

Chapter 2

Constitutional Limitations on Criminal Law

LEARNING OBJECTIVES

After studying this chapter, you will:

1. understand and appreciate the reasons for the limits on criminal law and criminal punishment in the U.S. constitutional democracy.
2. understand the principle of legality and the importance of its relationship to the limits of criminal law and punishment.
3. appreciate the nature and importance of retroactive criminal law making.
4. know the criteria for identifying vague laws, and understand and appreciate their constitutional significance and the consequences.
5. know and understand and appreciate the limits placed on the criminal law and criminal punishment by the specific provisions in the Bill of Rights.
6. understand and appreciate the constitutional significance and consequences of principle of proportionality in criminal punishment.
7. understand the importance of the right to trial by jury in the process of sentencing convicted offenders.

CHAPTER OUTLINE

I. The Principle of Legality

- A. The First Principle of Criminal Law
- B. *Hughes v. State* (1994)

II. The Ban on Ex Post Facto Laws

- A. Constitutional Status
- B. Statutes that criminalize innocent acts after they're committed are the clearest example of ex post facto laws
- C. Ban protects private individuals by ensuring that legislatures give them fair warning about what's criminal and that they can rely on that requirement
- D. Ban prevents legislators from them from passing arbitrary and vindictive laws

III. The Void-for-Vagueness Doctrine

- A. The Aims of the Void-for-Vagueness Doctrine
 1. Addresses laws that fail to give fair warning to individuals as to what the law prohibits
 2. Addresses laws that allow arbitrary and discriminatory criminal justice administration
- B. Defining Vagueness

1. The dividing line between what is lawful and what is unlawful cannot be left to conjecture

IV. Equal Protection of the Law

V. The Bill of Rights and the Criminal Law

A. Free Speech

1. The Court has expanded the meaning of “speech” by holding that the protection of the amendment “does not end with the spoken or written word” (*Texas v. Johnson* 1989, 404).
2. The Court has applied the prohibition to the states since 1925 (*Gitlow v. New York*)
3. The Court has ruled that free speech is a fundamental right, one that enjoys preferred status
4. Void-for-Overbreadth Doctrine

B. The Right to Privacy

1. In *Griswold v. Connecticut* (1965), the Court concluded that the fundamental right to privacy originates in six amendments to the U.S. Constitution: the First, Third, Fourth, Ninth, Fifth, and Fourteenth Amendments.

C. The Right to Bear Arms

1. In *District of Columbia v. Heller* (2008) the Court stated that the core of the Second Amendment is “the right of law-abiding, responsible citizens to use arms in defense of hearth and home” (2821).

VI. The Constitution and Criminal Sentencing

A. “Barbaric Punishments”

B. Disproportionate Punishments

1. The Death Penalty: “Death is Different”
2. The Death Penalty for Mentally Retarded Murderers
3. The Death Penalty for Juveniles

C. Sentences of Imprisonment

1. Three-Strikes-and-You’re-Out
2. Mandatory Minimums

VII. The Right to Trial By Jury

A. The *Apprendi* Rule

VIII. Chapter Summary

IX. Key Terms

CHAPTER SUMMARY

The Founding Fathers were suspicious of power, but devoted to the rights of individuals to control their own destiny. To resolve this dilemma they created a Constitution that balanced the power of government and the liberty of individuals. The United States is a Constitutional democracy.

The principle of legality means that no one can be convicted of, or punished for, a crime unless the law defined the crime and prescribed the punishment *before* she engaged in the behavior was defined as a crime.

The purpose of banning *ex post facto* and vague criminal statutes is that they undermine the central values of free societies. First, knowing what the law commands provides individuals with the opportunity to obey the law and avoid punishment. Second, providing individuals with this opportunity promotes the value of human autonomy and dignity. Third, the ban on retroactive criminal lawmaking also prevents officials from punishing conduct they think is wrong but which no existing criminal law prohibits. So fundamental did the authors of the Constitution consider a ban on retroactive criminal lawmaking that they raised it to constitutional status in Article I of the U.S. Constitution.

