PART 1

THE SUBSTANTIVE CRIMINAL LAW

CHAPTER 1

CRIMINALIZATION, DEFINITION AND CLASSIFICATION

SECTION 1. NATURE AND PURPOSES OF THE CRIMINAL LAW

Defining criminal law is notoriously challenging. The definition suggested by Blackstone is as follows: "A crime or misdemeanour is an act committed or omitted, in violation of a public law either forbidding or commanding it."[a] As pointed out in the Eighth Edition, this focus on conduct overlooks the fact that many acts may or may not be crimes, depending on their results and the attending circumstances.

Suppose, for example, **D** stabbed **X** unlawfully, inflicting a serious injury that resulted in **X's** death six weeks thereafter. Under the theory of the common law of crimes, unchanged by statute, **D** should be punished for the unlawful killing of **X,** but **X's** death was the result of **D's** act rather than the act itself, which was thrusting the knife.[b] If, quite by accident, a surgeon should have come upon **X** so soon after the wounding as to be able to save his life this would not in any way change **D's** act. The knife thrust by **D** would be unaltered by this fortuitous occurrence although the difference in the consequences would be tremendous. And although **D's** act would be the same in either case his crime would be entirely different because under the first assumption he is to be punished for an unlawful killing whereas under the second, there would be no killing and the punishment would be for unlawful wounding. In other words it is more accurate to define crime in terms of the social harm caused rather than the act committed.[c]

If **A** and **B** perform the same physical act of setting off a fire alarm, **A** is not guilty of a crime if the purpose was to report a fire. However, if **B** set off the alarm as a joke, the act of **B** would be a crime. The social harm proscribed by the conduct is the essence of the crime, not the physical act.

These considerations led Professors Perkins and Boyce to conclude that that a crime is any social harm defined and made punishable by law.[d]

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[a] 4 Bl.Comm. * 5.

[b] "The word 'act' is used throughout the Restatement of this Subject to denote an external manifestation of the actor's will and does not include any of its results even the most direct, immediate and intended." Restatement, Second, Torts § 2 (1965).

[c] For this reason Bishop defined crime in terms of the "wrong" done. "A crime is any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name." 1 Bishop, New Criminal Law § 32 (8th ed. 1892).

[d] There were witnesses to a murder who were well acquainted with the killer. But since he was one of identical twins and no witness could be sure which of the twins committed the crime, there could be no conviction. Usually a person can be held criminally responsible only for that person's own misconduct and the person need not show noninvolvement. People v. Lopez, 72 Ill.App.3d 713, 28 Ill.Dec. 906, 391 N.E.2d 105 (1979).

Criminologists and sociologists have sometimes given the concept of crime a broader definition.[e] Whatever benefit that may have for such purposes, from the standpoint of the law a crime is not such until it is recognized as a crime by law.[f] Although some civil remedies may involve sanctions similar to those normally imposed by criminal courts, i.e., fines, loss of rights, the degree of sanction[g] imposed by the criminal law is usually much more severe and the opprobrium associated with the criminal sanction is, except for minor offenses, usually more extreme.[h]

This is sensible, so far as it goes; but it leaves open the question of what counts as "social harm," and of when the legislature has decided to make harm-causing conduct punishable as a crime. Ordinarily the legislature declares conduct to be criminal, and willingly shoulders the burden of the criminal law's procedural safeguards. In the two cases that follow, however, the legislature purported to be imposing civil, as distinct from criminal, liability. Why might a legislature choose to invoke the criminal process rather than civil sanctions? To what extent does the Constitution *require* the legislature to proceed through the criminal process? What distinctive procedures do tradition and the Constitution require in criminal cases? Condensed to two short but very difficult questions, what is the nature, and what are the purposes, of the criminal law?

Kansas v. Crane

Supreme Court of the United States, 2002.
534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856.

[According to Justice Scalia's dissent, otherwise omitted, "Respondent was convicted of lewd and lascivious behavior and pleaded guilty to aggravated sexual battery for two incidents that took place on the same day in 1993. In the first, respondent exposed himself to a tanning salon attendant. In the second, 30 minutes later, respondent entered a video store, waited until he was the only customer present, and then exposed himself to the clerk. Not stopping there, he grabbed the clerk by the neck, demanded she perform oral sex on him, and threatened to rape her, before running out of the store. Following respondent's plea to aggravated sexual battery, the State filed a petition in State District Court to have respondent evaluated and adjudicated a sexual predator under the SVPA. That Act permits the civil deten-

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[e] Bottomley, Criminology in Focus 1–38 (1979); Rob White and Fiona Haines, Crime and Criminology 5 (1996).

[f] "No relevant statutory provision makes punishable as a crime a person's disobedience of an order closing a body of water . . . In the absence of such an express penal provision, the statute cannot be a basis for criminal prosecution. . . . " People v. Boyd, 642 P.2d 1, 3 (Colo.1982).

A statute defining domestic violence did not create a substantive crime but was a procedural statute applicable to other offenses. It was error to impose a separate sentence under the domestic violence statute. State v. Schackart, 153 Ariz. 422, 737 P.2d 398 (App.1987).

A crime is made up of two parts, forbidden conduct and prescribed penalty; the former without the latter is no crime. Cook v. Commonwealth, 20 Va.App. 510, 458 S.E.2d 317, 319 (1995).

The purpose of codification of all criminal offenses is to advise the public as to what conduct is criminal. State v. Boyd, 925 S.W.2d 237 (Tenn.Cr.App.1995).

[g] A civil contempt may result in confinement to coerce a person to take some action. Matter of Thornton, 560 F.Supp. 183 (S.D.N.Y.1983). The purpose is not a punitive sanction, but to obtain compliance with a court order.

[h] Hart, The Aims of the Criminal Law, 23 Law and Contemp.Prob. 401, 404–406 (1958); Robinson, The Criminal–Civil Distinction and Dangerous Blameless Offenders, 83 J.Crim.L. & Crim. 693, 694 (1993).

tion of a person convicted of any of several enumerated sexual offenses, if it is proven beyond a reasonable doubt that he suffers from a 'mental abnormality'—a disorder affecting his 'emotional or volitional capacity which predisposes the person to commit sexually violent offenses'—or a 'personality disorder,' either of 'which makes the person likely to engage in repeat acts of sexual violence.' " Kan. Stat. Ann. §§ 59–29a02(a), (b) (2000 Cum.Supp.).

Several psychologists examined respondent and determined he suffers from exhibitionism and antisocial personality disorder. Though exhibitionism alone would not support classification as a sexual predator, a psychologist concluded that the two in combination did place respondent's condition within the range of disorders covered by the SVPA, "cit[ing] the increasing frequency of incidents involving [respondent], increasing intensity of the incidents, [respondent's] increasing disregard for the rights of others, and his increasing daring and aggressiveness." *In re Crane,* 269 Kan. 578, 579, 7 P.3d 285, 287 (2000). Another psychologist testified that respondent's behavior was marked by "impulsivity or failure to plan ahead," indicating his unlawfulness "was a combination of willful and uncontrollable behavior," *id.,* at 584–585, 7 P.3d, at 290. The State's experts agreed, however, that " '[r]espondent's mental disorder does not impair his volitional control to the degree he cannot control his dangerous behavior.' " *Id.,* at 581, 7 P.3d, at 288.

Respondent moved for summary judgment, arguing "that for his detention to comport with substantive due process the State was required to prove not merely what the statute requires—that by reason of his mental disorder he is 'likely to engage in repeat acts of sexual violence'—but also that he is unable to control his violent behavior. The trial court denied this motion, and instructed the jury pursuant to the terms of the statute. *Id.,* at 581, 7 P.3d, at 287–288. The jury found, beyond a reasonable doubt, that respondent was a sexual predator as defined by the SVPA. The Kansas Supreme Court reversed, holding the SVPA unconstitutional as applied to someone, like respondent, who has only an emotional or personality disorder within the meaning of the Act, rather than a volitional impairment. For such a person, it held, the State must show not merely a likelihood that the defendant would engage in repeat acts of sexual violence, but also an inability to control violent behavior."]

■ JUSTICE BREYER delivered the opinion of the Court.

This case concerns the constitutional requirements substantively limiting the civil commitment of a dangerous sexual offender—a matter that this Court considered in Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). The State of Kansas argues that the Kansas Supreme Court has interpreted our decision in *Hendricks* in an overly restrictive manner. We agree and vacate the Kansas court's judgment.

I

In *Hendricks,* this Court upheld the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59–29a01 *et seq.* (1994), against constitutional challenge. 521 U.S., at 371, 117 S.Ct. 2072. In doing so, the Court characterized the confinement at issue as civil, not criminal, confinement. *Id.,* at 369, 117 S.Ct. 2072. And it held that the statutory criterion for confinement embodied in the statute's words "mental abnormality or personality disorder" satisfied " 'substantive' due process requirements." *Id.,* at 356, 360, 117 S.Ct. 2072.

In reaching its conclusion, the Court's opinion pointed out that "States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety." *Id.,* at 357, 117 S.Ct. 2072. It said that "[w]e have consistently upheld such involuntary commitment statutes" when (1) "the confinement takes place pursuant to proper procedures and evidentiary standards," (2) there is a finding of "dangerousness either to one's self or to others," and (3) proof of dangerousness is "coupled . . . with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.' " *Id.,* at 357–358, 117 S.Ct. 2072. It noted that the Kansas "Act unambiguously requires a finding of dangerousness either to one's self or to others," *id.,* at 357, 117 S.Ct. 2072, and then "links that finding to the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior," *id.,* at 358, 117 S.Ct. 2072 (citing Kan. Stat. Ann. § 59–29a02(b) (1994)). And the Court ultimately determined that the statute's "requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of . . . other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness." 521 U.S., at 358, 117 S.Ct. 2072.

The Court went on to respond to Hendricks' claim that earlier cases had required a finding, not of "mental abnormality" or "personality disorder," but of "mental illness." *Id.,* at 358–359, 117 S.Ct. 2072. In doing so, the Court pointed out that we "have traditionally left to legislators the task of defining [such] terms." *Id.,* at 359, 117 S.Ct. 2072. It then held that, to "the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria." *Id.,* at 360, 117 S.Ct. 2072. It added that Hendricks' own condition "doubtless satisfies those criteria," for (1) he suffers from pedophilia, (2) "the psychiatric profession itself classifies" that condition "as a serious mental disorder," and (3) Hendricks conceded that he cannot " 'control the urge' " to molest children. And it concluded that this "admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Ibid.*

II

In the present case the State of Kansas asks us to review the Kansas Supreme Court's application of *Hendricks.* The State here seeks the civil commitment of Michael Crane, a previously convicted sexual offender who, according to at least one of the State's psychiatric witnesses, suffers from both exhibitionism and antisocial personality disorder. *In re Crane,* 269 Kan. 578, 580–581, 7 P.3d 285, 287 (2000); *cf. also* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 569 (rev. 4th ed. 2000) (DSM–IV) (detailing exhibitionism), 701–706 (detailing antisocial personality disorder). After a jury trial, the Kansas District Court ordered Crane's civil commitment. 269 Kan., at 579–584, 7 P.3d, at 286–288. But the Kansas Supreme Court reversed. *Id., at 586,* 7 P.3d, at 290. In that court's view, the Federal Constitution as interpreted in *Hendricks* insists upon "a finding that the defendant cannot control his dangerous behavior"—even if (as provided by Kansas law) problems of "emotional capacity" and not "volitional capacity" prove the "source of bad behavior" warranting commitment. 269 Kan., at 586, 7 P.3d, at 290; *see also* Kan.

Stat. Ann. § 59–29a02(b) (2000 Cum.Supp.) (defining "[m]ental abnormality" as a condition that affects an individual's emotional *or* volitional capacity). And the trial court had made no such finding.

Kansas now argues that the Kansas Supreme Court wrongly read *Hendricks* as requiring the State *always* to prove that a dangerous individual is *completely* unable to control his behavior. That reading, says Kansas, is far too rigid.

III

We agree with Kansas insofar as it argues that *Hendricks* set forth no requirement of *total* or *complete* lack of control. *Hendricks* referred to the Kansas Act as requiring a "mental abnormality" or "personality disorder" that makes it "*difficult,* if not impossible, for the [dangerous] person to control his dangerous behavior." 521 U.S., at 358, 117 S.Ct. 2072 (emphasis added). The word "difficult" indicates that the lack of control to which this Court referred was not absolute. Indeed, as different *amici* on opposite sides of this case agree, an absolutist approach is unworkable. Brief for Association for the Treatment of Sexual Abusers as *Amicus Curiae* 3; *cf.* Brief for American Psychiatric Association et al. as *Amici Curiae* 10; *cf. also* American Psychiatric Association, Statement on the Insanity Defense 11 (1982), reprinted in G. Melton, J. Petrila, N. Poythress, & C. Slobogin, Psychological Evaluations for the Courts 200 (2d ed. 1997) (" 'The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk' "). Moreover, most severely ill people—even those commonly termed "psychopaths"—retain some ability to control their behavior. *See* Morse, *Culpability and Control, 142 U. Pa. L.Rev. 1587, 1634–1635 (1994);* cf. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 Psychol. Pub. Pol'y & L. 505, 520–525 (1998). Insistence upon absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities.

We do not agree with the State, however, insofar as it seeks to claim that the Constitution permits commitment of the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination. *See* Brief for Petitioner 17; Tr. of Oral Arg. 22, 30–31. *Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." 521 U.S., at 360, 117 S.Ct. 2072. That distinction is necessary lest "civil commitment" become a "mechanism for retribution or general deterrence"—functions properly those of criminal law, not civil commitment. *Id.*, at 372–373, 117 S.Ct. 2072 (KENNEDY, J., concurring); *cf. also Moran,* The Epidemiology of Antisocial Personality Disorder, 34 Social Psychiatry & Psychiatric Epidemiology 231, 234 (1999) (noting that 40%–60% of the male prison population is diagnosable with antisocial personality disorder). The presence of what the "psychiatric profession itself classifie[d] . . . as a serious mental disorder" helped to make that distinction in *Hendricks.* And a critical distinguishing feature of that "serious . . . disorder" there consisted of a special and serious lack of ability to control behavior.

In recognizing that fact, we did not give to the phrase "lack of control" a particularly narrow or technical meaning. And we recognize that in cases where lack of control is at issue, "inability to control behavior" will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when

viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case. 521 U.S., at 357–358, 117 S.Ct. 2072; *see also* Foucha v. Louisiana, 504 U.S. 71, 82–83, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (rejecting an approach to civil commitment that would permit the indefinite confinement "of any convicted criminal" after completion of a prison term).

We recognize that *Hendricks* as so read provides a less precise constitutional standard than would those more definite rules for which the parties have argued. But the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules. For one thing, the States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment. *Hendricks,* 521 U.S., at 359, 117 S.Ct. 2072; *id.,* at 374–375, 117 S.Ct. 2072 (BREYER, J., dissenting). For another, the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law. *See id.,* at 359, 117 S.Ct. 2072. *See also, e.g.,* Ake v. Oklahoma, 470 U.S. 68, 81, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (psychiatry not "an exact science"); DSM–IV xxx ("concept of mental disorder . . . lacks a consistent operational definition"); *id.,* at xxxii-xxxiii (noting the "imperfect fit between the questions of ultimate concern to the law and the information contained in [the DSM's] clinical diagnosis"). Consequently, we have sought to provide constitutional guidance in this area by proceeding deliberately and contextually, elaborating generally stated constitutional standards and objectives as specific circumstances require. *Hendricks* embodied that approach.

IV

The State also questions how often a volitional problem lies at the heart of a dangerous sexual offender's serious mental abnormality or disorder. It points out that the Kansas Supreme Court characterized its state statute as permitting commitment of dangerous sexual offenders who (1) suffered from a mental abnormality properly characterized by an "emotional" impairment and (2) suffered no "volitional" impairment. 269 Kan., at 583, 7 P.3d, at 289. It adds that, in the Kansas court's view, *Hendricks* absolutely forbids the commitment of any such person. 269 Kan., at 585–586, 7 P.3d, at 290. And the State argues that it was wrong to read *Hendricks* in this way. Brief for Petitioner 11; Tr. of Oral Arg. 5.

We agree that *Hendricks* limited its discussion to volitional disabilities. And that fact is not surprising. The case involved an individual suffering from pedophilia—a mental abnormality that critically involves what a lay person might describe as a lack of control. DSM–IV 571–572 (listing as a diagnostic criterion for pedophilia that an individual have acted on, or been affected by, "sexual urges" toward children). Hendricks himself stated that he could not " 'control the urge' " to molest children. 521 U.S., at 360, 117 S.Ct. 2072. In addition, our cases suggest that civil commitment of dangerous sexual offenders will normally involve individuals who find it particularly difficult to control their behavior—in the general sense described above. *Cf.* Seling v. Young, 531 U.S. 250, 256, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001); *cf. also* Abel & Rouleau, Male Sex Offenders, in Handbook of Outpatient Treatment of Adults: Nonpsychotic Mental Disorders

271 (M. Thase, B. Edelstein, & M. Hersen eds.1990) (sex offenders' "compulsive, repetitive, driven behavior . . . appears to fit the criteria of an emotional or psychiatric illness"). And it is often appropriate to say of such individuals, in ordinary English, that they are "unable to control their dangerousness." *Hendricks, supra*, at 358, 117 S.Ct. 2072.

Regardless, *Hendricks* must be read in context. The Court did not draw a clear distinction between the purely "emotional" sexually related mental abnormality and the "volitional." Here, as in other areas of psychiatry, there may be "considerable overlap between a . . . defective understanding or appreciation and . . . [an] ability to control . . . behavior." American Psychiatric Association Statement on the Insanity Defense, 140 Am. J. Psychiatry 681, 685 (1983) (discussing "psychotic" individuals). Nor, when considering civil commitment, have we ordinarily distinguished for constitutional purposes among volitional, emotional, and cognitive impairments. *See, e.g.,* Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983); Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). The Court in *Hendricks* had no occasion to consider whether confinement based solely on "emotional" abnormality would be constitutional, and we likewise have no occasion to do so in the present case.

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For these reasons, the judgment of the Kansas Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.[i]

In re Winship

Supreme Court of the United States, 1970.
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368.

■ MR. JUSTICE BRENNAN delivered the opinion of the Court.

Constitutional questions decided by this Court concerning the juvenile process have centered on the adjudicatory stage at "which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution." In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967). Gault decided that, although the Fourteenth Amendment does not require that the hearing at this stage conform with all the requirements of a criminal trial or even of the usual administrative proceeding, the Due Process Clause does require application during the adjudicatory hearing of "the essentials of due process and fair treatment." *Id., at 30, 87 S.Ct. at 1445.* This case presents the single, narrow question whether proof beyond a reasonable doubt is among the "essentials of due process and fair treatment" required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.[1]

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[i] In United States v. Comstock, 130 S.Ct. 1949 (2010), the Court rejected the claim that 18 U.S.C. §4248, which authorizes civil commitment of dangerous sex offenders following their release from federal prison, exceeds Congress's powers under Article I.

[1] Thus, we do not see how it can be said in dissent that this opinion "rests entirely on the assumption that all juvenile proceedings are 'criminal prosecutions,' hence subject to constitutional limitations." As in Gault, "we are not here concerned with * * * the pre-judicial stages of

Section 712 of the New York Family Court Act defines a juvenile delinquent as "a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime." During a 1967 adjudicatory hearing, conducted pursuant to § 742 of the Act, a judge in New York Family Court found that appellant, then a 12–year-old boy, had entered a locker and stolen $112 from a woman's pocketbook. The petition which charged appellant with delinquency alleged that his act, "if done by an adult, would constitute the crime or crimes of Larceny." The judge acknowledged that the proof might not establish guilt beyond a reasonable doubt, but rejected appellant's contention that such proof was required by the Fourteenth Amendment. The judge relied instead on § 744(b) of the New York Family Court Act which provides that "(a)ny determination at the conclusion of (an adjudicatory) hearing that a (juvenile) did an act or acts must be based on a preponderance of the evidence."[2] During a subsequent dispositional hearing, appellant was ordered placed in a training school for an initial period of 18 months, subject to annual extensions of his commitment until his 18th birthday—six years in appellant's case. The Appellate Division of the New York Supreme Court, First Judicial Department, affirmed without opinion, 30 A.D.2d 781, 291 N.Y.S.2d 1005 (1968). The New York Court of Appeals then affirmed by a four-to-three vote, expressly sustaining the constitutionality of § 744(b), 24 N.Y.2d 196, 299 N.Y.S.2d 414, 247 N.W.2d 253 (1969). We noted probable jurisdiction 396 U.S. 885, 90 S.Ct. 179, 24 L.Ed.2d 160 (1969). We reverse.

I

The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, (though) its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." C. McCormick, Evidence § 321, pp. 681–682 (1954); *see also* 9 J. Wigmore, Evidence, § 2497 (3d ed. 1940). Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does "reflect a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S. 145, 155, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968).

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the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process." 387 U.S., at 13, 87 S.Ct., at 1436. In New York, the adjudicatory stage of a delinquency proceeding is clearly distinct from both the preliminary phase of the juvenile process and from its dispositional stage. *See* N.Y. Family Court Act §§ 731–749. Similarly, we intimate no view concerning the constitutionality of the New York procedures governing children "in need of supervision." *See id.*, at §§ 711, 712, 742–745. nor Do we consider whether there are other "essentials of due process and fair treatment" required during the adjudicatory hearing of a delinquency proceeding. Finally, we have no occasion to consider appellant's argument that § 744(b) is a violation of the Equal Protection Clause, as well as a denial of due process.

