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Chapter 12

Crimes against the Public

The state has not only a right to “maintain a decent society” but an obligation to do so. In the public nuisance context, the community’s right to security and protection must be reconciled with the individual’s right to expressive and associative freedom. Reconciliation begins with the acknowledgment that the interests of the community are not invariably less important than the freedom of individuals.



Source: Image courtesy of Tara Storm.

- *People v. Acuna*, cited in Section 12 "Civil Responses to Gang Activity"

12.1 Quality-of-Life Crimes

LEARNING OBJECTIVES

1. Define the criminal act element required for disorderly conduct.
2. Define the criminal intent element required for disorderly conduct.
3. Define the attendant circumstance required for disorderly conduct.
4. Identify potential constitutional challenges to disorderly conduct statutes.
5. Analyze disorderly conduct grading.
6. Identify potential constitutional challenges to vagrancy statutes.
7. Identify potential constitutional challenges to loitering statutes.
8. Define the elements of loitering, and analyze loitering grading.
9. Compare sit-lie laws to loitering statutes.

Crimes against the public include offenses that affect the quality of life, group violence such as gang activity, and vice crimes. Because quality-of-life crimes are often based on *moral* or *value* judgments, these offenses tend to target the poor and downtrodden. If the conduct prohibited involves an individual's **status** in society, **assembling**, or **speech**, the First and Fourteenth Amendments require a narrowly tailored statute supported by a compelling government interest. This creates a conflict between legislators trying to ensure peace and tranquility for citizens and judges upholding the many individual protections included in the Bill of Rights.

The quality-of-life offenses discussed are disorderly conduct, vagrancy, and loitering. Upcoming sections analyze crimes involving group activity, such as unlawful assembly and riot, along with the ever-growing problem of criminal gangs, and novel criminal and civil responses. The final section of this chapter discusses common vice crimes, including possession, sale, and use of controlled substances and prostitution.

Disorderly Conduct

Disorderly conduct¹, also called **disturbing the peace**, criminalizes conduct that negatively impacts the quality of life for citizens in any given city, county, or state. Although disorderly conduct is typically a low-level offense, the enforcement of disorderly conduct statutes is important to preserve citizens' ability to live, work, and travel in safety and comfort. Disorderly conduct has the elements of criminal

1. Intentional or reckless disruption of the public peace.

act, criminal intent, and an attendant circumstance, as is explored in [Section 12.1.1 "Disorderly Conduct"](#).

Disorderly Conduct Act

Three **criminal acts** generally are identified in any disorderly conduct statute. The defendant must either (1) make a loud and unreasonable noise, obscene utterance, or gesture, (2) engage in fighting or threatening, or state fighting words, or (3) create a hazardous condition by an act that does not serve a legitimate purpose. 18 Pa. C. S. § 5503, accessed April 2, 2011, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.055.003.000.html>. The Model Penal Code defines disorderly conduct as engaging in fighting or threatening or violent tumultuous behavior, making unreasonable noise or an offensively course utterance, gesture, or display, addressing abusive language to any person present, or creating a hazardous or physically offensive condition by an act that serves no legitimate purpose (Model Penal Code § 250.2). When the criminal act is a loud and unreasonable noise, the quality of the noise is judged in the *setting* where the noise occurred. A noise made in an extremely quiet area can be softer than a noise made in a loud and busy area like a city street during peak hours. Haw. Rev. Stat. § 711-1101(2), accessed April 2, 2011, http://www.capitol.hawaii.gov/hrscurrent/vol14_Ch0701-0853/HRS0711/HRS_0711-1101.htm. The term “hazardous condition” generally refers to a situation that is dangerous and poses a risk of injury to others in the vicinity of the defendant’s conduct. *Wolfe v. State*, 24 P.3d 1252 (2001), accessed April 2, 2011, http://scholar.google.com/scholar_case?case=8611678948602739716&q=disorderly+conduct+%22hazardous+condition%22&hl=en&as_sdt=2,5&as_ylo=2000.

Example of Disorderly Conduct Act

David and Daniel leave a party in a quiet neighborhood at three in the morning. Both are inebriated. After walking a couple of blocks and telling stories, they begin singing loudly with their arms wrapped around each other. David stumbles and trips Daniel, who falls heavily to the sidewalk. Daniel gets up and starts screaming and swearing at David, challenging him to fight. David yells back, “Bring it on!” David pushes Daniel, he pushes back, and they begin punching and kicking. In this instance, David and Daniel have probably committed *three* separate disorderly conduct offenses. When David and Daniel began singing at three in the morning on a quiet street, they made a loud and unreasonable noise. When they challenged each other to fight, they uttered threats or stated fighting words. When they engaged in a fistfight, they committed fighting, or created a hazardous condition. Thus David and Daniel are most likely subject to a prosecution for and conviction of three counts of disorderly conduct in many jurisdictions.

