that compensation derived from the fines assessed in a case. No fines were assessed upon acquittal. The mayor­ judge thus received a salary supplement only if he convicted the defendant .... Second, sums from the criminal fines were deposited to the village's general treasury fund for village improvements and repairs....

The Court held that the Due Process Clause required disqualification "both because of [the mayor-judge's] direct pecuniary interest in the outcome, and because of

his official motive to convict and to graduate the fine to help the financial needs of the village."... It so held despite observing that "[t]here are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it."... The Court articulated the controlling principle:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defen­ dant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law....

The Court was thus concerned with more than the traditional common-law prohibition on direct pecuni­ ary interest. It was also concerned with a more general concept of interests that tempt adjudicators to disre­ gard neutrality ....

*8.*

The second instance requiring recusal that was not discussed at common law emerged in the criminal con­ tempt context, where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding . This Court characterized that first proceeding (perhaps pejoratively) as a " 'one-man grand jury.' " *Murchison,* 349 U.S., at 133.... In that first proceeding, and as pro­ vided by state law, a judge examined witnesses to determine whether criminal charges should be brought. The judge called the two petitioners before him. One petitioner answered questions, but the judge found him untruthful and charged him with perjury. The sec­ ond declined to answer on the ground that he did not have counsel with him, as state law seemed to permit. The judge charged him with contempt. The judge pro­ ceeded to try and convict both petitioners ....

This Court set aside the convictions on grounds that the judge had a conflict of interest at the trial stage because of his earlier participation followed by his deci­ sion to charge them. The Due Process Clause required disqualification. The Court recited the general rule that "no man can be a judge in his own case," adding that "no man is permitted to try cases where he has an inter­ est in the outcome." . . . It noted that the disqualifying criteria "cannot be defined with precision. Circumstances and relationships must be considered." ... That is because "[a]s a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session ...."

The *Murchison* Court was careful to distinguish the circumstances and the relationship from those where the Constitution would not require recusal. It noted that the single-judge grand jury is "more a part of the accusatory process than an ordinary lay