[2] The ruling appears in the following portion of the hearing transcript:

Counsel: "Your Honor is making a finding by the preponderance of the evidence."

Court: "Well, it convinces me."

Counsel: "It's not beyond a reasonable doubt, Your Honor."

Court: "That is true * * * Our statute says a preponderance and a preponderance it is."

Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required. Mr. Justice Frankfurter stated that "(i)t the duty of the Government to establish * * * guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.' " Leland v. Oregon, *supra*, 343 U.S., at 802–803, 72 S.Ct., at 1009 (dissenting opinion). In a similar vein, the Court said in Brinegar v. United States, *supra*, 338 U.S., at 174, 69 S.Ct., at 1310, that "(g)uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." Davis v. United States, *supra*, 160 U.S., at 488, 16 S.Ct., at 358 stated that the requirement is implicit in "constitutions * * * (which) recognize the fundamental principles that are deemed essential for the protection of life and liberty." In Davis a murder conviction was reversed because the trial judge instructed the jury that it was their duty to convict when the evidence was equally balanced regarding the sanity of the accused. This Court said: "On the contrary, he is entitled to an acquittal of the specific crime charged, if upon all the evidence, there is reasonable doubt whether he was capable in law of committing crime. * * * No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them * * * is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." *Id.*, at 484, 493, 16 S.Ct., at 357, 360.

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, *supra*, 156 U.S., at 453, 15 S.Ct., at 403. As the dissenters in the New York Court of Appeals observed, and we agree, "a person accused of a crime * * * would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." 24 N.Y.2d, at 205, 299 N.Y.S.2d, at 422, 247 N.E.2d, at 259.

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in Speiser v. Randall, *supra*, 357 U.S., at 525–526, 78 S.Ct., at 1342: "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable

doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." Dorsen & Rezneck, In Re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967).

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

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

II

We turn to the question whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law. The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child. We do not find convincing the contrary arguments of the New York Court of Appeals, Gault rendered untenable much of the reasoning relied upon by that court to sustain the constitutionality of § 744(b). The Court of Appeals indicated that a delinquency adjudication "is not a 'conviction' " (§ 781); that it affects no right or privilege, including the right to hold public office or to obtain a license (§ 782); and a cloak of protective confidentiality is thrown around all the proceedings (§§ 783–784).' 24 N.Y.2d at 200, 299 N.Y.S.2d, at 417–418, 247 N.E.2d, at 255–256. The court said further: "The delinquency status is not made a crime; and the proceedings are not criminal. There is, hence, no deprivation of due process in the statutory provision (challenged by appellant) * * *." 24 N.Y.2d, at 203, 299 N.Y.S.2d, at 420, 247 N.E.2d, at 257. In effect the Court of Appeals distinguished the proceedings in question here from a criminal prosecution by use of what Gault called the "civil label-of-convenience which has been attached to juvenile proceedings." 387 U.S., at 50, 87 S.Ct., at 1455. But Gault expressly rejected that distinction as a reason for holding the Due Process Clause inapplicable to a juvenile proceeding. 387 U.S., at 50–51, 87 S.Ct., at 1455, 1456. The Court of Appeals also attempted to justify the preponderance standard on the related ground that juvenile proceedings are designed "not to punish, but to save the child." 24 N.Y.2d, at 197, 299 N.Y.S.2d, at 415, 247 N.E.2d, at 254. Again, however, Gault expressly rejected this justification. 387 U.S., at 27, 87 S.Ct., at 1443. We made clear in that decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "(a) proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *Id.*, at 36, 87 S.Ct., at 1448.

Nor do we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of

beneficial aspects of the juvenile process. Use of the reasonable-doubt standard during the adjudicatory hearing will not disturb New York's policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, and that juvenile proceedings are confidential. Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the factfinding takes place. And the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment will remain unimpaired. Similarly, there will be no effect on the procedures distinctive to juvenile proceedings that are employed prior to the adjudicatory hearing.

The Court of Appeals observed that "a child's best interest is not necessarily, or even probably, promoted if he wins in the particular inquiry which may bring him to the juvenile court." 24 N.Y.2d, at 199, 299 N.Y.S.2d, at 417, 247 N.E.2d, at 255. It is true, of course, that the juvenile may be engaging in a general course of conduct inimical to his welfare that calls for judicial intervention. But that intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law[5] and to the possibility of institutional confinement on proof insufficient to convict him were he an adult.

We conclude, as we concluded regarding the essential due process safeguards applied in Gault, that the observance of the standard of proof beyond a reasonable doubt "will not compel the States to abandon or displace any of the substantive benefits of the juvenile process." *Gault, supra,* at 21, 87 S.Ct., at 1440.

Finally, we reject the Court of Appeals' suggestion that there is, in any event, only a "tenuous difference" between the reasonable-doubt and preponderance standards. The suggestion is singularly unpersuasive. In this very case, the trial judge's ability to distinguish between the two standards enabled him to make a finding of guilt that he conceded he might not have made under the standard of proof beyond a reasonable doubt. Indeed, the trial judge's action evidences the accuracy of the observation of commentators that "the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." *Dorsen & Rezneck,* supra, at 26–27.

III

In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in Gault—notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination. We therefore hold, in agreement with Chief Judge Fuld in dissent in the Court of Appeals, "that, where a 12–year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process * * * the case against him must be proved beyond a reasonable doubt." 24 N.Y.2d, at 207, 299 N.Y.S.2d, at 423, 247 N.E.2d, at 260.

Reversed.

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[5] The more comprehensive and effective the procedures used to prevent public disclosure of the finding, the less the danger of stigma. As we indicated in Gault, however, often the "claim of secrecy * * * is more rhetoric than reality." 387 U.S., at 24, 87 S.Ct., at 1442.

■ MR. JUSTICE HARLAN, concurring.

No one, I daresay, would contend that state juvenile court trials are subject to no federal constitutional limitations. Differences have existed, however, among the members of this Court as to what constitutional protections do apply. *See In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

The present case draws in question the validity of a New York statute that permits a determination of juvenile delinquency, founded on a charge of criminal conduct, to be made on a standard of proof that is less rigorous than that which would obtain had the accused been tried for the same conduct in an ordinary criminal case. While I am in full agreement that this statutory provision offends the requirement of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment, I am constrained to add something to what my Brother BRENNAN has written for the Court, lest the true nature of the constitutional problem presented become obscured or the impact on state juvenile court systems of what the Court holds today be exaggerated.

I

[E]ven though the labels used for alternative standards of proof are vague and not a very sure guide to decisionmaking, the choice of the standard for a particular variety of adjudication does, I think, reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations.

To explain why I think this so, I begin by stating two propositions, neither of which I believe can be fairly disputed. First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact-finder can acquire is a belief of what probably happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors

that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

When one makes such an assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems peculiarly appropriate for, as explained most sensibly, it simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence before (he) may find in favor of the party who has the burden to persuade the (judge) of the fact's existence."

In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. As Mr. Justice Brennan wrote for the Court in Speiser v. Randall, 357 U.S. 513, 525–526, 78 S.Ct. 1332, 1341–1342, 2 L.Ed.2d 1460 (1958):

"There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden * * * of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt."

In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free. It is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation.

II

When one assesses the consequences of an erroneous factual determination in a juvenile delinquency proceeding in which a youth is accused of a crime, I think it must be concluded that, while the consequences are not identical to those in a criminal case, the differences will not support a distinction in the standard of proof. First, and of paramount importance, a factual error here, as in a criminal case, exposes the accused to a complete loss of his personal liberty through a state-imposed confinement away from his home, family, and friends. And, second, a delinquency determination, to some extent at least, stigmatizes a youth in that it is by definition bottomed on a finding that the accused committed a crime. Although there are no doubt costs to society (and possibly even to the youth himself) in letting a guilty youth go free, I think here, as in a criminal case, it is far worse to declare an innocent youth a delinquent. I therefore agree that a juvenile court judge should be no less convinced of the factual conclusion that the accused committed the criminal act with which he is charged than would be required in a criminal trial.

III

I wish to emphasize, as I did in my separate opinion in *Gault*, 387 U.S. 1, 65, 87 S.Ct. 1428, 1463, that there is no automatic congruence between the procedural requirements imposed by due process in a criminal case, and those imposed by due process in juvenile cases. . . . [7]

[The dissenting opinions of Chief Justice Burger and Justice Black, are omitted].

SECTION 2. MORAL AND CONSTITUTIONAL LIMITS ON THE CRIMINAL SANCTION

The standard theoretical accounts of punishment, whether retributive or utilitarian, recognize a widely-accepted set of limits or side-constraints. For retributivists, side-constraints exclude punishment even when punishment is deserved; for utilitarians, side-constraints exclude punishment even when it is useful, or at least when it appears to be useful in the short-run. Indeed, one of the important purposes of administering punishment through law is to respect and enforce these constraints.

Legislators take heed of these moral side-constraints when they decide what to prohibit and how severely to punish offenses. In the United States, the moral side-constraints are also expressed in constitutional provisions, and the courts have the authority to invalidate legislation that conflicts with these provisions. In the cases that follow, ask yourself what side-constraint is at issue, whether you agree with the prosecution or the defense as a matter of legislative policy, and, finally, whether violations of the moral side-constraint are also violations of the Constitution.

(A) LEGALITY

Keeler v. Superior Court of Amador County

Supreme Court of California, In Bank, 1970.
2 Cal.3d 619, 87 Cal.Rptr. 481, 470 P.2d 617.

■ MOSK, JUSTICE. In this proceeding for writ of prohibition we are called upon to decide whether an unborn but viable fetus is a "human being" within the meaning of the California statute defining murder (Pen.Code, § 187). We conclude that the Legislature did not intend such a meaning, and that for us to construe the statute to the contrary and apply it to this petitioner would exceed our judicial power and deny petitioner due process of law.

The evidence received at the preliminary examination may be summarized as follows: Petitioner and Teresa Keeler obtained an interlocutory decree of divorce on September 27, 1968. They had been married for 16 years. Unknown to petitioner, Mrs. Keeler was then pregnant by one Ernest Vogt, whom she had met earlier that summer. She subsequently began living with Vogt in Stockton, but concealed the fact from petitioner. Peti-

[7] In Gault, for example, I agreed with the majority that due process required (1) adequate notice of the "nature and terms" of the proceedings; (2) notice of the right to retain counsel, and an obligation on the State to provide counsel for indigents "in cases in which the child may be confined"; and (3) a written record "adequate to permit effective review." 387 U.S., at 72, 87 S.Ct., at 1467. Unlike the majority, however, I thought it unnecessary at the time of Gault to impose the additional requirements of the privilege against self-incrimination, confrontation, and cross-examination.

tioner was given custody of their two daughters, aged 12 and 13 years, and under the decree Mrs. Keeler had the right to take the girls on alternate weekends.

On February 23, 1969, Mrs. Keeler was driving on a narrow mountain road in Amador County after delivering the girls to their home. She met petitioner driving in the opposite direction; he blocked the road with his car, and she pulled over to the side. He walked to her vehicle and began speaking to her. He seemed calm, and she rolled down her window to hear him. He said, "I hear you're pregnant. If you are you had better stay away from the girls and from here." She did not reply, and he opened the car door; as she later testified, "He assisted me out of the car. . . . [I]t wasn't roughly at this time." Petitioner then looked at her abdomen and became "extremely upset." He said, "You sure are. I'm going to stomp it out of you." He pushed her against the car, shoved his knee into her abdomen, and struck her in the face with several blows. She fainted, and when she regained consciousness petitioner had departed.

Mrs. Keeler drove back to Stockton, and the police and medical assistance were summoned. She had suffered substantial facial injuries, as well as extensive bruising of the abdominal wall. A Caesarian section was performed and the fetus was examined *in utero*. Its head was found to be severely fractured, and it was delivered stillborn. The pathologist gave as his opinion that the cause of death was skull fracture with consequent cerebral hemorrhaging, that death would have been immediate, and that the injury could have been the result of force applied to the mother's abdomen. There was no air in the fetus' lungs, and the umbilical cord was intact.

Upon delivery the fetus weighed five pounds and was 18 inches in length. Both Mrs. Keeler and her obstetrician testified that fetal movements had been observed prior to February 23, 1969. The evidence was in conflict as to the estimated age of the fetus;[1] the expert testimony on the point, however, concluded "with reasonable medical certainty" that the fetus had developed to the stage of viability, i.e., that in the event of premature birth on the date in question it would have had a 75 percent to 96 percent chance of survival.

An information was filed charging petitioner, in Count I, with committing the crime of murder (Pen.Code, § 187) in that he did "unlawfully kill a human being, to wit Baby Girl VOGT, with malice aforethought." In Count II petitioner was charged with wilful infliction of traumatic injury upon his wife (Pen.Code, § 273d), and in Count III, with assault on Mrs. Keeler by means of force likely to produce great bodily injury (Pen.Code, § 245). His motion to set aside the information for lack of probable cause (Pen.Code, § 995) was denied, and he now seeks a writ of prohibition; as will appear, only the murder count is actually in issue. Pending our disposition of the matter, petitioner is free on bail.

I

Penal Code section 187 provides: "Murder is the unlawful killing of a human being, with malice aforethought." The dispositive question is

[1] Mrs. Keeler testified, in effect, that she had no sexual intercourse with Vogt prior to August 1968, which would have made the fetus some 28 weeks old. She stated that the pregnancy had reached the end of the seventh month and the projected delivery date was April 25, 1969. The obstetrician, however, first estimated she was at least 31½ weeks pregnant, then raised the figure to 35 weeks in the light of the autopsy report of the size and weight of the fetus. Finally, on similar evidence an attending pediatrician estimated the gestation period to have been between 34½ and 36 weeks. The average full-term pregnancy is 40 weeks.

whether the fetus which petitioner is accused of killing was, on February 23, 1969, a "human being" within the meaning of this statute. If it was not, petitioner cannot be charged with its "murder" and prohibition will lie.

Section 187 was enacted as part of the Penal Code of 1872. Inasmuch as the provision has not been amended since that date, we must determine the intent of the Legislature at the time of its enactment. But section 187 was, in turn, taken verbatim from the first California statute defining murder, part of the Crimes and Punishments Act of 1850. (Stats.1850, ch. 99, § 19, p. 231.)[2] Penal Code section 5 (also enacted in 1872) declares: "The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments." We begin, accordingly, by inquiring into the intent of the Legislature in 1850 when it first defined murder as the unlawful and malicious killing of a "human being."

It will be presumed, of course, that in enacting a statute the Legislature was familiar with the relevant rules of the common law, and, when it couches its enactment in common law language, that its intent was to continue those rules in statutory form. (Baker v. Baker (1859) 13 Cal. 87, 95–96; Morris v. Oney (1963) 217 Cal.App.2d 864, 870, 32 Cal.Rptr. 88.) This is particularly appropriate in considering the work of the first session of our Legislature: its precedents were necessarily drawn from the common law, as modified in certain respects by the Constitution and by legislation of our sister states.

We therefore undertake a brief review of the origins and development of the common law of abortional homicide. (For a more detailed treatment, *see* Means, The Law of New York concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality (1968) 14 N.Y.L.F. 411 [hereinafter cited as Means]; Stern, Abortion: Reform and the Law (1968) 59 J.Crim.L., C. & P.S. 84; Quay, Justifiable Abortion—Medical and Legal Foundations II (1961) 49 Geo.L.J. 395.) From that inquiry it appears that by the year 1850—the date with which we are concerned—an infant could not be the subject of homicide at common law *unless it had been born alive.* Perhaps the most influential statement of the "born alive" rule is that of Coke, in mid–17th century: "If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the child dyeth in her body, and she is delivered of a dead childe, this is a great misprision [i.e., misdemeanor], and no murder; but if the child be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, *in rerum natura,* when it is born alive." (3 Coke, Institutes *58 (1648).) In short, "By Coke's time, the common law regarded abortion as murder only if the foetus is (1) quickened, (2) born alive, (3) lives for a brief interval, and (4) then dies." (Means, at p. 420.) Whatever intrinsic defects there may have been in Coke's work (see 3 Stephen, A History of the Criminal Law of England (1883) pp. 52–60), the common law accepted his views as authoritative. In the 18th century, for example, Coke's requirement that an infant be born

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[2] "Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned." The revisers of 1872 did no more than transpose the "express or implied malice" language of this provision to the following section (§ 188), and delete the second sentence as surplusage. (Code Commissioners' Note, Pen.Code of Cal. (1st ed. 1872), p. 80.)

alive in order to be the subject of homicide was reiterated and expanded by both Blackstone and Hale. . . .

We conclude that in declaring murder to be the unlawful and malicious killing of a "human being" the Legislature of 1850 intended that term to have the settled common law meaning of a person who had been born alive, and did not intend the act of feticide—as distinguished from abortion—to be an offense under the laws of California. . . .

Properly understood, the often cited case of People v. Chavez (1947) 77 Cal.App.2d 621, 176 P.2d 92, does not derogate from this rule. There the defendant was charged with the murder of her newborn child, and convicted of manslaughter. She testified that the baby dropped from her womb into the toilet bowl; that she picked it up two or three minutes later, and cut but did not tie the umbilical cord; that the baby was limp and made no cry; and that after 15 minutes she wrapped it in a newspaper and concealed it, where it was found dead the next day. The autopsy surgeon testified that the baby was a full-term, nine-month child, weighing six and one-half pounds and appearing normal in every respect; that the body had very little blood in it, indicating the child had bled to death through the untied umbilical cord; that such a process would have taken about an hour; and that in his opinion "the child was born alive, based on conditions he found and the fact that the lungs contained air and the blood was extravasated or pushed back into the tissues, indicating heart action." (Id. at p. 624, 176 P.2d at p. 93.)

On appeal, the defendant emphasized that a doctor called by the defense had suggested other tests which the autopsy surgeon could have performed to determine the matter of live birth; on this basis, it was contended that the question of whether the infant was born alive "rests entirely on pure speculation." (Id. at p. 624, 176 P.2d 92.) The Court of Appeal found only an insignificant conflict in that regard (Id. at p. 627, 176 P.2d 92), and focused its attention instead on testimony of the autopsy surgeon admitting the possibility that the evidence of heart and lung action could have resulted from the child's breathing "after presentation of the head but before the birth was completed" (Id. at p. 624, 176 P.2d at p. 93).

The court cited the mid–19th century English infanticide cases mentioned hereinabove, and noted that the decisions had not reached uniformity on whether breathing, heart action, severance of the umbilical cord, or some combination of these or other factors established the status of "human being" for purposes of the law of homicide. (Id. at pp. 624–625, 176 P.2d 92.) The court then adverted to the state of modern medical knowledge, discussed the phenomenon of viability, and held that "a viable child *in the process of being born* is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed. It should at least be considered a human being where it is a living baby and where in the natural course of events *a birth which is already started* would naturally be successfully completed." (Italics added.) (Id. at p. 626, 176 P.2d at p. 94.) Since the testimony of the autopsy surgeon left no doubt in that case that a live birth had at least begun, the court found "the evidence is sufficient here to support the implied finding of the jury that this child *was born alive and became a human being within the meaning of the homicide statutes.*" (Italics added.) (Id. at p. 627, 176 P.2d at p. 95.)[19]

[19] Penal Code section 192, which the defendant in *Chavez* was convicted of violating, defines manslaughter as "the unlawful killing of a human being without malice."

Chavez thus stands for the proposition—to which we adhere—that a viable fetus "in the process of being born" is a human being within the meaning of the homicide statutes. But it stands for no more; in particular it does not hold that a fetus, however viable, which is *not* "in the process of being born" is nevertheless a "human being in the law of homicide." On the contrary, the opinion is replete with references to the common law requirement that the child be "born alive," however that term is defined, and must accordingly be deemed to reaffirm that requirement as part of the law of California.[20] . . . And the text writers of the same period are no less unanimous on the point. (Perkins on Criminal Law, *supra*, pp. 29–30, 176 P.2d 92; Clark & Marshall, Crimes (6th ed. 1958) § 10.00, pp. 534–536; 1 Wharton, Criminal Law and Procedure (Anderson ed. 1957) § 189; 2 Burdick, Law of Crime (1946) § 445; 40 Am.Jur.2d, Homicide, §§ 9, 434; 40 C.J.S. Homicide § 2b.)

We conclude that the judicial enlargement of section 187 now urged upon us by the People would not have been foreseeable to this petitioner, and hence that its adoption at this time would deny him due process of law.

Let a peremptory writ of prohibition issue restraining respondent court from taking any further proceedings on Count I of the information, charging petitioner with the crime of murder.[j]

■ MCCOMB, PETERS, and TOBRINER, JJ., and PEEK, J. pro tem., concur.

■ BURKE, ACTING CHIEF JUSTICE (dissenting). . . .

■ SULLIVAN, J., concurs.

City of Chicago v. Morales

Supreme Court of the United States, 1999.
527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67.

■ JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, and an opinion with respect to Parts III, IV, and VI, in which JUSTICE SOUTER and JUSTICE GINSBURG join.