The U.S. Supreme Court has ruled that vague laws violate the guarantees of two provisions in the U.S. Constitution: the Fifth Amendment and the Fourteenth Amendment. The void-for-vagueness doctrine addresses two evils. First, void laws fail to give fair warning to individuals as to what the law prohibits. Second, they allow arbitrary and discriminatory criminal justice administration.

Whether the emphasis is on notice to individuals or control of officials, the void-for-vagueness doctrine can never cure the uncertainty in all laws. The test to determine whether a statute defining an offense is void for uncertainty is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. The dividing line between what is lawful and what is unlawful cannot be left to conjecture.

In addition to the due process guarantee, the Fourteenth Amendment to the U.S. Constitution commands that “no state shall deny to any person within its jurisdiction the equal protection of the laws.” Equal protection is far more frequently an issue in criminal procedure than it is in criminal law; we’ll note briefly here the limits it puts on criminal lawmaking and punishment. Equal protection doesn’t require the government to treat everybody exactly alike.

The Bill of Rights bans defining certain kinds of behavior as criminal. One is the ban on making a crime out of the First Amendment rights to speech, religion, and associations; the other is criminalizing behavior protected by the right to privacy created by the U.S. Supreme Court. Although the amendment itself directs its prohibition only at the U.S. Congress, the Court has applied the prohibition to the states since 1925 (*Gitlow v. New York*). The Court has ruled that free speech is a fundamental right, one that enjoys preferred status. According to the Supreme

Court, there are five categories of expression not protected by the First Amendment: obscenity, profanity, libel and slander, fighting words, and clear and present danger. The void-for-overbreadth doctrine protects speech guaranteed by the first amendment by invalidating laws so broadly written that the fear of prosecution creates a “chilling effect” that discourages people from exercising that freedom.

The U.S. Supreme Court has decided there is a constitutional right to privacy, a right that bans “all governmental invasions of the sanctity of a man’s home and the privacies of life” (*Griswold v. Connecticut* 1965, 484). Not only is privacy a constitutional right, it’s a *fundamental* right that requires the government to prove that a compelling interest justifies invading it. According to the Court (*Griswold v. Connecticut* 1965), the fundamental right to privacy originates in six amendments to the U.S. Constitution: First, Third, Fourth, Ninth, Fifth and Fourteenth. This cluster of amendments sends the implied but strong message that we have the right to be let alone by the government.

Barbaric punishments are punishments that are considered no longer acceptable to civilized society. According to the Supreme Court, for a punishment not to be “cruel” it must be: instantaneous and painless and can’t involve unnecessary mutilation of the body. Punishments must also be proportional: the punishment must fit the crime.

A majority of the U.S. Supreme Court has consistently agreed that the proportionality principle applies to death penalty cases; as the Court puts it, “death is different.” There are numerous capital crimes where no one is killed; they include treason, espionage, kidnapping, aircraft hijacking, large-scale drug trafficking, train wrecking, and perjury that leads to someone’s execution (Liptak 2003). Death is disproportionate for rape. Executing mentally retarded persons and juveniles violates the ban on cruel and unusual punishment. The consensus that the ban on cruel and unusual punishment includes a proportionality requirement in capital punishment does not extend to prison sentences.

Three-strikes laws are supposed to make sure that offenders who are convicted of a third felony get locked up for a very long time (sometimes for life). Three-strikes laws are popular for three reasons. They addressed the public’s dissatisfaction with the criminal justice system. They promised a simple solution to a complex problem—the “panacea phenomenon.” The use of the catchy phrase “three strikes and you’re out” was appealing; it put old habitual offender statute ideas into the language of modern baseball (Benekos and Merlo 1995, 3; Turner et al. 1995).

Mandatory minimum sentencing laws require judges to impose a non discretionary minimum amount of prison time that all offenders have to serve. Mandatory minimum sentences are the more rigid form of the broad scheme of determinate sentencing. This scheme, which fixes or determines sentence length according to the seriousness of the crime, places sentencing authority in legislatures. The less extreme form of fixed sentencing is sentencing guidelines in which a commission establishes a narrow range of penalties and judges are supposed to choose a specific sentence within that range. A sentence outside of the Guidelines range must be supported by a justification that “is proportional to the extent of the difference between the advisory range and the sentence imposed.” An abuse-of-discretion standard applies to appellate review of sentencing decisions.