In 1992, the Chicago City Council enacted the Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place. The question presented is whether the Supreme Court of Illinois correctly held that the ordinance violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

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[20] In People v. Belous (1969) 71 Cal.2d 954, 968, 80 Cal.Rptr. 354, 458 P.2d 194, a majority of this court recognized "there are major and decisive areas where the embryo and fetus are not treated as equivalent to the born child. . . . The intentional destruction of the born child is murder or manslaughter. The intentional destruction of the embryo or fetus is never treated as murder, and only rarely as manslaughter but rather as the lesser offense of abortion." While the case was decided after the occurrence of the acts with which petitioner is charged, it nonetheless indicates that Chavez did not change California law on this point. Indeed, in footnote 13 we proceeded to distinguish Chavez as a case holding that "for purposes of the manslaughter and murder statutes, human life may exist where childbirth has commenced but has not been fully completed." (Accord, Perkins on Criminal Law (2d ed. 1969), p. 30.) In the case at bar, of course, the record is devoid of evidence that "childbirth" had commenced at the time of the acts charged.

[j] Aftermath, Cal.Pen.Code § 187. "Murder is the unlawful killing of a human being, *or a fetus*, with malice aforethought. . . . " The words in italics were added by amendment in 1970, "triggered" by *Keeler*. Legal abortions are excluded from the current California statute. *See* People v. Smith, 188 Cal.App.3d 1495, 234 Cal.Rptr. 142 (1987).

I

Before the ordinance was adopted, the city council's Committee on Police and Fire conducted hearings to explore the problems created by the city's street gangs, and more particularly, the consequences of public loitering by gang members. Witnesses included residents of the neighborhoods where gang members are most active, as well as some of the aldermen who represent those areas. Based on that evidence, the council made a series of findings that are included in the text of the ordinance and explain the reasons for its enactment.

The council found that a continuing increase in criminal street gang activity was largely responsible for the city's rising murder rate, as well as an escalation of violent and drug related crimes. It noted that in many neighborhoods throughout the city, " 'the burgeoning presence of street gang members in public places has intimidated many law abiding citizens.' " 177 Ill.2d 440, 445, 227 Ill.Dec. 130, 687 N.E.2d 53, 58 (1997). Furthermore, the council stated that gang members " 'establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas; and . . . [m]embers of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present. . . . ' " *Ibid.* It further found that " 'loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area' " and that " '[a]ggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear.' " Moreover, the council concluded that the city " 'has an interest in discouraging all persons from loitering in public places with criminal gang members.' " *Ibid.*

The ordinance creates a criminal offense punishable by a fine of up to $500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service. Commission of the offense involves four predicates. First, the police officer must reasonably believe that at least one of the two or more persons present in a " 'public place' " is a " 'criminal street gang membe[r].' " Second, the persons must be " 'loitering,' " which the ordinance defines as "remain[ing] in any one place with no apparent purpose." Third, the officer must then order " 'all' " of the persons to disperse and remove themselves " 'from the area.' " Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance. *Ibid.*[2]

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[2] The ordinance states in pertinent part:

Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

"(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

"(c) As used in this Section:

"(1) 'Loiter' means to remain in any one place with no apparent purpose.

"(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

. . .

Two months after the ordinance was adopted, the Chicago Police Department promulgated General Order 92–4 to provide guidelines to govern its enforcement. That order purported to establish limitations on the enforcement discretion of police officers "to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way." Chicago Police Department, General Order 92–4, reprinted in App. to Pet. for Cert. 65a. The limitations confine the authority to arrest gang members who violate the ordinance to sworn "members of the Gang Crime Section" and certain other designated officers, and establish detailed criteria for defining street gangs and membership in such gangs. *Id.*, at 66a–67a. In addition, the order directs district commanders to "designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community," and provides that the ordinance "will be enforced only within the designated areas." *Id.*, at 68a–69 a. The city, however, does not release the locations of these "designated areas" to the public.

II

During the three years of its enforcement, the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance.[7] In the ensuing enforcement proceedings, 2 trial judges upheld the constitutionality of the ordinance, but 11 others ruled that it was invalid. In respondent Youkhana's case, the trial judge held that the "ordinance fails to notify individuals what conduct is prohibited, and it encourages arbitrary and capricious enforcement by police."

The Illinois Appellate Court affirmed the trial court's ruling in the *Youkhana* case, consolidated and affirmed other pending appeals in accordance with *Youkhana,* and reversed the convictions of respondents Gutierrez, Morales, and others. The Appellate Court was persuaded that the ordinance impaired the freedom of assembly of nongang members in violation of the First Amendment to the Federal Constitution and Article I of the Illinois Constitution, that it was unconstitutionally vague, that it improperly criminalized status rather than conduct, and that it jeopardized rights guaranteed under the Fourth Amendment.

"(5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned."

(e) Any person who violates this Section is subject to a fine of not less than $100 and not more than $500 for each offense, or imprisonment for not more than six months, or both.

"In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service pursuant to section 1–4–120 of this Code." Chicago Municipal Code § 8–4–015 (added June 17, 1992), reprinted in App. to Pet. for Cert. 61a–63a.

[7] Brief for Petitioner 16. There were 5,251 arrests under the ordinance in 1993, 15,660 in 1994, and 22,056 in 1995. City of Chicago, R. Daley & T. Hillard, Gang and Narcotic Related Violent Crime: 1993–1997, p. 7 (June 1998). The city believes that the ordinance resulted in a significant decline in gang-related homicides. It notes that in 1995, the last year the ordinance was enforced, the gang-related homicide rate fell by 26%. In 1996, after the ordinance had been held invalid, the gang-related homicide rate rose 11%. Pet. for Cert. 9, n. 5. However, gang-related homicides fell by 19% in 1997, over a year after the suspension of the ordinance. Daley & Hillard, at 5. Given the myriad factors that influence levels of violence, it is difficult to evaluate the probative value of this statistical evidence, or to reach any firm conclusion about the ordinance's efficacy. *Cf.* Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order–Maintenance Policing New York Style*, 97 Mich. L.Rev. 291, 296 (1998) (describing the "hotly contested debate raging among . . . experts over the causes of the decline in crime in New York City and nationally").

The Illinois Supreme Court affirmed. It held "that the gang loitering ordinance violates due process of law in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties." 177 Ill.2d, at 447, 227 Ill.Dec. 130, 687 N.E.2d, at 59. The court did not reach the contentions that the ordinance "creates a status offense, permits arrests without probable cause or is overbroad." *Ibid.*

In support of its vagueness holding, the court pointed out that the definition of "loitering" in the ordinance drew no distinction between innocent conduct and conduct calculated to cause harm. "Moreover, the definition of 'loiter' provided by the ordinance does not assist in clearly articulating the proscriptions of the ordinance." *Id.*, at 451–452, 227 Ill.Dec. 130, 687 N.E.2d, at 60–61. Furthermore, it concluded that the ordinance was "not reasonably susceptible to a limiting construction which would affirm its validity."

We granted certiorari, and now affirm. Like the Illinois Supreme Court, we conclude that the ordinance enacted by the city of Chicago is unconstitutionally vague.

III

The basic factual predicate for the city's ordinance is not in dispute. As the city argues in its brief, "the very presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways intimidates residents, who become afraid even to leave their homes and go about their business. That, in turn, imperils community residents' sense of safety and security, detracts from property values, and can ultimately destabilize entire neighborhoods." The findings in the ordinance explain that it was motivated by these concerns. We have no doubt that a law that directly prohibited such intimidating conduct would be constitutional,[17] but this ordinance broadly covers a significant amount of additional activity. Uncertainty about the scope of that additional coverage provides the basis for respondents' claim that the ordinance is too vague.

We are confronted at the outset with the city's claim that it was improper for the state courts to conclude that the ordinance is invalid on its face. The city correctly points out that imprecise laws can be attacked on their face under two different doctrines. First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 612–615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. Kolender v. Lawson, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

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[17] In fact the city already has several laws that serve this purpose. *See*, e.g., Ill. Comp. Stat., ch. 720 §§ 5/12–6 (1998) (intimidation); 570/405.2 (streetgang criminal drug conspiracy); 147/1 *et seq.* (Illinois Streetgang Terrorism Omnibus Prevention Act); 5/25–1 (mob action). Deputy Superintendent Cooper, the only representative of the police department at the Committee on Police and Fire hearing on the ordinance, testified that, of the kinds of behavior people had discussed at the hearing, "90 percent of those instances are actually criminal offenses where people, in fact, can be arrested." Record, Appendix II to plaintiff's Memorandum in Opposition to Motion to Dismiss 182 (Tr. of Proceedings, Chicago City Council Committee on Police and Fire, May 18, 1992).

While we, like the Illinois courts, conclude that the ordinance is invalid on its face, we do not rely on the overbreadth doctrine. We agree with the city's submission that the law does not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional. The ordinance does not prohibit speech. Because the term "loiter" is defined as remaining in one place "with no apparent purpose," it is also clear that it does not prohibit any form of conduct that is apparently intended to convey a message. By its terms, the ordinance is inapplicable to assemblies that are designed to demonstrate a group's support of, or opposition to, a particular point of view. *Cf.* Clark v. Community for Creative Non–Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); Gregory v. Chicago, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969). Its impact on the social contact between gang members and others does not impair the First Amendment "right of association" that our cases have recognized. *See* Dallas v. Stanglin, 490 U.S. 19, 23–25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989).

On the other hand, as the United States recognizes, the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment.[19] We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. Williams v. Fears, 179 U.S. 270, 274, 21 S.Ct. 128, 45 L.Ed. 186 (1900); *see also* Papachristou v. Jacksonville, 405 U.S. 156, 164, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).[20] Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" Kent v. Dulles, 357 U.S. 116, 126, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958), or the right to move "to whatsoever place one's own inclination may direct" identified in

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[19] See Brief for United States as *Amicus Curiae* 23: "We do not doubt that, under the Due Process Clause, individuals in this country have significant liberty interests in standing on sidewalks and in other public places, and in traveling, moving, and associating with others." The city appears to agree, at least to the extent that such activities include "social gatherings." Brief for Petitioner 21, n. 13. Both Justice SCALIA, *post,* at 1872–1874 (dissenting opinion), and Justice THOMAS, *post,* at 1881–1883 (dissenting opinion), not only disagree with this proposition, but also incorrectly assume (as the city does not, see Brief for Petitioner 44) that identification of an obvious liberty interest that is impacted by a statute is equivalent to finding a violation of substantive due process. *See* n. 35, *infra.*

[20] Petitioner cites historical precedent against recognizing what it describes as the "fundamental right to loiter." Brief for Petitioner 12. While antiloitering ordinances have long existed in this country, their pedigree does not ensure their constitutionality. In 16th-century England, for example, the " 'Slavery acts' " provided for a 2–year enslavement period for anyone who " 'liveth idly and loiteringly, by the space of three days.' " Note, Homelessness in a Modern Urban Setting, 10 Ford. Urb. L.J. 749, 754, n. 17 (1982). In *Papachristou* we noted that many American vagrancy laws were patterned on these "Elizabethan poor laws." 405 U.S., at 161–162, 92 S.Ct. 839. These laws went virtually unchallenged in this country until attorneys became widely available to the indigent following our decision in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). *See* Recent Developments, Constitutional Attacks on Vagrancy Laws, 20 Stan. L.Rev. 782, 783 (1968). In addition, vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery. In 1865, for example, Alabama broadened its vagrancy statute to include " 'any runaway, stubborn servant or child' " and " 'a laborer or servant who loiters away his time, or *refuses to comply with any* contract for a term of service without just cause.' " T. Wilson, Black Codes of the South 76 (1965). The Reconstruction-era vagrancy laws had especially harsh consequences on African–American women and children. L. Kerber, No Constitutional Right to be Ladies: Women and the Obligations of Citizenship 50–69 (1998). Neither this history nor the scholarly compendia in Justice THOMAS' dissent, *post,* at 1881–1883, persuades us that the right to engage in loitering that is entirely harmless in both purpose and effect is not a part of the liberty protected by the Due Process Clause.

Blackstone's Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765).

There is no need, however, to decide whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine. *Cf.* Aptheker v. Secretary of State, 378 U.S. 500, 515–517, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964) (right to travel); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 82–83, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (abortion); Kolender v. Lawson, 461 U.S., at 355, n. 3, 358–360, and n. 9, 103 S.Ct. 1610. For it is clear that the vagueness of this enactment makes a facial challenge appropriate. This is not an ordinance that "simply regulates business behavior and contains a scienter requirement." *See* Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). It is a criminal law that contains no *mens rea* requirement, *see* Colautti v. Franklin, 439 U.S. 379, 395, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), and infringes on constitutionally protected rights, *see id.,* at 391, 99 S.Ct. 675. When vagueness permeates the text of such a law, it is subject to facial attack.[22]

Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. *See* Kolender v. Lawson, 461 U.S., at 357, 103 S.Ct. 1855. Accordingly, we first consider whether the ordinance provides fair notice to the citizen and then discuss its potential for arbitrary enforcement.

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[22] The burden of the first portion of Justice SCALIA's dissent is virtually a facial challenge to the facial challenge doctrine. *See post,* at 1867–1872. He first lauds the "clarity of our general jurisprudence" in the method for assessing facial challenges and then states that the clear import of our cases is that, in order to mount a successful facial challenge, a plaintiff must "establish that no set of circumstances exists under which the Act would be valid." *See post,* at 1870 (emphasis deleted); United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself (even though the defendants in that case did not claim that the statute was unconstitutional as applied to them, *see id.,* at 745, n. 3, 107 S.Ct. 2095, the Court nevertheless entertained their facial challenge). Since we, like the Illinois Supreme Court, conclude that vagueness permeates the ordinance, a facial challenge is appropriate.

We need not, however, resolve the viability of *Salerno's* dictum, because this case comes to us from a state—not a federal—court. When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing, which we have recognized as a prudential doctrine and not one mandated by Article III *of the Constitution. See* Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 955, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). When a state court has reached the merits of a constitutional claim, "invoking prudential limitations on [the respondent's] assertion of *jus tertii* would serve no functional purpose." City of Revere v. Massachusetts Gen. Hospital, 463 U.S. 239, 243, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983) (internal quotation marks omitted).

Whether or not it would be appropriate for federal courts to apply the *Salerno* standard in some cases—a proposition which is doubtful—state courts need not apply prudential notions of standing created by this Court. See ASARCO Inc. v. Kadish, 490 U.S. 605, 618, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989). Justice SCALIA's assumption that state courts must apply the restrictive *Salerno* test is incorrect as a matter of law; moreover it contradicts "essential principles of federalism." *See* Dorf, *Facial Challenges to State and Federal Statutes,* 46 Stan. L.Rev. 235, 284 (1994).

IV

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . . . " Giaccio v. Pennsylvania, 382 U.S. 399, 402–403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The Illinois Supreme Court recognized that the term "loiter" may have a common and accepted meaning, 177 Ill.2d, at 451, 227 Ill.Dec. 130, 687 N.E.2d, at 61, but the definition of that term in this ordinance—"to remain in any one place with no apparent purpose"—does not. It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?[23]

Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of "loitering," but rather about what loitering is covered by the ordinance and what is not. The Illinois Supreme Court emphasized the law's failure to distinguish between innocent conduct and conduct threatening harm. Its decision followed the precedent set by a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent.[25] However, state courts have uniformly invalidated laws that do not join the term "loitering" with a second specific element of the crime.[26]

The city's principal response to this concern about adequate notice is that loiterers are not subject to sanction until after they have failed to comply with an officer's order to disperse. "[W]hatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do." We find this response unpersuasive for at least two reasons.

First, the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939). Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit. If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty. If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance

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[23] The Solicitor General, while supporting the city's argument that the ordinance is constitutional, appears to recognize that the ordinance cannot be read literally without invoking intractable vagueness concerns. "[T]he purpose simply to stand on a corner cannot be an 'apparent purpose' under the ordinance; if it were, the ordinance would prohibit nothing at all." Brief for United States as *Amicus Curiae* 12–13.

[25] See, *e.g.*, Tacoma v. Luvene, 118 Wash.2d 826, 827 P.2d 1374 (1992) (upholding ordinance criminalizing loitering with purpose to engage in drug-related activities); People v. Superior Court, 46 Cal.3d 381, 394–395, 250 Cal.Rptr. 515, 758 P.2d 1046, 1052 (1988) (upholding ordinance criminalizing loitering for the purpose of engaging in or soliciting lewd act).

[26] See, *e.g.*, State v. Richard, 108 Nev. 626, 627, n. 2, 836 P.2d 622, 623, n. 2 (1992) (striking down statute that made it unlawful "for any person to loiter or prowl upon the property of another without lawful business with the owner or occupant thereof").

becomes indistinguishable from the law we held invalid in Shuttlesworth v. Birmingham, 382 U.S. 87, 90, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965).[29] Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law.[30]

Second, the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance. It provides that the officer "shall order all such persons to disperse and remove themselves from the area." App. to Pet. for Cert. 61a. This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again? As we do here, we have found vagueness in a criminal statute exacerbated by the use of the standards of "neighborhood" and "locality." Connally v. General Constr. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). We remarked in *Connally* that "[b]oth terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles." *Id.,* at 395, 46 S.Ct. 126.

Lack of clarity in the description of the loiterer's duty to obey a dispersal order might not render the ordinance unconstitutionally vague if the definition of the forbidden conduct were clear, but it does buttress our conclusion that the entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted. The Constitution does not permit a legislature to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." United States v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563 (1876). This ordinance is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." Coates v. Cincinnati, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971).

V

The broad sweep of the ordinance also violates " 'the requirement that a legislature establish minimal guidelines to govern law enforcement.' " Kolender v. Lawson, 461 U.S., at 358, 103 S.Ct. 1855. There are no such guidelines in the ordinance. In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leav-

[29] "Literally read . . . this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration." 382 U.S., at 90, 86 S.Ct. 211.

[30] As we have noted in a similar context: "If petitioners were held guilty of violating the Georgia statute because they disobeyed the officers, this case falls within the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute." Wright v. Georgia, 373 U.S. 284, 292, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963).

ing the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may—indeed, she "shall"—order them to disperse.

Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." Kolender v. Lawson, 461 U.S., at 360, 103 S.Ct. 1855 (internal quotation marks omitted). As we discussed in the context of fair notice, *see* supra, at 1859–1860, this page, the principal source of the vast discretion conferred on the police in this case is the definition of loitering as "to remain in any one place with no apparent purpose."

As the Illinois Supreme Court interprets that definition, it "provides absolute discretion to police officers to decide what activities constitute loitering." 177 Ill.2d, at 457, 227 Ill.Dec. 130, 687 N.E.2d, at 63. We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court."The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined." Smiley v. Kansas, 196 U.S. 447, 455, 25 S.Ct. 289, 49 L.Ed. 546 (1905).

Nevertheless, the city disputes the Illinois Supreme Court's interpretation, arguing that the text of the ordinance limits the officer's discretion in three ways. First, it does not permit the officer to issue a dispersal order to anyone who is moving along or who has an apparent purpose. Second, it does not permit an arrest if individuals obey a dispersal order. Third, no order can issue unless the officer reasonably believes that one of the loiterers is a member of a criminal street gang.

Even putting to one side our duty to defer to a state court's construction of the scope of a local enactment, we find each of these limitations insufficient. That the ordinance does not apply to people who are moving—that is, to activity that would not constitute loitering under any possible definition of the term—does not even address the question of how much discretion the police enjoy in deciding which stationary persons to disperse under the ordinance. Similarly, that the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue. The "no apparent purpose" standard for making that decision is inherently subjective because its application depends on whether some purpose is "apparent" to the officer on the scene.

Presumably an officer would have discretion to treat some purposes—perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening—as too frivolous to be apparent if he suspected a different ulterior motive. Moreover, an officer conscious of the city council's reasons for enacting the ordinance might well ignore its text and issue a dispersal order, even though an illicit purpose is actually apparent.

It is true, as the city argues, that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That *limitation would no* doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members. But this ordinance, for reasons that are not explained in the findings of the city council, requires no harmful purpose and applies to nongang members as well as sus-

pected gang members.[34] It applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.

Ironically, the definition of loitering in the Chicago ordinance not only extends its scope to encompass harmless conduct, but also has the perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment. As the city council's findings demonstrate, the most harmful gang loitering is motivated either by an apparent purpose to publicize the gang's dominance of certain territory, thereby intimidating nonmembers, or by an equally apparent purpose to conceal ongoing commerce in illegal drugs. As the Illinois Supreme Court has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says and that it has no application to loiterers whose purpose is apparent. The relative importance of its application to harmless loitering is magnified by its inapplicability to loitering that has an obviously threatening or illicit purpose.

Finally, in its opinion striking down the ordinance, the Illinois Supreme Court refused to accept the general order issued by the police department as a sufficient limitation on the "vast amount of discretion" granted to the police in its enforcement. We agree. *See* Smith v. Goguen, 415 U.S. 566, 575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). That the police have adopted internal rules limiting their enforcement to certain designated areas in the city would not provide a defense to a loiterer who might be arrested elsewhere. Nor could a person who knowingly loitered with a well-known gang member anywhere in the city safely assume that they would not be ordered to disperse no matter how innocent and harmless their loitering might be.

VI

In our judgment, the Illinois Supreme Court correctly concluded that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police "to meet constitutional standards for definiteness and clarity."[35] 177 Ill.2d, at 459, 227 Ill.Dec. 130, 687 N.E.2d, at 64. We recognize the serious and difficult problems testified to by the citizens of Chicago that led to the enactment of this ordinance. "We are mindful that the preservation of liberty depends in part on the maintenance of social order." Houston v. Hill, 482 U.S. 451, 471–472, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). However, in this instance the city has enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets.

Accordingly, the judgment of the Supreme Court of Illinois is

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[34] Not *all of the respondents* in this case, for example, are gang members. The city admits that it was unable to prove that Morales is a gang member but justifies his arrest and conviction by the fact that Morales admitted "that he knew he was with criminal street gang members." Reply Brief for Petitioner 23, n. 14. In fact, 34 of the 66 respondents in this case were charged in a document that only accused them of being in the presence of a gang member. Tr. of Oral Arg. 34, 58.

[35] This conclusion makes it unnecessary to reach the question whether the Illinois Supreme Court correctly decided that the ordinance is invalid as a deprivation of substantive due process. For this reason, Justice THOMAS, *see* post, at 1881–1883, and Justice SCALIA, *see post,* at 1873, are mistaken when they assert that our decision must be analyzed under the framework for substantive due process set out in Washington v. Glucksberg, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

Affirmed.

■ JUSTICE O'CONNOR, with whom JUSTICE BREYER joins, concurring in part and concurring in the judgment.

I agree with the Court that Chicago's Gang Congregation Ordinance, Chicago Municipal Code § 8–4–015 (1992) (gang loitering ordinance or ordinance) is unconstitutionally vague. A penal law is void for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" or fails to establish guidelines to prevent "arbitrary and discriminatory enforcement" of the law. Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Of these, "the more important aspect of the vagueness doctrine 'is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Id.*, at 358, 103 S.Ct. 1855 (quoting Smith v. Goguen, 415 U.S. 566, 574–575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974)). I share Justice THOMAS' concern about the consequences of gang violence, and I agree that some degree of police discretion is necessary to allow the police "to perform their peacekeeping responsibilities satisfactorily." *Post,* at 1885 (dissenting opinion). A criminal law, however, must not permit policemen, prosecutors, and juries to conduct " 'a standardless sweep . . . to pursue their personal predilections.' " Kolender v. Lawson, *supra*, at 358, 103 S.Ct. 1855 (quoting Smith v. Goguen, *supra*, at 575, 94 S.Ct. 1242). . . .

As it has been construed by the Illinois court, Chicago's gang loitering ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement officers. . . .

This vagueness consideration alone provides a sufficient ground for affirming the Illinois court's decision, and I agree with Part V of the Court's opinion, which discusses this consideration. . . . Accordingly, there is no need to consider the other issues briefed by the parties and addressed by the plurality. I express no opinion about them.

It is important to courts and legislatures alike that we characterize more clearly the narrow scope of today's holding. As the ordinance comes to this Court, it is unconstitutionally vague. Nevertheless, there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence. For example, the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a "harmful purpose," *see ibid.*, from laws that target only gang members, see *ibid.*, and from laws that incorporate limits on the area and manner in which the laws may be enforced, *see ibid.* In addition, the ordinance here is unlike a law that "directly prohibit[s]" the " 'presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways,' " that " 'intimidates residents.' " *Ante,* at 1856 (quoting Brief for Petitioner 14). Indeed, as the plurality notes, the city of Chicago has several laws that do exactly this. *See* ante, at 1857, n. 17. Chicago has even enacted a provision that "enables police officers to fulfill . . . their traditional functions," including "preserving the public peace." *See post,* at 1883 (THOMAS, J., dissenting). Specifically, Chicago's general disorderly conduct provision allows the police to arrest those who knowingly "provoke, make or aid in making a breach of peace." *See* Chicago Municipal Code § 8–4–010 (1992).

In my view, the gang loitering ordinance could have been construed more narrowly. The term "loiter" might possibly be construed in a more

limited fashion to mean "to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities." Such a definition would be consistent with the Chicago City Council's findings and would avoid the vagueness problems of the ordinance as construed by the Illinois Supreme Court. See App. to Pet. for Cert. 60a–61a. As noted above, so would limitations that restricted the ordinance's criminal penalties to gang members or that more carefully delineated the circumstances in which those penalties would apply to nongang members.

The Illinois Supreme Court did not choose to give a limiting construction to Chicago's ordinance. . . . Nevertheless, we cannot impose a limiting construction that a state supreme court has declined to adopt. . . . Accordingly, I join Parts I, II, and V of the Court's opinion and concur in the judgment.

■ JUSTICE KENNEDY, concurring in part and concurring in the judgment.

I join Parts I, II, and V of the Court's opinion and concur in the judgment.

I also share many of the concerns Justice STEVENS expresses in Part IV with respect to the sufficiency of notice under the ordinance. As interpreted by the Illinois Supreme Court, the Chicago ordinance would reach a broad range of innocent conduct. For this reason it is not necessarily saved by the requirement that the citizen must disobey a police order to disperse before there is a violation.

We have not often examined these types of orders. *Cf.* Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965). It can be assumed, however, that some police commands will subject a citizen to prosecution for disobeying whether or not the citizen knows why the order is given. Illustrative examples include when the police tell a pedestrian not to enter a building and the reason is to avoid impeding a rescue team, or to protect a crime scene, or to secure an area for the protection of a public official. It does not follow, however, that any unexplained police order must be obeyed without notice of the lawfulness of the order. The predicate of an order to disperse is not, in my view, sufficient to eliminate doubts regarding the adequacy of notice under this ordinance. A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to a dispersal order based on the officer's own knowledge of the identity or affiliations of other persons with whom the citizen is congregating; nor may the citizen be able to assess what an officer might conceive to be the citizen's lack of an apparent purpose.

■ JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The duly elected members of the Chicago City Council enacted the ordinance at issue as part of a larger effort to prevent gangs from establishing dominion over the public streets. By invalidating Chicago's ordinance, I fear that the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery. The ordinance is not vague. "[A]ny fool would know that a particular category of conduct would be within [its] reach." Kolender v. Lawson, 461 U.S. 352, 370, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (White, J., dissenting). Nor does it violate the Due Process Clause. The asserted "freedom to loiter for innocent purposes," *ante,* at 1857 (plurality opinion), is in no way " 'deeply rooted in this Nation's history and

tradition,' " Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (citation omitted). I dissent.

I

The human costs exacted by criminal street gangs are inestimable. In many of our Nation's cities, gangs have "[v]irtually overtak[en] certain neighborhoods, contributing to the economic and social decline of these areas and causing fear and lifestyle changes among law-abiding residents." U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Assistance, Monograph: Urban Street Gang Enforcement 3 (1997). Gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror that the Court does not give sufficient consideration, often relegating them to the status of prisoners in their own homes.

The city of Chicago has suffered the devastation wrought by this national tragedy. Last year, in an effort to curb plummeting attendance, the Chicago Public Schools hired dozens of adults to escort children to school. The youngsters had become too terrified of gang violence to leave their homes alone. Martinez, Parents Paid to Walk Line Between Gangs and School, Chicago Tribune, Jan. 21, 1998, p. 1. The children's fears were not unfounded. In 1996, the Chicago Police Department estimated that there were 132 criminal street gangs in the city. Illinois Criminal Justice Information Authority, Research Bulletin: Street Gangs and Crime 4 (Sept.1996). Between 1987 and 1994, these gangs were involved in 63,141 criminal incidents, including 21,689 nonlethal violent crimes and 894 homicides. *Id.,* at 4–5.

Before enacting its ordinance, the Chicago City Council held extensive hearings on the problems of gang loitering. Concerned citizens appeared to testify poignantly as to how gangs disrupt their daily lives. Ordinary citizens like Ms. D'Ivory Gordon explained that she struggled just to walk to work:

"When I walk out my door, these guys are out there. . . .

. . .

"They watch you. . . . They know where you live. They know what time you leave, what time you come home. I am afraid of them. I have even come to the point now that I carry a meat cleaver to work with me. . . .

". . . I don't want to hurt anyone, and I don't want to be hurt. We need to clean these corners up. Clean these communities up and take it back from them." Transcript of Proceedings before the City Council of Chicago, Committee on Police and Fire 66–67 (May 15, 1992) (hereinafter Transcript).

Eighty-eight-year-old Susan Mary Jackson echoed her sentiments, testifying: "We used to have a nice neighborhood. We don't have it anymore. . . . I am scared to go out in the daytime. . . . [Y]ou can't pass because they are standing. I am afraid to go to the store. I don't go to the store because I am afraid. At my age if they look at me real hard, I be ready to holler." *Id.,* at 93–95. Another long-time resident testified:

"I have never had the terror that I feel everyday when I walk down the streets of Chicago. . . .

"I have had my windows broken out. I have had guns pulled on me. I have been threatened. I get intimidated on a daily basis, and it's come to the point where I say, well, do I go out today. Do I put my ax in my brief-

case. Do I walk around dressed like a bum so I am not looking rich or got any money or anything like that." *Id.*, at 124–125.

Following these hearings, the council found that "criminal street gangs establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas." App. to Pet. for Cert. 60a. It further found that the mere presence of gang members "intimidate[s] many law abiding citizens" and "creates a justifiable fear for the safety of persons and property in the area." *Ibid.* It is the product of this democratic process—the council's attempt to address these social ills—that we are asked to pass judgment upon today.

II

. . . The plurality . . . concludes that the city's commonsense effort to combat gang loitering fails constitutional scrutiny for two separate reasons—because it infringes upon gang members' constitutional right to "loiter for innocent purposes," *ante*, at 1857, and because it is vague on its face, *ante*, at 1858. A majority of the Court endorses the latter conclusion. I respectfully disagree.

A

We recently reconfirmed that "[o]ur Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking' . . . that direct and restrain our exposition of the Due Process Clause." *Glucksberg*, 521 U.S., at 721, 117 S.Ct. 2258 (quoting Moore v. East Cleveland, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion)).

Only laws that infringe "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' " offend the Due Process Clause. *Glucksberg, supra*, at 720–721, 117 S.Ct. 2258. . . .

Tellingly, the plurality cites only three cases in support of the asserted right to "loiter for innocent purposes." *See ante*, at 1857–1858. Of those, only one—decided more than 100 years after the ratification of the Fourteenth Amendment—actually addressed the validity of a vagrancy ordinance. That case, *Papachristou, supra*, contains some dicta that can be read to support the fundamental right that the plurality asserts.[5] However, the Court in *Papachristou* did not undertake the now-accepted analysis applied in substantive due process cases—it did not look to tradition to define the rights protected by the Due Process Clause. In any event, a careful reading of the opinion reveals that the Court never said anything about a constitutional right. The Court's holding was that the antiquarian language employed in the vagrancy ordinance at issue was unconstitutionally vague.

[5] The other cases upon which the plurality relies concern the entirely distinct right to interstate and international travel. *See* Williams v. Fears, 179 U.S. 270, 274–275, 21 S.Ct. 128, 45 L.Ed. 186 (1900); Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958). The plurality claims that dicta in those cases articulating a right of free movement, *see Williams, supra*, at 274, 21 S.Ct. 128; *Kent, supra*, at 125, 78 S.Ct. 1113, also supports an individual's right to "remain in a public place of his choice." Ironically, *Williams* rejected the argument that a tax on persons engaged in the business of importing out-of-state labor impeded the freedom of transit, so the precise holding in that case does not support, but undermines, the plurality's view. Similarly, the precise holding in *Kent* did not bear on a constitutional right to travel; instead, the Court held only that Congress had not authorized the Secretary of State to deny certain passports. Furthermore, the plurality's approach distorts the principle articulated in those cases, stretching it to a level of generality that permits the Court to disregard the relevant historical evidence that should guide the analysis. Michael H. v. Gerald D., 491 U.S. 110, 127, n. 6, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (plurality opinion).

See id., at 162–163, 92 S.Ct. 839. Even assuming, then, that *Papachristou* was correctly decided as an original matter—a doubtful proposition—it does not compel the conclusion that the Constitution protects the right to loiter for innocent purposes. The plurality's contrary assertion calls to mind the warning that "[t]he Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. . . . [We] should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare." *Moore,* 431 U.S., at 544, 97 S.Ct. 1932 (White, J., dissenting). When "the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." *Ibid.*

B

The Court concludes that the ordinance is also unconstitutionally vague because it fails to provide adequate standards to guide police discretion and because, in the plurality's view, it does not give residents adequate notice of how to conform their conduct to the confines of the law. I disagree on both counts.

1

At the outset, it is important to note that the ordinance does not criminalize loitering *per se*. Rather, it penalizes loiterers' failure to obey a police officer's order to move along. A majority of the Court believes that this scheme vests too much discretion in police officers. Nothing could be further from the truth. Far from according officers too much discretion, the ordinance merely enables police officers to fulfill one of their traditional functions. Police officers are not, and have never been, simply enforcers of the criminal law. They wear other hats—importantly, they have long been vested with the responsibility for preserving the public peace. . . .

In order to perform their peacekeeping responsibilities satisfactorily, the police inevitably must exercise discretion. Indeed, by empowering them to act as peace officers, the law assumes that the police will exercise that discretion responsibly and with sound judgment. That is not to say that the law should not provide objective guidelines for the police, but simply that it cannot rigidly constrain their every action. By directing a police officer not to issue a dispersal order unless he "observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place," App. to Pet. for Cert. 61a, Chicago's ordinance strikes an appropriate balance between those two extremes. Just as we trust officers to rely on their experience and expertise in order to make spur-of-the-moment determinations about amorphous legal standards such as "probable cause" and "reasonable suspicion," so we must trust them to determine whether a group of loiterers contains individuals (in this case members of criminal street gangs) whom the city has determined threaten the public peace. . . .

In concluding that the ordinance adequately channels police discretion, I do not suggest that a police officer enforcing the Gang Congregation Ordinance will never make a mistake. Nor do I overlook the *possibility* that a police officer, acting in bad faith, might enforce the ordinance in an arbitrary or discriminatory way. But our decisions should not turn on the proposition that such an event will be anything but rare. Instances of arbitrary or discriminatory enforcement of the ordinance, like any other law, are best addressed when (and if) they arise, rather than prophylactically through

the disfavored mechanism of a facial challenge on vagueness grounds. *See* United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid").

2

The plurality's conclusion that the ordinance "fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted," *ante,* at 1861, is similarly untenable. There is nothing "vague" about an order to disperse. . . .

The plurality also concludes that the definition of the term loiter—"to remain in any one place with no apparent purpose," *see* 177 Ill.2d, at 445, 227 Ill.Dec. 130, 687 N.E.2d, at 58—fails to provide adequate notice.[11] "It is difficult to imagine," the plurality posits, "how any citizen of the city of Chicago standing in a public place . . . would know if he or she had an 'apparent purpose.' " *Ante,* at 1859. The plurality underestimates the intellectual capacity of the citizens of Chicago. Persons of ordinary intelligence are perfectly capable of evaluating how outsiders perceive their conduct, and here "[i]t is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [loitering] and that would be covered by the statute." *See* Smith v. Goguen, 415 U.S. 566, 584, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) (White, J., concurring in judgment). Members of a group standing on the corner staring blankly into space, for example, are likely well aware that passersby would conclude that they have "no apparent purpose." In any event, because this is a facial challenge, the plurality's ability to hypothesize that some individuals, in some circumstances, may be unable to ascertain how their actions appear to outsiders is irrelevant to our analysis. Here, we are asked to determine whether the ordinance is "vague in all of its applications." *Hoffman Estates, supra,* at 497, 102 S.Ct. 1186. The answer is unquestionably no.

* * *

Today, the Court focuses extensively on the "rights" of gang members and their companions. It can safely do so—the people who will have to live with the consequences of today's opinion do not live in our neighborhoods. Rather, the people who will suffer from our lofty pronouncements are people like Ms. Susan Mary Jackson; people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens. As one resident described: "There is only about maybe one or two percent of the people in the city causing these problems maybe, but it's keeping 98 percent of us in our houses and off the streets and afraid to shop." Transcript 126.

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[11] The Court asserts that we cannot second-guess the Illinois Supreme Court's conclusion that the definition " 'provides absolute discretion to police officers to decide what activities constitute loitering,' " *ante,* at 1861 (quoting 177 Ill.2d, at 440, 457, 227 Ill.Dec., at 140, 687 N.E.2d, at 63). While we are bound by a state court's construction of a statute, the Illinois court "did not, strictly speaking, construe the [ordinance] in the sense of defining the meaning of a particular statutory word or phase. Rather, it merely characterized [its] 'practical effect'. . . . This assessment does not bind us." Wisconsin v. Mitchell, 508 U.S. 476, 484, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993).

By focusing exclusively on the imagined "rights" of the two percent, the Court today has denied our most vulnerable citizens the very thing that Justice STEVENS, *ante,* at 1858, elevates above all else—the " 'freedom of movement.' " And that is a shame. I respectfully dissent.

Skilling v. United States

130 S.Ct. 2896 (2010).

■ GINSBURG, J., delivered the opinion of the Court, Part I of which was joined by ROBERTS, C.J., and STEVENS, SCALIA, KENNEDY, THOMAS, and ALITO, JJ., Part II of which was joined by ROBERTS, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., and Part III of which was joined by ROBERTS, C. J., and STEVENS, BREYER, ALITO, and SOTOMAYOR, JJ. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined, and KENNEDY, J., joined except as to Part III. ALITO, J., filed an opinion concurring in part and concurring in the judgment. SOTOMAYOR, J., filed an opinion concurring in part and dissenting in part, in which STEVENS and BREYER, JJ., joined.

Opinion

■ JUSTICE GINSBURG delivered the opinion of the Court.

In 2001, Enron Corporation, then the seventh highest-revenue-grossing company in America, crashed into bankruptcy. We consider in this opinion two questions arising from the prosecution of Jeffrey Skilling, a longtime Enron executive, for crimes committed before the corporation's collapse. First, did pretrial publicity and community prejudice prevent Skilling from obtaining a fair trial? Second, did the jury improperly convict Skilling of conspiracy to commit "honest-services" wire fraud, 18 U.S.C. §§ 371, 1343, 1346?

Answering no to both questions, the Fifth Circuit affirmed Skilling's convictions. We conclude, in common with the Court of Appeals, that Skilling's fair-trial argument fails; Skilling, we hold, did not establish that a presumption of juror prejudice arose or that actual bias infected the jury that tried him. But we disagree with the Fifth Circuit's honest-services ruling. In proscribing fraudulent deprivations of "the intangible right of honest services," § 1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal. We therefore hold that § 1346 covers only bribery and kickback schemes. Because Skilling's alleged misconduct entailed no bribe or kickback, it does not fall within § 1346's proscription. We therefore affirm in part and vacate in part.

I

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

Less than four months after Skilling's departure, Enron spiraled into bankruptcy. The company's stock, which had traded at $90 per share in August 2000, plummeted to pennies per share in late 2001. Attempting to

comprehend what caused the corporation's collapse, the U.S. Department of Justice formed an Enron Task Force, comprising prosecutors and FBI agents from around the Nation. The Government's investigation uncovered an elaborate conspiracy to prop up Enron's short-run stock prices by overstating the company's financial well-being. In the years following Enron's bankruptcy, the Government prosecuted dozens of Enron employees who participated in the scheme. In time, the Government worked its way up the corporation's chain of command: On July 7, 2004, a grand jury indicted Skilling, Lay, and Richard Causey, Enron's former chief accounting officer.

These three defendants, the indictment alleged,

> "engaged in a wide-ranging scheme to deceive the investing public, including Enron's shareholders, . . . about the true performance of Enron's businesses by: (a) manipulating Enron's publicly reported financial results; and (b) making public statements and representations about Enron's financial performance and results that were false and misleading."

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

Count 1 of the indictment charged Skilling with conspiracy to commit securities and wire fraud; in particular, it alleged that Skilling had sought to "depriv[e] Enron and its shareholders of the intangible right of [his] honest services."[1] The indictment further charged Skilling with more than 25 substantive counts of securities fraud, wire fraud, making false representations to Enron's auditors, and insider trading. . .

The Court of Appeals . . . rejected Skilling's claim that his conduct did not indicate any conspiracy to commit honest-services fraud. "[T]he jury was entitled to convict Skilling," the court stated, "on these elements": "(1) a material breach of a fiduciary duty . . . (2) that results in a detriment to the employer," including one occasioned by an employee's decision to "withhold material information, i.e., information that he had reason to believe would lead a reasonable employer to change its conduct." The Fifth Circuit did not address Skilling's argument that the honest-services statute, if not interpreted to exclude his actions, should be invalidated as unconstitutionally vague.

Arguing that the Fifth Circuit erred in its consideration of these claims, Skilling sought relief from this Court. We granted certiorari, and now affirm in part, vacate in part, and remand for further proceedings.[9] We consider first Skilling's allegation of juror prejudice, and next, his honest-services argument.

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[1] The mail- and wire-fraud statutes criminalize the use of the mails or wires in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341 (mail fraud); § 1343 (wire fraud). The honest-services statute, § 1346, defines "the term 'scheme or artifice to defraud' " in these provisions to include "a scheme or artifice to deprive another of the intangible right of honest services."

[9] We also granted certiorari and heard arguments this Term in two other cases raising questions concerning the honest-services statute's scope. See Black v. United States, No. 08–876; Weyhrauch v. United States, No. 08–1196. Today we vacate and remand those decisions in light of this opinion. Black, post, p. ___; Weyhrauch, post, p. ___.

II

[The Court rejected Skilling's claims of prejudicial pretrial publicity and jury prejudice.]

III

We next consider whether Skilling's conspiracy conviction was premised on an improper theory of honest-services wire fraud. The honest-services statute, § 1346, Skilling maintains, is unconstitutionally vague. Alternatively, he contends that his conduct does not fall within the statute's compass.

A

To place Skilling's constitutional challenge in context, we first review the origin and subsequent application of the honest-services doctrine.

1

Enacted in 1872, the original mail-fraud provision, the predecessor of the modern-day mail- and wire-fraud laws, proscribed, without further elaboration, use of the mails to advance "any scheme or artifice to defraud." See *McNally v. United States,* 483 U.S. 350, 356, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). In 1909, Congress amended the statute to prohibit, as it does today, "any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises*." § 1341 (emphasis added); see *id.,* at 357–358, 107 S.Ct. 2875. Emphasizing Congress' disjunctive phrasing, the Courts of Appeals, one after the other, interpreted the term "scheme or artifice to defraud" to include deprivations not only of money or property, but also of intangible rights.

In an opinion credited with first presenting the intangible-rights theory, *Shushan v. United States,* 117 F.2d 110 (1941), the Fifth Circuit reviewed the mail-fraud prosecution of a public official who allegedly accepted bribes from entrepreneurs in exchange for urging city action beneficial to the bribe payers. "It is not true that because the [city] was to make and did make a saving by the operations there could not have been an intent to defraud," the Court of Appeals maintained. *Id.,* at 119. "A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official," the court observed, "would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public." *Id.,* at 115.

The Fifth Circuit's opinion in *Shushan* stimulated the development of an "honest-services" doctrine. Unlike fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, see, *e.g., United States v. Starr,* 816 F.2d 94, 101 (C.A.2 1987), the honest-services theory targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment. For example, if a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, the city (the betrayed party) would suffer no tangible loss. Cf. *McNally,* 483 U.S., at 360, 107 S.Ct. 2875. Even if the scheme occasioned a money or property *gain* for the betrayed party, courts reasoned, actionable harm lay in the denial of that party's right to the offender's "honest services." See, *e.g., United States v. Dixon,* 536 F.2d 1388, 1400 (C.A.2 1976).

"Most often these cases . . . involved bribery of public officials," *United States v. Bohonus*, 628 F.2d 1167, 1171 (C.A.9 1980), but courts also recognized private-sector honest-services fraud. In perhaps the earliest application of the theory to private actors, a District Court, reviewing a bribery scheme, explained:

> "When one tampers with [the employer-employee] relationship for the purpose of causing the employee to breach his duty [to his employer,] he in effect is defrauding the employer of a lawful right. The actual deception that is practised is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interests." *United States v. Procter & Gamble Co.,* 47 F.Supp. 676, 678 (D.Mass.1942).

Over time, "[a]n increasing number of courts" recognized that "a recreant employee"—public or private—"c[ould] be prosecuted under [the mail-fraud statute] if he breache[d] his allegiance to his employer by accepting bribes or kickbacks in the course of his employment," *United States v. McNeive,* 536 F.2d 1245, 1249 (C.A.8 1976); by 1982, all Courts of Appeals had embraced the honest-services theory of fraud, Hurson, Limiting the Federal Mail Fraud Statute—A Legislative Approach, 20 Am.Crim. L.Rev. 423, 456 (1983).

2

In 1987, this Court, in *McNally v. United States,* stopped the development of the intangible-rights doctrine in its tracks. *McNally* involved a state officer who, in selecting Kentucky's insurance agent, arranged to procure a share of the agent's commissions via kickbacks paid to companies the official partially controlled. 483 U.S., at 360, 107 S.Ct. 2875. The prosecutor did not charge that, "in the absence of the alleged scheme[,] the Commonwealth would have paid a lower premium or secured better insurance." *Ibid.* Instead, the prosecutor maintained that the kickback scheme "defraud [ed] the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." *Id.*, at 353, 107 S.Ct. 2875.

We held that the scheme did not qualify as mail fraud. "Rather than constru [ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," we read the statute "as limited in scope to the protection of property rights." *Id.,* at 360, 107 S.Ct. 2875. "If Congress desires to go further," we stated, "it must speak more clearly." *Ibid.*

3

Congress responded swiftly. The following year, it enacted a new statute "specifically to cover one of the 'intangible rights' that lower courts had protected . . . prior to *McNally:* 'the intangible right of honest services.' " *Cleveland v. United States,* 531 U.S. 12, 19–20, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000). In full, the honest-services statute stated:

> "For the purposes of th[e] chapter [of the United States Code that prohibits, *inter alia,* mail fraud, § 1341, and wire fraud, § 1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." § 1346.

B

Congress, Skilling charges, reacted quickly but not clearly: He asserts that § 1346 is unconstitutionally vague. To satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). The void-for-vagueness doctrine embraces these requirements.

According to Skilling, § 1346 meets neither of the two due process essentials. First, the phrase "the intangible right of honest services," he contends, does not adequately define what behavior it bars. Second, he alleges, § 1346's "standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections," thereby "facilitat[ing] opportunistic and arbitrary prosecutions." (quoting *Kolender*, 461 U.S., at 358, 103 S.Ct. 1855).

In urging invalidation of § 1346, Skilling swims against our case law's current, which requires us, if we can, to construe, not condemn, Congress' enactments. See, *e.g., Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 571, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). See also *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963) (stressing, in response to a vagueness challenge, "[t]he strong presumptive validity that attaches to an Act of Congress"). Alert to § 1346's potential breadth, the Courts of Appeals have divided on how best to interpret the statute. Uniformly, however, they have declined to throw out the statute as irremediably vague.

We agree that § 1346 should be construed rather than invalidated. First, we look to the doctrine developed in pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase "the intangible right of honest services." Second, to preserve what Congress certainly intended the statute to cover, we pare that body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. Confined to these paramount applications, § 1346 presents no vagueness problem.

1

There is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Court of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud. Congress enacted § 1346 on the heels of *McNally* and drafted the statute using that decision's terminology. As the Second Circuit observed in its leading analysis of § 1346:

"The definite article 'the' suggests that 'intangible right of honest services' had a specific meaning to Congress when it enacted the statute—Congress was recriminalizing mail- and wire-fraud schemes to deprive others of *that* 'intangible right of honest services,' which had been protected before *McNally,* not *all* intangible rights of honest services whatever they might be thought to be." *United States v. Rybicki,* 354 F.3d 124, 137–138 (2003) (en banc).

2

Satisfied that Congress, by enacting § 1346, "meant to reinstate the body of pre-*McNally* honest-services law," we have surveyed that case law.

In parsing the Courts of Appeals decisions, we acknowledge that Skilling's vagueness challenge has force, for honest-services decisions preceding *McNally* were not models of clarity or consistency. While the honest-services cases preceding *McNally* dominantly and consistently applied the fraud statute to bribery and kickback schemes—schemes that were the basis of most honest-services prosecutions—there was considerable disarray over the statute's application to conduct outside that core category. In light of this disarray, Skilling urges us, as he urged the Fifth Circuit, to invalidate the statute *in toto*.

It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction. See, e.g., *Hooper v. California,* 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895) ("The elementary rule is that *every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." (emphasis added)). See also *Boos v. Barry,* 485 U.S. 312, 330–331, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988); *Schneider v. Smith,* 390 U.S. 17, 26, 88 S.Ct. 682, 19 L.Ed.2d 799 (1968). We have accordingly instructed "the federal courts ... to avoid constitutional difficulties by [adopting a limiting interpretation] if such a construction is fairly possible." *Boos,* 485 U.S., at 331, 108 S.Ct. 1157; see *United States v. Harriss,* 347 U.S. 612, 618, 74 S.Ct. 808, 98 L.Ed. 989 (1954) ("[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague ... And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction.").

Arguing against any limiting construction, Skilling contends that it is impossible to identify a salvageable honest-services core; "the pre-*McNally* caselaw," he asserts, "is a hodgepodge of oft-conflicting holdings" that are "hopelessly unclear." Brief for Petitioner 39 (some capitalization and italics omitted). We have rejected an argument of the same tenor before. In *Civil Service Comm'n v. Letter Carriers,* federal employees challenged a provision of the Hatch Act that incorporated earlier decisions of the United States Civil Service Commission enforcing a similar law. "[T]he several thousand adjudications of the Civil Service Commission," the employees maintained, were "an impenetrable jungle"—"undiscoverable, inconsistent, [and] incapable of yielding any meaningful rules to govern present or future conduct." 413 U.S., at 571, 93 S.Ct. 2880. Mindful that "our task [wa]s not to destroy the Act if we c[ould], but to construe it," we held that "the rules that had evolved over the years from repeated adjudications were subject to sufficiently clear and summary statement." *Id.,* at 571–572, 93 S.Ct. 2880.

A similar observation may be made here. Although some applications of the pre-*McNally* honest-services doctrine occasioned disagreement among the Courts of Appeals, these cases do not cloud the doctrine's solid core: The "vast majority" of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes. *United States v. Runnels,* 833 F.2d 1183, 1187 (C.A.6 1987); see Brief for United States 42, and n. 4 (citing dozens of examples).[41] Indeed,

[41] Justice SCALIA emphasizes divisions in the Courts of Appeals regarding the source and scope of fiduciary duties. But these debates were rare in bribe and kickback cases. The existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute; examples include public official-public, see, e.g., United States v. Mandel, 591 F.2d 1347 (C.A.4 1979); employee-employer, see, e.g., United States v. Bohonus, 628 F.2d 1167 (C.A.9 1980); and union official-union members, see, e.g., United States v. Price, 788 F.2d 234 (C.A.4

the *McNally* case itself, which spurred Congress to enact § 1346, presented a paradigmatic kickback fact pattern. 483 U.S., at 352–353, 360, 107 S.Ct. 2875. Congress' reversal of *McNally* and reinstatement of the honest-services doctrine, we conclude, can and should be salvaged by confining its scope to the core pre-*McNally* applications.

As already noted, the honest-services doctrine had its genesis in prosecutions involving bribery allegations. See *Shushan*, 117 F.2d, at 115 (public sector); *Procter & Gamble Co.*, 47 F.Supp., at 678 (private sector). See also *United States v. Orsburn*, 525 F.3d 543, 546 (C.A.7 2008). Both before *McNally* and after § 1346's enactment, Courts of Appeals described schemes involving bribes or kickbacks as "core . . . honest services fraud precedents," *United States v. Czubinski*, 106 F.3d 1069, 1077 (C.A.1 1997); "paradigm case[s]," *United States v. deVegter*, 198 F.3d 1324, 1327–1328 (C.A.11 1999); "[t]he most obvious form of honest services fraud," *United States v. Carbo*, 572 F.3d 112, 115 (C.A.3 2009); "core misconduct covered by the statute," *United States v. Urciuoli*, 513 F.3d 290, 294 (C.A.1 2008); "most [of the] honest services cases," *United States v. Sorich*, 523 F.3d 702, 707 (C.A.7 2008); "typical," *United States v. Brown*, 540 F.2d 364, 374 (C.A.8 1976); "clear-cut," *United States v. Mandel*, 591 F.2d 1347, 1363 (C.A.4 1979); and "uniformly . . . cover[ed]," *United States v. Paradies*, 98 F.3d 1266, 1283, n. 30 (C.A.11 1996).

In view of this history, there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine.[42] To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.[43]

1986). See generally Chiarella v. United States, 445 U.S. 222, 233, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980) (noting the "established doctrine that [a fiduciary] duty arises from a specific relationship between two parties").

[42] Apprised that a broader reading of § 1346 could render the statute impermissibly vague, Congress, we believe, would have drawn the honest-services line, as we do now, at bribery and kickback schemes. Cf. Levin v. Commerce Energy, Inc., 560 U.S. ——, ——, 130 S.Ct. 2323, ——,176 L.Ed.2d 1131 (2010) (slip op., at 11) ("[C]ourts may attempt ... to implement what the legislature would have willed had it been apprised of the constitutional infirmity."); United States v. Booker, 543 U.S. 220, 246, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) ("We seek to determine what 'Congress would have intended' in light of the Court's constitutional holding.").

[43] Justice SCALIA charges that our construction of § 1346 is "not interpretation but invention." Stating that he "know [s] of no precedent for ... 'paring down' " the pre-McNally case law to its core, ibid., he contends that the Court today "wield[s] a power we long ago abjured: the power to define new federal crimes . As noted,, cases "paring down" federal statutes to avoid constitutional shoals are legion. These cases recognize that the Court does not legislate, but instead respects the legislature, by preserving a statute through a limiting interpretation. See United States v. Lanier, 520 U.S. 259, 267–268, n. 6, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (This Court does not "create a common law crime" by adopting a "narrow[ing] constru[ction]." (internal quotation marks omitted)); supra, at 2931, n. 42. Given that the Courts of Appeals uniformly recognized bribery and kickback schemes as honest-services fraud before McNally, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292, and that these schemes composed the lion's share of honest-services cases, limiting § 1346 to these heartland applications is surely "fairly possible." Boos v. Barry, 485 U.S. 312, 331, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988); cf. Clark v. Martinez, 543 U.S. 371, 380, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) (opinion of the Court by SCALIA, J.) (when adopting a limiting construction, "[t]he lowest common denominator, as it were, must govern"). So construed, the statute is not unconstitu-

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The Government urges us to go further by locating within § 1346's compass another category of proscribed conduct: "undisclosed self-dealing by a public official or private employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Id.*, at 43–44. "[T]he theory of liability in *McNally* itself was nondisclosure of a conflicting financial interest," the Government observes, and "Congress clearly intended to revive th[at] nondisclosure theory." Id., at 44. Moreover, "[a]lthough not as numerous as the bribery and kickback cases," the Government asserts, "the pre-*McNally* cases involving undisclosed self-dealing were abundant." *Ibid.*

Neither of these contentions withstands close inspection. *McNally,* as we have already observed, involved a classic kickback scheme: A public official, in exchange for routing Kentucky's insurance business through a middleman company, arranged for that company to share its commissions with entities in which the official held an interest. 483 U.S., at 352–353, 360, 107 S.Ct. 2875. This was no mere failure to disclose a conflict of interest; rather, the official conspired with a third party so that both would profit from wealth generated by public contracts. See *id.*, at 352–353, 107 S.Ct. 2875. Reading § 1346 to proscribe bribes and kickbacks—and nothing more—satisfies Congress' undoubted aim to reverse *McNally* on its facts.

Nor are we persuaded that the pre-*McNally* conflict-of-interest cases constitute core applications of the honest-services doctrine. Although the Courts of Appeals upheld honest-services convictions for "some schemes of non-disclosure and concealment of material information," *Mandel,* 591 F.2d, at 1361, they reached no consensus on which schemes qualified. In light of the relative infrequency of conflict-of-interest prosecutions in comparison to bribery and kickback charges, and the intercircuit inconsistencies they produced, we conclude that a reasonable limiting construction of § 1346 must exclude this amorphous category of cases.

Further dispelling doubt on this point is the familiar principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland,* 531 U.S., at 25, 121 S.Ct. 365 (quoting *Rewis v. United States,* 401 U.S. 808, 812, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971)). "This interpretive guide is especially appropriate in construing [§ 1346] because . . . mail [and wire] fraud [are] predicate offense[s] under [the Racketeer Influenced and Corrupt Organizations Act], 18 U.S.C. § 1961(1) (1994 ed., Supp. IV), and the money laundering statute, § 1956(c)(7)(A)." *Cleveland,* 531 U.S., at 25, 121 S.Ct. 365. Holding that honest-services fraud does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks, we resist the Government's less constrained construction absent Congress' clear instruction otherwise. *E.g., United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–222, 73 S.Ct. 227, 97 L.Ed. 260 (1952).

In sum, our construction of § 1346 "establish[es] a uniform national standard, define[s] honest services with clarity, reach[es] only seriously culpable conduct, and accomplish[es] Congress's goal of 'overruling' *McNally.*" Brief for Albert W. Alschuler as *Amicus Curiae* in *Weyhrauch v. United*

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tionally vague. Only by taking a wrecking ball to a statute that can be salvaged through a reasonable narrowing interpretation would we act out of step with precedent.

States, O.T.2009, No. 08–1196, pp. 28–29. "If Congress desires to go further," we reiterate, "it must speak more clearly than it has." *McNally,* 483 U.S., at 360, 107 S.Ct. 2875.

4

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

As to fair notice, "whatever the school of thought concerning the scope and meaning of § 1346, it has always been "as plain as a pikestaff that" bribes and kickbacks constitute honest-services fraud," *Williams v. United States,* 341 U.S. 97, 101, 71 S.Ct. 576, 95 L.Ed. 774 (1951), and the statute's mens rea requirement further blunts any notice concern, see, e.g., *Screws v. United States,* 325 U.S. 91, 101–104, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (plurality opinion). See also *Broadrick v. Oklahoma,* 413 U.S. 601, 608, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) ("[E]ven if the outermost boundaries of [a statute are] imprecise, any such uncertainty has little relevance . . . where appellants' conduct falls squarely within the 'hard core' of the statute's proscriptions."). Today's decision clarifies that no other misconduct falls within § 1346's province. See *United States v. Lanier,* 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) ("[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute.").

As to arbitrary prosecutions, we perceive no significant risk that the honest-services statute, as we interpret it today, will be stretched out of shape. Its prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes. See, e.g., 18 U.S.C. §§ 201(b), 666(a)(2); 41 U.S.C. § 52(2) ("The term 'kickback' means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances].").[45] See also, *e.g.,* United States v. Ganim, 510 F.3d 134, 147–149 (C.A.2 2007) (Sotomayor, J.) (reviewing honest-services conviction involving bribery in light of elements of bribery under other federal statutes); *United States v. Whitfield,* 590 F.3d 325, 352–353 (C.A.5 2009); *United States v. Kemp,* 500 F.3d 257, 281–286 (C.A.3 2007). A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds.

C

It remains to determine whether Skilling's conduct violated § 1346. Skilling's honest-services prosecution, the Government concedes, was not "prototypical.". The Government charged Skilling with conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health, thereby artificially inflating its stock price. It was the *Government's* theory at trial that Skilling "profited from the fraudulent scheme . . . through the

[45] Overlap with other federal statutes does not render § 1346 superfluous. The principal federal bribery statute, § 201, for example, generally applies only to federal public officials, so § 1346's application to state and local corruption and to private-sector fraud reaches misconduct that might otherwise go unpunished.

receipt of salary and bonuses, . . . and through the sale of approximately $200 million in Enron stock, which netted him $89 million."

The Government did not, at any time, allege that Skilling solicited or accepted side payments from a third party in exchange for making these misrepresentations. See Record 41328 (May 11, 2006 Letter from the Government to the District Court) ("[T]he indictment does not allege, and the government's evidence did not show, that [Skilling] engaged in bribery."). It is therefore clear that, as we read § 1346, Skilling did not commit honest-services fraud.

Because the indictment alleged three objects of the conspiracy—honest-services wire fraud, money-or-property wire fraud, and securities fraud—Skilling's conviction is flawed. See *Yates v. United States,* 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957) (constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory). This determination, however, does not necessarily require reversal of the conspiracy conviction; we recently confirmed, in *Hedgpeth v. Pulido,* 555 U.S. 57, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008) *(per curiam),* that errors of the *Yates* variety are subject to harmless-error analysis. The parties vigorously dispute whether the error was harmless. We leave this dispute for resolution on remand.

Whether potential reversal on the conspiracy count touches any of Skilling's other convictions is also an open question. All of his convictions, Skilling contends, hinged on the conspiracy count and, like dominoes, must fall if it falls. The District Court, deciding Skilling's motion for bail pending appeal, found this argument dubious, but the Fifth Circuit had no occasion to rule on it. That court may do so on remand.

* * *

For the foregoing reasons, we affirm the Fifth Circuit's ruling on Skilling's fair-trial argument, vacate its ruling on his conspiracy conviction, and remand the case for proceedings consistent with this opinion.

It is so ordered.

■ JUSTICE SCALIA, with whom Justice THOMAS joins, and with whom JUSTICE KENNEDY joins except as to Part III, concurring in part and concurring in the judgment.

I agree with the Court that petitioner Jeffrey Skilling's challenge to the impartiality of his jury and to the District Court's conduct of the *voir dire* fails. I therefore join Parts I and II of the Court's opinion. I also agree that the decision upholding Skilling's conviction for so-called "honest-services fraud" must be reversed, but for a different reason. In my view, the specification in 18 U.S.C. § 1346 (2006 ed., Supp. II) that "scheme or artifice to defraud" in the mail-fraud and wire-fraud statutes, §§ 1341 and 1343 (2006 ed.), includes "a scheme or artifice to deprive another of the intangible right of honest services," is vague, and therefore violates the Due Process Clause of the Fifth Amendment. The Court strikes a pose of judicial humility in proclaiming that our task is "not to destroy the Act . . . but to construe it," *ante,* at 2930 (internal quotation marks omitted). But in transforming the prohibition of "honest-services fraud" into a prohibition of "bribery and kick-backs" it is wielding a power we long ago abjured: the power to define new federal crimes. See *United States v. Hudson,* 7 Cranch 32, 34, 3 L.Ed. 259 (1812). . .

In short, the first step in the Court's analysis—holding that "the intangible right of honest services" refers to "the honest-services doctrine recognized in Court of Appeals' decisions before *McNally,*"—is a step out of the frying pan into the fire. The pre-*McNally* cases provide no clear indication of what constitutes a denial of the right of honest services. The possibilities range from any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal, to only the secret use of a perpetrator's position of trust in order to harm whomever he is beholden to. The duty probably did not have to be rooted in state law, but maybe it did. It might have been more demanding in the case of public officials, but perhaps not. At the time § 1346 was enacted there was no settled criterion for choosing among these options, for conclusively settling what was in and what was out.

II

The Court is aware of all this. It knows that adopting by reference "the pre-*McNally* honest-services doctrine," is adopting by reference nothing more precise than the referring term itself ("the intangible right of honest services"). Hence the *deus ex machina*: "[W]e pare that body of precedent down to its core," *ante*, at 2928. Since the honest-services doctrine "had its genesis" in bribery prosecutions, and since several cases and counsel for Skilling referred to bribery and kickback schemes as "core" or "paradigm" or "typical" examples, or "[t]he most obvious form," of honest-services fraud, *ante*, at 2930–2931 (internal quotation marks omitted), and since two cases and counsel for the Government say that they formed the "vast majority," or "most" or at least "[t]he bulk" of honest-services cases, THEREFORE it must be the case that they are all Congress meant by its reference to the honest-services doctrine.

Even if that conclusion followed from its premises, it would not suffice to eliminate the vagueness of the statute. It would solve (perhaps) the indeterminacy of what acts constitute a breach of the "honest services" obligation under the pre-*McNally* law. But it would not solve the most fundamental indeterminacy: the character of the "fiduciary capacity" to which the bribery and kickback restriction applies. Does it apply only to public officials? Or in addition to private individuals who contract with the public? Or to everyone, including the corporate officer here? The pre-*McNally* case law does not provide an answer. Thus, even with the bribery and kickback limitation the statute does not answer the question "What is the criterion of guilt?"

But that is perhaps beside the point, because it is obvious that mere prohibition of bribery and kickbacks was not the intent of the statute. To say that bribery and kickbacks represented "the core" of the doctrine, or that most cases applying the doctrine involved those offenses, is not to say that they *are* the doctrine. All it proves is that the multifarious versions of the doctrine *overlap* with regard to those offenses. But the doctrine itself is much more. Among all the pre-*McNally* smorgasbord-offerings of varieties of honest-services fraud, *not one* is limited to bribery and kickbacks. That is a dish the Court has cooked up all on its own. . .

Arriving at that conclusion requires not interpretation but invention. The Court replaces a vague criminal standard that Congress adopted with a more narrow one (included within the vague one) that can pass constitutional muster. I know of no precedent for such "paring down," and it seems to me clearly beyond judicial power. This is not, as the Court claims, simply a matter of adopting a "limiting construction" in the face of potential un-

constitutionality. To do that, our cases have been careful to note, the narrowing construction must be "fairly possible," *Boos v. Barry,* 485 U.S. 312, 331, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988), "reasonable," *Hooper v. California,* 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895), or not "plainly contrary to the intent of Congress," *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). As we have seen (and the Court does not contest), *no court* before *McNally* concluded that the "deprivation of honest services" meant *only* the acceptance of bribes or kickbacks. If it were a "fairly possible" or "reasonable" construction, not "contrary to the intent of Congress," one would think that *some* court would have adopted it. The Court does not even point to a *post-McNally* case that reads § 1346 to cover only bribery and kickbacks, and I am aware of none. . .

I certainly agree with the Court that we must, "if we can," uphold, rather than "condemn," Congress's enactments, *ante,* at 2927–2928. But I do not believe we have the power, in order to uphold an enactment, to rewrite it. Congress enacted the entirety of the pre-*McNally* honest-services law, the content of which is (to put it mildly) unclear. In prior vagueness cases, we have resisted the temptation to make all things right with the stroke of our pen. See, *e.g., Smith v. Goguen,* 415 U.S. 566, 575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). I would show the same restraint today, and reverse Skilling's conviction on the basis that § 1346 provides no "ascertainable standard" for the conduct it condemns, *L. Cohen,* 255 U.S., at 89, 41 S.Ct. 298. Instead, the Court today adds to our functions the prescription of criminal law.

III

A brief word about the appropriate remedy. As I noted *supra,* at 2935–2936, Skilling has argued that § 1346 cannot be constitutionally applied to him because it affords no definition of the right whose deprivation it prohibits. Though this reasoning is categorical, it does not make Skilling's challenge a "facial" one, in the sense that it seeks invalidation of the statute in all its applications, as opposed to preventing its enforcement against him. I continue to doubt whether "striking down" a statute is ever an appropriate exercise of our Article III power. See *Chicago v. Morales,* 527 U.S. 41, 77, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (SCALIA, J., dissenting). In the present case, the universality of the infirmity Skilling identifies in § 1346 may mean that if he wins, anyone else prosecuted under the statute will win as well, see *Smith, supra,* at 576–578, 88 S.Ct. 682. But Skilling only asks that *his* conviction be reversed, Brief for Petitioner 57–58, so *the remedy* he seeks is not facial invalidation.

I would therefore reverse Skilling's conviction under § 1346 on the ground that it fails to define the conduct it prohibits. The fate of the statute in future prosecutions—obvious from my reasoning in the case—would be a matter for *stare decisis.*

* * *

It is hard to imagine a case that more clearly fits the description of what Chief Justice Waite said could not be done, in a colorful passage oft-cited in our vagueness opinions, *United States v. Reese,* 92 U.S., at 221:

> "The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government . . .

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

■ JUSTICE ALITO, concurring in part and concurring in the judgment.

I join the judgment of the Court and all but Part II of the Court's opinion. I write separately to address petitioner's jury-trial argument. . .

(B) CONDUCT VERSUS STATUS

Robinson v. California

Supreme Court of the United States, 1962.
370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758.

■ JUSTICE STEWART delivered the opinion of the Court.

A California statute makes it a criminal offense for a person to "be addicted to the use of narcotics."[1] This appeal draws into question the constitutionality of that provision of the state law, as construed by the California courts in the present case.

The appellant was convicted after a jury trial in the Municipal Court of Los Angeles. The evidence against him was given by two Los Angeles police officers. Officer Brown testified that he had had occasion to examine the appellant's arms one evening on a street in Los Angeles some four months before the trial.[2] The officer testified that at that time he had observed "scar tissue and discoloration on the inside" of the appellant's right arm, and "what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow" on the appellant's left arm. The officer also testified that the appellant under questioning had admitted to the occasional use of narcotics.

Officer Lindquist testified that he had examined the appellant the follow morning in the Central Jail in Los Angeles. The officer stated that at that time he had observed discolorations and scabs on the appellant's arms, and he identified photographs which had been taken of the appellant's

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[1] The statute is § 11721 of the California Health and Safety Code. It provides: "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation in granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail."

[2] At the trial the appellant, claiming that he had been the victim of an unconstitutional search and seizure, unsuccessfully objected to the admission of Officer Brown's testimony. That claim is also pressed here, but since we do not reach it there is no need to detail the circumstances which led to Officer Brown's examination of the appellant's person. Suffice it to say, that at the time the police first accosted the appellant, he was not engaging in illegal or irregular conduct of any kind, and the police had no reason to believe he had done so in the past.

arms shortly after his arrest the night before. Based upon more than ten years of experience as a member of the Narcotic Division of the Los Angeles Police Department, the witness gave his opinion that "these marks and the discoloration were the result of the injection of hypodermic needles into the tissue into the vein that was not sterile." He stated that the scabs were several days old at the time of his examination, and that the appellant was neither under the influence of narcotics nor suffering withdrawal symptoms at the time he saw him. This witness also testified that the appellant had admitted using narcotics in the past.

The appellant testified in his own behalf, denying the alleged conversations with the police officers and denying that he had ever used narcotics or been addicted to their use. He explained the marks on his arms as resulting from an allergic condition contracted during his military service. His testimony was corroborated by two witnesses.

The trial judge instructed the jury that the statute made it a misdemeanor for a person 'either to use narcotics, or to be addicted to the use of narcotics."[3] That portion of the statute referring to the "use" of narcotics is based upon the "act" of using. That portion of the statute referring to "addicted to the use" of narcotics is based upon a condition or status. They are not identical. * * * To be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that (it) is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present.

The judge further instructed the jury that the appellant could be convicted under a general verdict if the jury agreed either that he was of the "status" or had committed the "act" denounced by the statute.[4] "All that the People must show is either that the defendant did use a narcotic in Los Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics * * *."[5]

Under these instructions the jury returned a verdict finding the appellant "guilty of the offense charged." An appeal was taken to the Appellate Department of the Los Angeles County Superior Court, "the highest court of a State in which a decision could be had' in this case." 28 U.S.C. § 1257, 28 U.S.C.A. § 1257. *See* Smith v. California, 361 U.S. 147, 149, 80 S.Ct.

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[3] The judge did not instruct the jury as to the meaning of the term "under the influence of" narcotics, having previously ruled that there was no evidence of a violation of that provision of the statute. *See* note 1, *supra*.

[4] "Where a statute such as that which defines the crime charged in this case denounces an act and a status or condition, either of which separately as well as collectively, constitute the criminal offense charged, an accusatory pleading which accuses the defendant of having committed the *act and of being* of the status or condition so denounced by the statute, is deemed supported if the proof shows that the defendant is guilty of any one or more of the offenses thus specified. However, it is important for you to keep in mind that, in order to convict a defendant in such a case, it is necessary that all of you agree as to the same particular act or status or condition found to have been committed or found to exist. It is not necessary that the particular act or status or condition so agreed upon be stated in the verdict."

[5] The instructions continued "and it is then up to the defendant to prove that the use, or of being addicted to the use of narcotics was administered by or under the direction of a person licensed by the State of California to prescribe and administer narcotics or at least to raise a reasonable doubt concerning the matter." No evidence, of course, had been offered in support of this affirmative defense, since the appellant had denied that he had used narcotics or been addicted to their use.

215, 216, 4 L.Ed.2d 205; Edwards v. California, 314 U.S. 160, 171, 62 S.Ct. 164, 165, 86 L.Ed. 119. Although expressing some doubt as to the constitutionality of "the crime of being a narcotic addict," the reviewing court in an unreported opinion affirmed the judgment of conviction, citing two of its own previous unreported decisions which had upheld the constitutionality of the statute.[6] We noted probable jurisdiction of this appeal, 368 U.S. 918, 82 S.Ct. 244, 7 L.Ed.2d 133, because it squarely presents the issue whether the statute as construed by the California courts in this case is repugnant to the Fourteenth Amendment of the Constitution.

The broad power of a State to regulate the narcotic drugs traffic within its borders is not here in issue. More than forty years ago, in Whipple v. Martinson, 256 U.S. 41, 41 S.Ct. 425, 65 L.Ed. 819, this Court explicitly recognized the validity of that power: "There can be no question of the authority of the state in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habitforming drugs * * *. The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question." 256 U.S. at 45, 41 S.Ct. at 426.

Such regulation, it can be assumed, could take a variety of valid forms. A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders. In the interest of discouraging the violation of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics.[7] Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures. *Cf.* Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643. Or a State might choose to attack the evils of narcotics traffic on broader fronts also—through public health education, for example, or by efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish. In short, the range of valid choice which a State might make in this area is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide. Upon that premise we turn to the California law in issue here.

It would be possible to construe the statute under which the appellant was convicted as one which is operative only upon proof of the actual use of narcotics within the State's jurisdiction. But the California courts have not so construed this law. Although there was evidence in the present case that the appellant had used narcotics in Los Angeles, the jury were instructed that they could convict him even if they disbelieved that evidence. The appellant could be convicted, they were told, if they found simply that the appellant's "status" or "chronic condition" was that of being "addicted to the use of narcotics." And it is impossible to know from the jury's verdict that the defendant was not convicted upon precisely such a finding.

The instructions of the trial court, implicitly approved on appeal, amounted to "a ruling on a question of state law that is as binding on us as

[6] The appellant tried unsuccessfully to secure habeas corpus relief in the District Court of Appeal and the California Supreme Court.

[7] California appears to have established just such a program in §§ 5350–5361 of its Welfare and Institutions Code. The record contains no explanation of why the civil procedures authorized by this legislation were not utilized in the present case.

though the precise words had been written" into the statute. Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131. "We can only take the statute as the state courts read it." *Id.*, at 6, 69 S.Ct. at 896 Indeed, in their brief in this Court counsel for the State have emphasized that it is "the proof of addiction by circumstantial evidence * * * by the tell-tale track of needle marks and scabs over the veins of his arms, that remains the gist of the section."

This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *See* State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422.

We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness.[8] Indeed, it is apparently an illness which may be contracted innocently or involuntarily.[9] We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

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[8] In its brief the appellee stated: "Of course it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. So is an alcoholic." Thirty-seven years ago this Court recognized that persons addicted to narcotics "are diseased and proper subjects for (medical) treatment." Linder v. United States, 268 U.S. 5, 18, 45 S.Ct. 446, 449, 69 L.Ed. 819.

[9] Not only may addiction innocently result from the use of medically prescribed narcotics, but a person may even be a narcotics addict from the moment of his birth. *See* Schneck, Narcotic Withdrawal Symptoms in the Newborn Infant Resulting from Maternal Addiction, 52 Journal of Pediatrics, 584 (1958); Roman and Middelkamp, Narcotic Addiction in a Newborn Infant, 53 Journal of Pediatrics 231 (1958); Kunstadter, Klein, Lundeen, Witz, and Morrison, Narcotic Withdrawal Symptoms in Newborn Infants, 168 Journal of the American Medical Association, 1008, (1958); Slobody and Cobrinik, Neonatal Narcotic Addiction, 14 Quarterly Review of Pediatrics, 169 (1959); Vincow and Hackel, Neonatal Narcotic Addiction, 22 General Practitioner 90 (1960); Dikshit, Narcotic Withdrawal Syndrome in Newborns, 28 Indian Journal of Pediatrics 11 (1961).

We are not unmindful that the vicious evils of the narcotics traffic have occasioned the grave concern of government. There are, as we have said, countless fronts on which those evils may be legitimately attacked. We deal in this case only with an individual provision of a particularized local law as it has so far been interpreted by the California courts.

Reversed.

■ JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

■ JUSTICE HARLAN, concurring.

I am not prepared to hold that on the present state of medical knowledge it is completely irrational and hence unconstitutional for a State to conclude that narcotics addiction is something other than an illness nor that it amounts to cruel and unusual punishment for the State to subject narcotics addicts to its criminal law. Insofar as addiction may be identified with the use or possession of narcotics within the State (or, I would suppose, without the State), in violation of local statutes prohibiting such acts, it may surely be reached by the State's criminal law. But in this case the trial court's instructions permitted the jury to find the appellant guilty on no more proof than that he was present in California while he was addicted to narcotics.* Since addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act.

If the California statute reaches this type of conduct, and for present purposes we must accept the trial court's construction as binding, Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131, it is an arbitrary imposition which exceeds the power that a State may exercise in enacting its criminal law. Accordingly, I agree that the application of the California statute was unconstitutional in this case and join the judgment of reversal.

[The concurring opinion of Justice Douglas, and the dissenting opinions of Justice Clark and Justice White, are omitted.]

(C) LIBERTY

(1) LIBERTY PROTECTED BY THE SPECIFIC CONSTITUTIONAL PROVISIONS

R.A.V. v. City of St. Paul, Minnesota

Supreme Court of the United States, 1992.
505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305.

■ JUSTICE SCALIA delivered the opinion of the Court.

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely-made cross by taping together

* The jury was instructed that "it is not incumbent upon the People *to prove the unlawfulness* of defendant's use of narcotics. All that the People must show is either that the defendant did use a narcotic in Los Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics." (Emphasis added.) Although the jury was told that it should acquit if the appellant proved that his "being addicted to the use of narcotics was administered (sic) by or under the direction of a person licensed by the State of California to prescribe and administer narcotics," this part of the instruction did not cover other possible lawful uses which could have produced the appellant's addiction.

40 years without the possibility of parole "probably" would be constitutional. Tr. of Oral Arg. 6–7; see also *ante,* at n. 12 (THOMAS, J., dissenting). . .

SECTION 3. CLASSIFICATION AND COLLATERAL CONSEQUENCES

The common law divided crime into three major groups: (1) treason, (2) felony and (3) misdemeanor. To remove the uncertainty which had developed in the ancient law, the Statute of Treasons enacted in 1350[l] specified exactly what should constitute this offense including, among certain other wrongs, a manifested intent to kill the king, queen or prince, levying war against the king, adhering to his enemies, giving them aid and comfort. The original determinant of felony was forfeiture of lands and goods, although three influences tended to obscure this fact: (1) under the English common law all felonies carried also the death penalty except mayhem for which mutilation was substituted,[m] (2) misdemeanors were never punished capitally and (3) early statutes creating new felonies regularly imposed and emphasized the penalty of death. Because of these facts there has been a tendency to say that under the common-law plan all offenses punished by death were felonies whereas those punished only by some milder penalty were misdemeanors. This is very nearly accurate but it is well to bear in mind that the actual determinant was forfeiture.[n]

Statutes in this country commonly divide offenses into two classes: (1) felony and (2) misdemeanor. The determinant is usually the penalty imposed although the exact nature of the penalty employed for this purpose is not uniform and nowhere has any resemblance to the common law[o] in this regard except that a capital offense is a felony. Very few felonies are capital today and the other type of penalty used to distinguish felony from misdemeanor usually follows one of two patterns. It is based upon either: (1) the type of institution in which the offender may be incarcerated (such as the state prison), or (2) the length of term which may be imposed (as, for example, a term exceeding one year).

Some jurisdictions have provided for a different classification than just felonies and misdemeanors and have classified some minor offenses as infractions or petty offenses. The United States Code, 18 U.S.C.A. § 1, divides federal crimes into felonies, an offense punishable by death or imprisonment in excess of one year, misdemeanors and petty offenses. A petty offense is a misdemeanor punishable by not more than six months imprisonment. 18 U.S.C.A. § 3559 divides felonies into classes A through E and misdemeanors into classes A through C. An offense called an infraction is

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[l] 25 Edw. 111, c. 2.

[m] Whipping was substituted for death as the penalty for petit larceny, but this was a change from the common law resulting from an early statute. Statute of Westminster, 1, c. 15 (1275).

[n] In the words of Blackstone, "the true criterion of felony is forfeiture". 4 Bl.Comm. * 97.

[o] "The common law of England has been by statute adopted as a rule of decision in this state, § 8–17, W.S.1957; and statutes are to be construed in harmony with existing law and their meaning determined in the light of the common law." Goldsmith v. Cheney, 468 P.2d 813, 816 (Wyo.1970).

"The English common law, so far as it is reasonable in itself, suitable to the condition and business of our people, and consistent with the letter and spirit of our federal and state constitutions and statutes, has been and is followed by our courts, and may be said to constitute a part of the common law of Ohio." Bloom v. Richards, 2 Ohio St. 387, 390 (1853); State v. McElhinney, 88 Ohio App. 431, 433, 100 N.E.2d 273, 275 (1950).

punishable by imprisonment for not more than five days and a fine of up to $5,000 and is also a petty offense.

The California Penal Code § 16 divides crimes into felonies, misdemeanors and infractions. A felony is a crime punishable by death or by imprisonment in the state prison. Other crimes are misdemeanors or infractions.[p] It is expressly provided (in § 19.b) that an infraction is not punishable by imprisonment, and that one charged with an infraction is not entitled to a jury trial, nor to be assigned counsel if indigent.

One very important classification scheme divides offenses into (1) capital crimes and (2) noncapital crimes. Under modern statutes a capital crime is one which *may* be punished by death; the customary provision being that one convicted of such an offense "shall be punished by death or by imprisonment for life." Both policy questions and issues of constitutional law are discussed in *Kansas v. Marsh, infra* Chapter 12.

Federal and state statutes establish a dizzying array of collateral consequences, sometimes referred to as "enmeshed penalties." There are literally thousands of these follow-on consequences. *See generally* American Bar Association Criminal Justice Section, National Inventory of the Collateral Consequences of Conviction, *available online* at http://www.abacollateralconsequences.org/ The triggering offense is most commonly defined as "any felony," but convictions for other categories of offenses—such as those that involve dishonesty or false statement, violence against the person, etc., can trigger collateral consequences of their own.

The sex-offender registration statutes offer one variation on this theme, as conviction for designated sex offenses subjects the offender to extensive affirmative obligations to avoid certain areas or persons and to keep the authorities informed about his whereabouts. The registration laws may also subject the offender to public notice of his record and current address. The Supreme Court has, so far, rejected constitutional challenges to these laws. *See* Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003) (no constitutional violation in posting offenders name and address on the internet); Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (registration laws are nonpunitive and may be enforced *ex post facto*).

Courts generally hold that the accused need not be admonished about the collateral civil consequences of a conviction before pleading guilty. It therefore bears emphasis that counsel carries an important responsibility to advise the defendant of the possible ramifications of pleading to an offense within one classification or another, bearing in mind that different clients may place different values on the various legal entitlements at risk from conviction, such as immigration status, the right to vote, or to possess a rifle in deer season. In Padilla v. Kentucky, 130 S.Ct. 1473 (2012), the Supreme Court held that failure to advise the accused that his guilty plea subjected *him to automatic* deportation amounted to ineffective assistance of counsel under the Sixth Amendment. The *Padilla* Court did not reach the issue of whether Padilla was prejudiced by the bad advice he received and so said nothing about the appropriate remedy. Presumably in a case where prejudice was shown, the remedy would be to vacate the plea.

[p] West's Cal.Penal Code § 17 (1987).

MODEL PENAL CODE[q]

Section 1.04 Classes of Crimes; Violations.

(1) An offense defined by this Code or by any other statute of this State, for which a sentence of [death or of][r] imprisonment is authorized, constitutes a crime. Crimes are classified as felonies, misdemeanors or petty misdemeanors.

(2) A crime is a felony if it is so designated in this Code or if persons convicted thereof may be sentenced [to death or] to imprisonment for a term which, apart from an extended term, is in excess of one year.[s]

(3) A crime is a misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto.

(4) A crime is a petty misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto or if it is defined by a statute other than this Code which now provides that persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is less than one year.

(5) An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction or if it is defined by a statute other than this Code which now provides that the offense shall not constitute a crime. A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

(6) Any offense declared by law to constitute a crime, without specification of the grade thereof or of the sentence authorized upon conviction, is a misdemeanor.

(7) An offense defined by any statute of this State other than this Code shall be classified as provided in this Section and the sentence that may be imposed upon conviction thereof shall hereafter be governed by this Code:

Section 6.08 Sentence of Imprisonment for Misdemeanors and Petty Misdemeanors; Ordinary Terms.

A person who has been convicted of a misdemeanor or a petty misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the Court and shall not exceed one year in the case of a misdemeanor or thirty days in the case of a petty misdemeanor.

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[q] Prepared by the American Law Institute. All references to the Model Penal Code herein, unless otherwise indicated, are to the Proposed Official Draft, 1962. Such quotations have been expressly authorized by the American Law Institute.

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[r] Since a few jurisdictions do not have capital punishment all references to the death sentence are bracketed in the Code.

[s] A felony punished by death is a separate category. Aside from this, felonies are divided into three degrees. For a felony of the first degree the maximum penalty is life imprisonment; for a felony of the second degree the maximum is ten years; and for a felony of the third degree the maximum is five years.

CHAPTER 6

IMPUTABILITY

SECTION 1. THE NECESSITY OF AN ACT

4 Blackstone, Commentaries on the Laws of England, 78–79. Let us next see what is a *compassing* or *imagining* of the death of the king & c. These are synonymous terms, the word *compass* signifying the purpose or design of the mind or will, and not, as in common speech, the carrying such design to effect. . . . But, as this compassing or imagining is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open or *overt* act. . . . There is no question, also, but that taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the king, is a sufficient overt act of high treason.[a] The act necessary to be cognizable as criminal must be that required for the actus reus of the offense.

State v. Quick

Supreme Court of South Carolina, 1942.
199 S.C. 256, 19 S.E.2d 101.

■ FISHBURNE, JUSTICE. The defendant was convicted of the unlawful manufacture of intoxicating liquor under Section 1829, Code 1932, and amendments thereto. The main question in the case, as we see it, is whether the lower Court erred in refusing to direct a verdict of acquittal, a motion therefor having been made at the close of the evidence offered by the State. . . .

We think there can be no doubt but that the evidence overwhelmingly tends to show an intention on the part of the appellant to manufacture liquor; certainly such inference may reasonably be drawn. But intent alone, not coupled with some overt act toward putting the intent into effect, is not cognizable by the Courts. The law does not concern itself with mere guilty intention, unconnected with any overt act. State v. Kelly, 114 S.C. 336, 103 S.E. 511; 14 Am.Jur., Sec. 25, Page 786. . . .

In our opinion the defendant is entitled to a new trial in any event. But because of the error in overruling his motion for a directed verdict the judgment is reversed, with direction to enter a verdict of not guilty.

■ BONHAM, C.J., BAKER and STUKES, JJ., and WM. H. GRIMBALL, A.A.J., concur.

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[a] 18 U.S.C.A. § 871 (1976) punishes knowingly and willfully making a threat against the President. It requires proof of a true threat but it need not be communicated to the President. United States v. Frederickson, 601 F.2d 1358 (8th Cir.1979).

Mere political rhetoric is insufficient. A true threat is required. Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969).

State v. Rider

Supreme Court of Missouri, 1886.
90 Mo. 54, 1 S.W. 825.

■ HENRY, C.J. At the September term, 1885, of the Saline criminal court the defendant was indicted for murder for killing one R.P. Tallent, and was tried at the November term of said court, 1885, and convicted of murder in the first degree. From that judgment he has appealed to this court.

The evidence for the state proved that he killed the deceased, and of that fact there is no question. It also tended to prove that he armed himself with a gun, and sought the deceased with the intent to kill him. The evidence tended to prove that the relations between the defendant and his wife were not of the most agreeable character, and that the deceased was criminally intimate with her, and on the day of the homicide had taken her off in a skiff to Brunswick. That defendant went in search of his wife to the residence of the deceased, armed with a shot gun, and met the latter near his residence. What then occurred no one witnessed, except the parties engaged, but defendant testified as follows: "Well, me and Mr. Merrill went to this path that was leading toward the river. When we come to that path Mr. Merrill stopped, and I went on in the direction of Mr. Tallent's house, to see if I could learn anything about where my wife was, and I discovered no sign of her there, and I started back north on this path, going down on the slough bank; after going down some distance from the bank I meets Mr. Tallent; I spoke to Mr. Tallent and asked him if he knew where my wife was, and he made this remark: 'I have taken her where you won't find her;' and he says, 'God damn you, we will settle this right here.' He started at me with his axe in a striking position, and I bid Mr. Tallent to stop; then he advanced a few feet, and I fired. I fired one time." The axe of deceased, found on the ground, had a shot in the handle near the end farthest from the blade, and on the same side as the blade, and this evidence had a tendency to corroborate the testimony of the accused, showing that the axe was pointing in the direction from which the shot came, and was held in an upright position.

The court, for the state, instructed the jury as follows:

"The court instructs the jury, that if they believe from the evidence that prior to the killing of the deceased, the defendant prepared and armed himself with a gun, and went in search of, and sought out, deceased, with the intention of killing him, or shooting him, or doing him some great bodily harm, and that he did find, overtake, or intercept, deceased, and did shoot and kill deceased while he was returning from the river to his home, then it makes no difference who commenced the assault, and the jury shall not acquit the defendant; and the jury are further instructed that in such case they shall disregard any and all testimony tending to show that the character or reputation of deceased for turbulency, violence, peace and quiet was bad, and they shall further disregard any and all evidence of threats made by deceased against the defendant."

The mere intent to commit a crime is not a crime. An attempt to perpetrate it is necessary to constitute guilt in law. One may arm himself with the purpose of seeking and killing an adversary, and may seek and find him, yet, if guilty of no overt act, commits no crime. It has been repeatedly held in this and nearly every state in the Union, that one against whom threats have been made by another is not justifiable in assaulting him unless the threatener makes some attempt to execute his threats. A threat to

kill but indicates an intent or purpose to kill; and the unexpressed purpose or intent certainly affords no better excuse for an assault by the person against whom it exists than such an intent accompanied with a threat to accomplish it. The above instruction authorized the jury to convict the defendant even though he had abandoned the purpose to kill the deceased when he met him, and was assaulted by deceased and had to kill him to save his own life. . . .

For the errors above noted the judgment is reversed and cause remanded. All concur.[b]

SECTION 2. WHAT CONSTITUTES AN ACT

State v. Taft

Supreme Court of Appeals of West Virginia, 1958.
143 W.Va. 365, 102 S.E.2d 152.

■ GIVEN, JUDGE. . . . The indictment in the instant case is in two counts. The first count charges defendant with having driven an automobile while "under the influence of intoxicating liquor". . . . On the verdict of the jury, the judgment was that defendant serve six months in the county jail, the sentence to run consecutively to the sentence mentioned in case No. 10907. . . .

After the jury had considered of a verdict for some time, the foreman requested the trial court to answer the question, "Is there a legal definition for what constitutes driving a car?" Whereupon, over objection of defendant, the court instructed the jury "that the term 'driving' has been defined and construed as requiring that a vehicle be in motion in order for the offense to be committed." Defendant then offered, in writing, an instruction which would have told the jury "that if they believe from the evidence that defendant got in his parked car for the purpose of waiting for someone else, and that the brakes of his car accidentally released and the car drifted some two to three feet into the rear end of a car parked in front of said Taft car, and that the movement of said car was accidental, and not the act and intent of the defendant, then you are authorized to find and determine that the defendant was not then and there driving his said car, and if you so find that the defendant was not then and there driving his said car, you may find the defendant not guilty."

The statute on which the indictment is based makes it a criminal offense for a person "to drive any vehicle on any highway of this state" while "under the influence of intoxicating liquor"; or "under the influence of any narcotic drug." The question posed by the action of the court, as related to the instructions mentioned above, is whether the mere motion of the vehicle constituted "driving" of the vehicle, within the meaning of the statute. We think that it does not.

Though movement of a vehicle is an essential element of the statutory requirement, the mere movement of a vehicle does not necessarily, in every circumstance, constitute a "driving" of the vehicle. To "drive" a vehicle necessarily implies a driver or operator and an affirmative or positive action on

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[b] Rider was tried again under proper instructions and again convicted. This conviction was affirmed. State v. Rider, 95 Mo. 474, 8 S.W. 723 (1888).

"In every crime or public offense, there must exist a union, or joint operation of act and intent, or criminal negligence." West's Cal. Penal Code § 20 (1996).

the part of the driver. A mere movement of the vehicle might occur without any affirmative act by a driver, or, in fact by any person. If a vehicle is moved by some power beyond the control of the driver, or by accident, it is not such an affirmative or positive action on the part of the driver as will constitute a driving of a vehicle within the meaning of the statute. This being true, the instruction telling the jury that the vehicle must "be in motion in order for an offense to be committed" necessarily, in view of the evidence before the jury, had the effect of telling them that any accidental movement of the vehicle was sufficient to constitute a driving of the vehicle within the meaning of the statute, and constituted prejudicial error. What is said in this respect also indicates prejudicial error in the refusal to give to the jury the instruction offered by defendant, quoted above, after the giving of the instruction first mentioned. . . .

For the reasons indicated, the judgment of the circuit court is reversed, the verdict of the jury set aside, and defendant is awarded a new trial.[c]

Reversed; verdict set aside; new trial awarded.

People v. Decina

Court of Appeals of New York, 1956.
2 N.Y.2d 133, 157 N.Y.S.2d 558, 138 N.E.2d 799.

[Defendant was convicted of the statutory offense known as "criminal negligence in the operation of a vehicle resulting in death." He appealed, insisting that the court erred (1) in overruling his demurrer to the indictment and (2) in the admission of incompetent testimony. The Appellate Division held that the demurrer was properly overruled but reversed and granted a new trial on the second ground. From this determination both parties appealed.]

■ FROESSEL, JUDGE. . . . We turn first to the subject of defendant's cross appeal, namely, that his demurrer should have been sustained, since the *indictment* here does not charge a crime. The indictment states essentially that defendant, *knowing* "that he was subject to epileptic attacks or other disorder rendering him likely to lose consciousness for a considerable period of time", was culpably negligent "in that he *consciously* undertook to and *did operate* his Buick sedan on a public highway" (emphasis supplied) and "while so doing" suffered such an attack which caused said automobile "to travel at a fast and reckless rate of speed, jumping the curb and driving over the sidewalk" causing the death of 4 persons. In our opinion, this clearly states a violation of section 1053—a of the Penal Law. The statute does not require that a defendant must deliberately intend to kill a human being, for that would be murder. Nor does the statute require that he knowingly and consciously follow the precise path that leads to death and destruction. It is sufficient, we have said, when his conduct manifests a "disregard of the consequences which may ensue from the act, and indifference to the rights of others. No clearer definition, applicable to the hundreds of

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[c] The statute makes it an offense to be in "actual physical control of a motor vehicle while under the influence of intoxicating liquor." One may be in "actual physical control" of a motor vehicle without actually driving it. Hughes v. State, 535 P.2d 1023 (Okl.Cr.1975).

A person who is asleep and whose vehicle is off the road and not running is not in actual physical control of the vehicle. State v. Bugger, 25 Utah 2d 404, 483 P.2d 442 (1971).

Defendant was in actual physical control of a vehicle where he was asleep behind the steering wheel of a vehicle stuck in a borrow pit. State v. Taylor, 203 Mont. 284, 661 P.2d 33 (1983).

varying circumstances that may arise, can be given. Under a given state of facts, whether negligence is culpable is a question of judgment." People v. Angelo, 246 N.Y. 451, 457, 159 N.E. 394, 396.

Assuming the truth of the indictment, as we must on a demurrer, this defendant knew he was subject to epileptic attacks and seizures that might strike *at any time.* He also knew that a moving motor vehicle uncontrolled on a public highway is a highly dangerous instrumentality capable of unrestrained destruction. With this *knowledge,* and without anyone accompanying him, he deliberately took a chance by making a conscious choice of a course of action, in disregard of the consequences which he knew might follow from his conscious act, and which in this case did ensue. How can we say as a matter of law that this did not amount to culpable negligence within the meaning of section 1053–a?

To hold otherwise would be to say that a man may freely indulge himself in liquor in the same hope that it will not affect his driving, and if it later develops that ensuing intoxication causes dangerous and reckless driving resulting in death, his unconsciousness or involuntariness at that time would relieve him from prosecution under the statute. His awareness of a condition which he knows may produce such consequences as here, and his disregard of the consequences, renders him liable for culpable negligence, as the courts below have properly held. To have a sudden sleeping spell, an unexpected heart or other disabling attack, without any prior knowledge or warning thereof, is an altogether different situation, and there is simply no basis for comparing such cases with the flagrant disregard manifested here. . . .

Accordingly, the Appellate Division properly sustained the lower court's order overruling the demurrer, as well as its denial of the motion in arrest of judgment on the same ground. . . .

[The court agreed with the Appellate Division that reversible error had been committed in the admission of evidence.]

Accordingly, the order of the Appellate Division should be affirmed.[d]

■ DESMOND, JUDGE (concurring in part and dissenting in part).

I agree that the judgment of conviction cannot stand but I think the indictment should be dismissed because it alleges no crime. Defendant's demurrer should have been sustained. . . .

Just what is the court holding here? No less than this: that a driver whose brief blackout lets his car run amuck and kill another has killed that other by reckless driving. But any such "recklessness" consists necessarily not of the erratic behavior of the automobile while its driver is unconscious, but of his driving at all when he knew he was subject to such attacks. Thus, it must be that such a black-out-prone driver is guilty of reckless driving. Vehicle and Traffic Law, Consol.Laws, c. 71, § 58, whenever and as soon as he steps into the driver's seat of a vehicle. Every time he drives, accident or no accident, he is subject to criminal prosecution for reckless driving or to revocation of his operator's license, Vehicle and Traffic Law, § 71, subd. 3. And how many of this State's 5,000,000 licensed operators are subject to

[d] A driver of a vehicle who had an epileptic seizure while driving when he knew he was subject to a seizure was responsible for the resulting homicide when defendant's vehicle struck a child. The defendant's conduct was gross negligence. Commonwealth v. Cheatham, 419 Pa. Super. 603, 615 A.2d 802 (1992). *See* Forbes v. Commonwealth, 498 S.E.2d 457 (Va.App.1998) (diabetic did not act with criminal negligence in driving when he only had slight warning of a problem).

such penalties for merely driving the cars they are licensed to drive? No one knows how many citizens or how many or what kind of physical conditions will be gathered in under this practically limitless coverage of section 1053—a of the Penal Law and section 58 and subdivision 3 of section 71 of the Vehicle and Traffic Law. It is no answer that prosecutors and juries will be reasonable or compassionate. A criminal statute whose reach is so unpredictable violates constitutional rights, as we shall now show. . . .

■ CONWAY, CH. J., DYE and BURKE, JJ., concur with FROESSEL, J.; DESMOND, J., concurs in part and dissents in part in an opinion in which FULD and VAN VOORHIS, JJ., concur.

Order affirmed.

State v. Kimbrell

Supreme Court of South Carolina, 1987.
294 S.C. 51, 362 S.E.2d 630.

■ CHANDLER, JUSTICE:

Appellant Vicki Kimbrell (Kimbrell) was convicted of trafficking in cocaine and sentenced to twenty-five years imprisonment. We reverse and remand for a new trial.

FACTS

On March 31, 1986, a confidential informant (Roberts) arranged a meeting between an undercover police officer (O'Donald) and Kimbrell's ex-husband, Gene Kimbrell (Gene), a suspected drug dealer. At 5:00 that afternoon, Roberts and O'Donald went to Gene's mobile home where O'Donald bought an ounce of cocaine from Gene and agreed to purchase cocaine every two weeks. Although Kimbrell was present during these discussions, she did not participate in the drug transaction.

Based upon the information O'Donald had acquired during the March 31 meeting, narcotics officers obtained a warrant to search Gene's mobile home. They then planned a "buy-bust" operation. Thereafter, O'Donald called Gene and arranged for a buy of both cocaine and marijuana.

O'Donald, wearing a hidden transmitter, arrived at Gene's mobile home on the afternoon of April 3. When he and Gene went into the kitchen, O'Donald saw a small amount of cocaine on a plate and a zip-lock bag of cocaine on the kitchen counter. A set of scales was on the kitchen table.

When O'Donald asked to see the marijuana, Gene led him down the hallway towards the back door. Gene stopped at the bedroom door, knocked, and told Kimbrell "the toot (cocaine) is laying on the table, we're going outside, watch it." Kimbrell, carrying a beige pocketbook, then walked out of the bedroom and into the kitchen.

Gene and O'Donald proceeded outside and viewed the marijuana in Gene's pickup truck. When they reentered the mobile home, Kimbrell returned to the bedroom and closed the door.

O'Donald then transmitted a signal to the other officers that they should commence the bust. Kimbrell ran out from the bedroom shouting that a car had just pulled up, after which she ran back into the bedroom and closed the door. Upon their arrival, the other officers found Kimbrell sitting on the bed, the butt of a pistol protruding from her beige pocketbook.

DIRECTED VERDICT

In reviewing the denial of a motion for directed verdict in a criminal case, the evidence must be viewed in the light most favorable to the State. A jury issue is created when there is any direct or circumstantial evidence which reasonably tends to prove the guilt of the accused.

A person who is *knowingly* in actual or constructive possession of ten or more grams of cocaine is guilty of trafficking in cocaine. The thrust of Kimbrell's directed verdict motion is that the State failed to present sufficient evidence of her *knowing possession* of the cocaine seized.

An accused person has possession of contraband when he has both the power and intent to control its disposition or use. Here, the State produced evidence that Kimbrell had actual knowledge of the presence of the cocaine. Because actual knowledge of the presence of the drug is strong evidence of intent to control its disposition or use, knowledge may be equated with or substituted for the intent element. Possession may be inferred from circumstances.

From the evidence in this case it can be inferred that Kimbrell had both the power and intent to control the cocaine during the time Gene and the undercover agent were outside the mobile home.

From the record, it is patent that the State presented sufficient evidence to submit the case to the jury. While Gene's testimony as to what transpired is at variance with that of the State's witnesses, it was for the jury to resolve the disputed evidence.

. . .

MERE PRESENCE

Kimbrell argues the trial judge erred in refusing her request to charge that "mere presence, where the drugs are present, would not be sufficient to convict, without more." We agree.

It is error to refuse a requested charge on an issue raised by the indictment and the evidence presented at trial. The charge requested by Kimbrell is a correct statement of the law. The judge's charge, as given, did not adequately cover the substance of Kimbrell's request. Failure to charge on *mere presence* constitutes reversible error.[e]

Reversed and Remanded.

MODEL PENAL CODE

Article 2. General Principles of Liability

Section 2.01 Requirement of Voluntary Act; (Omission as Basis of Liability;) Possession as an Act.

(1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) The following are not voluntary acts within the meaning of this Section:

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[e] Mere presence of a controlled substance in defendant's urine did not constitute possession under a statute prohibiting unlawful possession of a controlled substance. State v. Lewis, 394 N.W.2d 212 (Minn.App.1986).

Attempted possession with intent to distribute is a crime. State v. Curry, 107 N.M. 133, 753 P.2d 1321 (App.1988).

(2) Mitigation. If the particular conduct charged to constitute a criminal attempt, solicitation or conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section, the Court shall exercise its power under Section 6.12[r] to enter judgment and impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution.

(3) Multiple Convictions. A person may not be convicted of more than one offense defined by this Article for conduct designed to commit or to culminate in the commission of the same crime.[s]

SECTION 4. NEGATIVE ACTS

Biddle v. Commonwealth

Supreme Court of Appeals of Virginia, 1965.
206 Va. 14, 141 S.E.2d 710.

■ I'ANSON, JUSTICE. Defendant, Shirley Mae Biddle, having waived a jury trial, was tried by the court on an indictment charging her with the murder of her three-month-old baby girl and found guilty of murder in the first degree. After receiving a report from the probation officer, the trial court fixed her punishment and sentenced her to the State penitentiary for a period of twenty years. We granted her a writ of error.

Defendant contends that the trial court erred . . . and (2) in holding that the evidence was sufficient to sustain a conviction of first degree murder. . . .

The defendant says that the evidence is sufficient to sustain a conviction of manslaughter but it fails to support her conviction of murder in the first degree, because the death of the baby resulted from negligence and not from a malicious omission of duty.

When the detectives visited defendant's home on the night of January 22, 1964, Henley observed the deceased baby's body in an extreme condition of malnutrition, and when he unpinned her diaper he found blood spots on it and on her private parts from diaper rash. He observed another infant lying on newspapers in a bassinet, with a leather jacket over her, and her diapers were wet and dirty and there was a rash on her buttocks. In the kitchen, the detectives saw a large, open can of Pet milk, with a saucer covering the top, and food on the stove which appeared to have been there for several days.

Medical testimony shows that when the baby was born on October 18, 1963, she "seemed to be perfectly healthy." There was also evidence that the baby weighed 5 pounds 8 ounces at birth.

Testimony of the medical examiner reveals that he made a postmortem examination of the baby's body two days after her death; that she

[r] Section 6.12 provides: "If, when a person, having been convicted of a felony, the Court having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the view that it would be unduly harsh to sentence the offender in accordance with the Code, the Court may enter judgment of conviction for a lesser degree of felony or for a misdemeanor and impose sentence accordingly."

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weighed 4 pounds 5½ ounces; that the intestinal tract and stomach were entirely empty, and that the body was dehydrated. It was his opinion that the child had not been fed for several days.

The defendant . . . testified that she fed the baby every day but she was small and sometimes would not drink all the milk she gave her; that she fed her three times on the day she died; that she ate very little pablum and fruit; that she never cried because she was hungry; that she loved the baby and did not treat her any differently from the rest of her children; that she had the means to buy food for the children and had milk and other baby food on hand at all times; that she knew the baby had lost weight but had not taken her to a doctor; that her husband had accused her of having the baby by her stepfather and her other children by other men, and she stayed upset most of the time over his untrue accusations.

Defendant's mother said that the baby had been in her home during the day she died and that she had fed her a small amount of fruit and pablum twice on that day, but that she did not appear to be very well.

Section 18.1–21, Code of 1950, as amended, 1960 Repl.Vol., 1964 Cum.Supp., distinguishes the degrees of murder, but it does not define murder itself. . . .

Murder at common law is a homicide committed with malice aforethought, either express or implied.

The precise question presented here seems never to have been decided by this Court. The general rule, supported by numerous authorities in England and the United States, is that if death is the direct consequence of the malicious omission of the performance of a duty, such as of a mother to feed her child, this is a case of murder; but if the omission is not wilful, and arose out of neglect only, it is manslaughter. . . .

Thus, from the authorities heretofore quoted, whether the defendant was guilty of manslaughter or murder depends upon the nature and character of the act or acts which resulted in the child's death.

Here the defendant was harassed by her husband's accusations that none of her children was his, and the baby's feedings appeared to depend upon how she and her husband got along. When the relationship between them was pleasant she fed the baby, but when it was not she neglected her. She had milk in the house to feed the baby the night it died, but it is apparent from the medical examiner's testimony that she had not fed her for several days. The conditions found when the detectives first went to the apartment and the statements contained in the second signed paper writing made by the defendant to Henley at police headquarters show that she neglected the baby and was careless and indifferent in the performance of her duties not only to the baby, but to other members of her family as well. But, from a consideration of all the facts and circumstances of the case, the Commonwealth has not proved beyond a reasonable doubt that defendant wilfully or maliciously withheld food and liquids from the baby. Hence the conviction of first degree murder is not supported by the evidence, and for this reason the judgment is reversed and the case is remanded for a new trial.

Defendant's court-appointed counsel is allowed a fee of $200, plus expenses, for representing her on the appeal in this Court.

Reversed and remanded.[t]

Commonwealth v. Teixera

Supreme Judicial Court of Massachusetts, 1986.
396 Mass. 746, 488 N.E.2d 775.

■ HENNESSEY, CHIEF JUSTICE.

The defendant appeals from his conviction by a six-person jury in the District Court of neglecting to support an illegitimate child (G.L. c. 273, § 15).[1] On appeal, the defendant argues that the judge erred in denying his motion for a required finding of not guilty, contending that the evidence was insufficient to establish certain elements of the crime. Among these insufficiencies, the defendant contends, is the Commonwealth's failure to establish his financial ability to support the allegedly illegitimate child. Additionally, the defendant argues that the judge's charge that failure to provide support is prima facie evidence that the neglect is wilful and without cause impermissibly shifted the burden of proof to the defendant. . . . We conclude that a judgment of not guilty must be entered because the Commonwealth failed to establish the defendant's financial ability to support the child. . . .

The mother of the child for whom support is sought met the defendant in August, 1979, while hitchhiking. The mother testified that she dated the defendant approximately once a week from August, 1979, to January, 1980. According to her testimony, she became sexually intimate with the defendant at the end of August and continued relations through December, 1979. Near the end of November, 1979, she stated, she discovered that she was pregnant. She testified that she informed the defendant of the pregnancy, and that he suggested that she have an abortion, although he did not offer to pay for the procedure. On another occasion, she testified, the defendant suggested that she place the child for adoption. Her testimony indicates that she did not see the defendant after March, 1980, until November, 1983, when the nonsupport action was pending.

The child was born on June 30, 1980. . . . [T]he mother testified that in July, 1980, she informed the defendant by telephone that he had a son. The mother applied for welfare benefits for the child in September, 1980, and in August, 1981, a complaint issued against the defendant for nonsupport of an illegitimate child.

At trial, no direct evidence was presented regarding the mother's marital status, and no evidence was introduced as to the defendant's financial circumstances. The defendant, who claims to be indigent, did not testify in his own defense. . . .

The defendant contends that the judge erred in denying the defendant's motion for a required finding of not guilty because the Commonwealth

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[t] "The question thus posed to the jury was whether defendant's omission to provide food for his child was 'aggravated, culpable, gross, or reckless' neglect 'incompatible with a proper regard for human life' (involuntary manslaughter) or involved such a high degree of probability that it would result in death that it constituted 'a wanton disregard for human life' making it second degree murder." People v. Burden, 72 Cal.App.3d 603, 140 Cal.Rptr. 282, 289 (1977).

The elements that support murder by omission and murder by commission are the same. Defendant must act intentionally or knowingly. State v. Tucker, 10 Haw.App. 43, 861 P.2d 24 (1993) remanded other ground and second opinion, 10 Haw.App. 73, 861 P.2d 37 (1993).

[1] The defendant was placed on probation with support payments to be determined by probation officers.

failed to produce evidence regarding the defendant's financial ability to support the child during the period for which the defendant was charged with nonsupport. Section 15 of G.L. c. 273 (1984 ed.) is designed to provide criminal penalties for a parent who "neglects or wilfully refuses to support." In proceedings under § 15, therefore, the Commonwealth must prove each element of the offense beyond a reasonable doubt. . . .

To find a defendant guilty of a violation of § 15, the Commonwealth must prove the following elements beyond a reasonable doubt: (1) the defendant is the parent of the illegitimate child; (2) the defendant, if male, knew or should have known of the existence of a valid claim of his parentage prior to the service of the complaint; and (3) the defendant neglected or wilfully refused to contribute reasonably to the child's support and maintenance.

The statutory requirement that the parents contribute reasonably to the child's support and that the failure to do so be wilful or neglectful before a conviction can be sustained requires the Commonwealth to prove that the defendant was financially able or had the earning capacity to contribute to the support of the child. . . . Because there was no such proof in the instant case, the defendant was entitled to a required finding of not guilty.[2]

Reversed.

Jones v. United States

United States Court of Appeals, District of Columbia Circuit, 1962.
113 U.S.App.D.C. 352, 308 F.2d 307.

[Shirley Green was the mother of the two children mentioned. Because she was not married and was living with her parents at the time, she arranged to have appellant take Robert from the hospital to appellant's home and agreed to pay appellant $72 a month for his care. There was a dispute in the evidence as to whether these payments were continued beyond five months. When Anthony was born, and was ready to leave the hospital, he also was taken to appellant's home. There seems to have been no specific monetary agreement covering his support, but he remained at appellant's home. Shirley also lived there for at least three weeks, there was a dispute in the evidence as to where she was living later.]

■ WRIGHT, CIRCUIT JUDGE. Appellant, together with one Shirley Green, was tried on a three-count indictment charging them jointly with (1) abusing and maltreating Robert Lee Green, (2) abusing and maltreating Anthony Lee Green, and (3) involuntary manslaughter through failure to perform their legal duty of care for Anthony Lee Green, which failure resulted in his death. At the close of evidence, after trial to a jury, the first two counts were dismissed as to both defendants. On the third count, appellant was convicted of involuntary manslaughter. Shirley Green was found not guilty. . . .

Appellant also takes exception to the failure of the trial court to charge that the jury must find beyond a reasonable doubt, as an element of the crime, that appellant was under a legal duty to supply food and necessities

[2] Financial ability or earning capacity of the defendant may be established by inference drawn from the testimony of the mother or by other direct evidence. . . .

to Anthony Lee. Appellant's attorney did not object to the failure to give this instruction, but urges here the application of Rule 52(b).

The problem of establishing the duty to take action which would preserve the life of another has not often arisen in the case law of this country. The most commonly cited statement of the rule is found in People v. Beardsley, 150 Mich. 206, 113 N.W. 1128, 1129, 13 L.R.A., N.S., 1020:

"The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter. . . . This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation. It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death. . . ."

There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

It is the contention of the Government that either the third or the fourth ground is applicable here. However, it is obvious that in any of the four situations, there are critical issues of fact which must be passed on by the jury—specifically in this case, whether appellant had entered into a contract with the mother for the care of Anthony Lee or, alternatively, whether she assumed the care of the child and secluded him from the care of his mother, his natural protector. On both of these issues, the evidence is in direct conflict, appellant insisting that the mother was actually living with appellant and Anthony Lee, and hence should have been taking care of the child herself, while Shirley Green testified she was living with her parents and was paying appellant to care for both children.

In spite of this conflict, the instructions given in the case failed even to suggest the necessity for finding a legal duty of care. The only reference to duty in the instructions was the reading of the indictment which charged, inter alia, that the defendants "failed to perform their legal duty." A finding of legal duty is the critical element of the crime charged and failure to instruct the jury concerning it was plain error. . . .

Reversed and remanded.[u]

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[u] A woman, entrusted with her grandchild, who became so intoxicated that she allowed it to be suffocated although its screams could be heard throughout the neighborhood, is guilty of manslaughter. Cornell v. State, 159 Fla. 687, 32 So.2d 610 (1947). A guard at a railroad crossing, who did not see an approaching train because he was looking the other way and hence did not operate the safety devices, with the result that a motorist was killed, is guilty of manslaughter. State v. Benton, 38 Del. 1, 187 A. 609 (1936). Compare Regina v. Smith, 11 Cox C.C. 210 (1869) with Rex v. Pittwood, 19 Times Law Rep. 37 (1902) and State v. Harrison, 107 N.J.L. 213, 152 A. 867 (1930).

Some early English cases held the failure to provide medical care for a child could result in a manslaughter conviction. Regina v. Downes, 18 Cox CC III (Cr.App. 1875); Regina v. Senior, however, in Regina v. Lowe [1973] 1 All ER 805, the Court of Appeal held the cases were no longer good law for the purposes of constructive manslaughter.

Where husband,a diabetic, made a choice to forego insulin treatment, wife was under no duty to seek medical aid for the husband who died of diabetic ketoacidosis. Commonwealth v. Konz, 450 A.2d 638 (Pa.1982).

Davis v. Commonwealth

Supreme Court of Virginia, 1985.
230 Va. 201, 335 S.E.2d 375.

■ STEPHENSON, JUSTICE.

In a bench trial, Mary B. Davis was convicted of involuntary manslaughter of her mother, Emily B. Carter, . . . The trial court found that Carter's death resulted from Davis' criminal negligence in failing to provide her mother with heat, food, liquids, and other necessaries.

The principal issues in this appeal are: (1) whether Davis had a legal duty to care for Carter, and if so, (2) whether she breached the duty by conduct constituting criminal negligence. . . .

On November 29, 1983, a paramedic with the Lynchburg Fire Department responded to a call at a house located at 1716 Monroe Street in the City of Lynchburg. The house was occupied by Davis and Carter. The paramedic arrived about 5:35 p.m. and found Carter lying on a bed. It was a cold day, and there was no heat in Carter's room. The only source of heat was a tin heater, and it was not being used. The only food in the house was two cans of soup, a can of juice, and an open box of macaroni and cheese. Two trash cans were found behind the house. One contained 11 or 12 empty vegetable cans, and the other was full of empty beer cans. An operable stove, a supply of firewood and a color television were found in Davis' upstairs bedroom.

Carter was admitted to a hospital that evening. . . .

A forensic pathologist with the Chief Medical Examiner's Office conducted an autopsy on Carter's body. He concluded that the causes of death were "pneumonia and freezing to death due to exposure to cold with a chronic state of starvation." He stated that any one of these conditions alone could have caused her death.

Additionally, the pathologist testified that a body temperature of 80 degrees was extremely low and that, except in rare, isolated cases involving children or young people, "no one survives" such a low body temperature. . . .

The pathologist further testified that when a person's dehydration reaches a five to seven percent range, it suggests that she has received no liquids for at least two days. He described Carter's condition as "bone dry." He also testified that Carter's physical condition at the time of the autopsy indicated that she had eaten "no food whatsoever" for at least 30 days.

For a number of years, Carter had been senile and totally disabled. The attending physician testified that Davis said her mother was "not able to feed herself at all; that she was not able to care for her personal needs and that she had to wear diapers and had to have total care." Moreover, Davis informed a number of people that she was responsible for the total care of Carter.

A parent who, sincerely motivated by religious faith, failed to secure medical treatment for child, can be convicted of negligent homicide notwithstanding Free Exercise Clause of the First Amendment. Walker v. Superior Court, 763 P.2d 852 (1988).

Good faith belief of parent in spiritual means alone to treat child may be a defense to misdemeanor offense of failing to provide medical care for the child and therefore to manslaughter. State v. Lockhart, 664 P.2d 1059 (Okla.Cr.1983).

Carter signed a writing naming Davis her authorized representative to apply for, receive, and use her food stamps. Relying on this document, the Department of Social Services awarded Davis additional food stamp benefits of $75 per month and exempted her from the requirement of registering for outside employment as a requisite to receiving these benefits.

Davis also was the representative payee of Carter's social security benefits in the amount of $310 per month. Davis' household expenses were paid exclusively from Carter's social security. Davis also received $23 per month in food stamps for her mother.

Next, we determine whether, under the facts and circumstances presented, Davis was under a legal duty to care for her mother. This presents an issue which we have not addressed previously.

A legal duty is one either "imposed by law, or by contract." When a death results from an omission to perform a legal duty, the person obligated to perform the duty may be guilty of culpable homicide. Biddle v. Commonwealth, 206 Va. 14, 20, 141 S.E.2d 710, 714 (1965). If the death results from a malicious omission of the performance of a duty, the offense is murder. On the other hand, although no malice is shown, if a person is criminally negligent in omitting to perform a duty, he is guilty of involuntary manslaughter.

Davis acknowledges the accuracy of the foregoing legal principles. She contends, however, that the evidence fails to establish that she had a legal duty to care for her mother, asserting that the evidence proved at most a moral duty. We do not agree.

The evidence makes clear that Davis accepted sole responsibility for the total care of Carter. This became her full-time occupation. In return, Carter allowed Davis to live in her home expense free and shared with Davis her income from social security. Additionally, Carter authorized Davis to act as her food stamp representative, and for this Davis received food stamp benefits in her own right. From this uncontroverted evidence, the trial court reasonably could find the existence of an implied contract. Clearly, Davis was more than a mere volunteer; she had a legal duty, not merely a moral one, to care for her mother.

Finally, we consider whether the evidence is sufficient to support the trial court's finding of criminal negligence. . . .

When the proximate cause of a death is simply ordinary negligence, i.e., the failure to exercise reasonable care, the negligent party cannot be convicted of involuntary manslaughter. To constitute criminal negligence essential to a conviction of involuntary manslaughter, an accused's conduct "must be of such reckless, wanton or flagrant nature as to indicate a callous disregard for human life and of the probable consequences of the act."

Davis contends that she cared for her mother as best she could under the circumstances. She points to the testimony of her four sisters and her boyfriend who stated that everything seemed normal and that they observed nothing to suggest that Carter was being neglected. These witnesses stated that the house always was heated properly and that sufficient food was available at all times.

Against this testimony, however, was the scientific evidence that Carter died of starvation and freezing. The evidence indicates that Carter had received no food for at least 30 days. She lay helpless in bed in an unheated room during cold weather. The trial court, as the trier of fact, de-

termines the weight of the evidence and the credibility of the witnesses. Obviously, the court, as it had the right to do, accepted the Commonwealth's evidence and gave little or no weight to the testimony of the defendant and her witnesses. The court reasonably could conclude that Carter could not have starved or frozen to death unless she had been neglected completely for a protracted period of time.

We hold, therefore, that the evidence supports the trial court's finding that Davis' breach of duty was so gross and wanton as to show a callous and reckless disregard of Carter's life and that Davis' criminal negligence proximately caused Carter's death. Accordingly, we will affirm the judgment of the trial court.

Affirmed.

Van Buskirk v. State

Court of Criminal Appeals of Oklahoma, 1980.
611 P.2d 271.

■ CORNISH, PRESIDING JUDGE. On July 9, 1977, during an argument between the appellant and her boyfriend, Robert Rose, the pair stopped in a low place between two hills on the road from Allen to Ada, Oklahoma. Rose was ordered to get out of the car, and he was thereafter struck by the appellant's vehicle. The appellant then drove away, leaving Rose in the roadway. Subsequently, Rose was struck by another car moving at a high speed. The appellant was charged with Murder in the Second Degree in Pontotoc County District Court. She was convicted of Manslaughter, Second Degree, and sentenced to two (2) years' imprisonment.

I

The first question for determination is whether the trial court erred in instructing the jury on Manslaughter in the Second Degree. The appellant's position is that the manslaughter in the second degree statute, 21 O.S.1971, § 716, was impliedly repealed when the negligent homicide statute, 47 O.S.1971, § 11–903, was passed. The appellant's assertion is correct to the extent that motor vehicles are involved. Atchley v. State, Okl.Cr., 473 P.2d 286 (1970). However, the negligent homicide statute applies only when death is caused "by the driving of any vehicle in reckless disregard of the safety of others." Section 11–903(a). A review of the facts indicates that § 11–903(a) is not applicable here.

According to the appellant's testimony, she was driving when Rose slapped her, knocking her eyeglasses off her face. She stopped the car, ordered Rose to get out and searched for her glasses. Rose left the passenger's side of the car and started to walk in front of the vehicle around to the driver's side. The appellant said that as she leaned over to look for her eyeglasses she accidentally pressed the gas pedal. The result was that the car lurched forward, lifting Rose onto the hood. Rose pounded on the windshield, cursing, and the appellant then hit the brake pedal, throwing Rose to the ground. The appellant testified that Rose was starting to get up as she put the vehicle in reverse, swerved around him and drove away.

A passing motorist saw Rose lying in the roadway. He stopped his car and attempted to signal to a rapidly approaching car. The motorist said that Rose was "sort of moaning." The motorist's efforts to stop the approaching car were to no avail. The automobile struck Rose and dragged

him a short distance down the highway. Having ascertained that Rose was dead, he pulled the body from the road.

Under these facts, we do not believe that Rose was the victim of negligent homicide. The crime was committed, not when the appellant struck Rose, but when she abandoned him in a position of peril. At that time she could reasonably have anticipated that another vehicle might strike Rose. The foreseeability of such a consequence—where the victim lay helpless in a lane of traffic, in a low place between two hills—is apparent. It places the appellant squarely within the scope of 21 O.S.1971, § 716:

"Every killing of one human being by the act, procurement *or culpable negligence* of another, which, under the provisions of this chapter, is not murder, nor manslaughter in the first degree, nor excusable nor justifiable homicide, is manslaughter in the second degree." (Emphasis added)

Thus, the trial court correctly instructed the jury on Manslaughter in the Second Degree.

II

In the fourth, fifth, and sixth assignments of error the appellant complains that the trial court failed to give instructions on proximate cause, justifiable homicide and/or self-defense, and circumstantial evidence. The record indicates that at the time of the trial the appellant neither objected to the instructions given by the trial court nor requested that any particular instruction be given. In such a situation, this Court will generally limit itself to an examination of the instructions which were given, to see whether they fairly covered the issues raised during the trial. We have carefully examined the trial court's instructions and find that they adequately cover the subject matter of inquiry.

III

The next alleged error also relates to the jury instructions. The fourth instruction defines murder in the second degree, but the ninth instruction informs the jury that the trial judge made a judicial determination that the facts of the case would not support a conviction for murder in the second degree, and that they should not consider that charge. The appellant argues that the combination of instructions must have prejudiced the jury against her. Although we are uncertain why the trial court chose to proceed in this manner, we fail to see how the appellant suffered any prejudice thereby. The appellant raises no more than speculation as to the effect of the instructions. Where, as here, the appellant has been deprived of no fundamental right, this Court will not search the books for authorities to support the mere assertion that the trial court has erred.

IV

The remaining allegations of error relate to the sufficiency of the evidence. The appellant argues that her demurrer to the evidence should have been sustained, that the trial court erred in failing to direct a verdict in her favor, and that the verdict is contrary to the evidence. When an appellant challenges the sufficiency of the evidence presented at the trial, the function of this Court is to determine whether the State presented a prima facie case. If so, then all questions of fact were properly submitted to the jury. In the case before us, the State did present a prima facie case, and these assignments of error are without merit. The judgment and sentence is AFFIRMED.