Disorderly Conduct Intent

The criminal intent element required for disorderly conduct in many jurisdictions is the **specific intent** or **purposely** to cause public inconvenience, annoyance, or alarm, or the **reckless** intent to cause a *risk* thereof. Ala. Code § 13A-11-7, accessed April 3, 2011, <http://law.onecle.com/alabama/criminal-code/13A-11-7.html>. The Model Penal Code has the same criminal intent requirement (Model Penal Code § 250.2(1)).

Example of Disorderly Conduct Intent

Review the example given in Section 12 "Example of Disorderly Conduct Act" with David and Daniel. David and Daniel may not have had the **specific intent** to cause public inconvenience, annoyance, or alarm; however, their behavior in a quiet neighborhood late at night displays the **reckless** intent to cause a risk of such inconvenience, annoyance, or alarm. Although David and Daniel are inebriated, recall from Chapter 6 "Criminal Defenses, Part 2" that intoxication is *not* generally a defense to a reckless intent crime. Thus a trier of fact could find that David and Daniel have the appropriate criminal intent for disorderly conduct, and they may both be subject to conviction of this offense.

Disorderly Conduct Attendant Circumstance

In many jurisdictions, disorderly conduct requires the **attendant circumstance** that the conduct occur in a public place. Tex. Penal Code § 42.01, accessed April 2, 2011, <http://law.onecle.com/texas/penal/42.01.00.html>. This goes along with the purposeful or reckless intent to inconvenience, annoy, or alarm the public, or create a risk thereof. The Model Penal Code defines public as “affecting or likely to affect persons in a place to which the public or a substantial group has access...highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood” (Model Penal Code § 250.2).

Example of Disorderly Conduct Attendant Circumstance

Review the example in Section 12 "Example of Disorderly Conduct Act" with David and Daniel. David and Daniel commit their acts of loud and unreasonable noise, threats, fighting words, fighting, and creating a hazardous condition on a **sidewalk** in a **neighborhood**. Thus in jurisdictions that require the disorderly conduct attendant circumstance of a public place, David and Daniel may be subject to prosecution for and conviction of this offense. If David and Daniel committed exactly the same acts in a private residence located on fifty acres with no neighbors for miles, the attendant circumstance for disorderly conduct would be *lacking*, along with the *criminal intent* to annoy, inconvenience, or alarm the public.

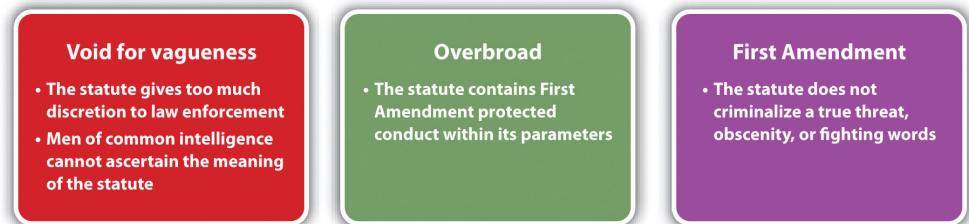
Potential Constitutional Challenges to Disorderly Conduct Statutes

Because disorderly conduct statutes often criminalize **obscene gestures and words, threats, and fighting words**, they are subject to constitutional challenges under the First and Fourteenth Amendments. However, not all speech is protected under the First Amendment. As [Chapter 3 "Constitutional Protections"](#) discusses in detail, it is constitutional to regulate *obscenity, true threats, and fighting words*. Nonetheless, any statute criminalizing speech or expression is subject to strict scrutiny, must be narrowly drafted, and supported by a compelling government interest. Thus two common grounds for challenging disorderly conduct statutes are **void for vagueness** and **overbreadth**. *Colten v. Kentucky*, 407 U.S. 104 (1972), accessed April 3, 2011, http://scholar.google.com/scholar_case?case=7926620308068158831&q=Colten+v.+Kentucky&hl=en&as_sdt=2,5.

Example of a Disorderly Conduct Statute That Is Unconstitutional

A state legislature enacts a disorderly conduct statute that prohibits “making rude and annoying comments to another.” This statute is most likely unconstitutional under the First and Fourteenth Amendments. The words *rude* and *annoying* are ambiguous, which could lead to uneven application by law enforcement and a failure to provide adequate notice to the public of what is criminal. Therefore, the statute can be stricken as **void for vagueness**. In addition, rude and annoying comments are not necessarily fighting words, true threats, or obscenity, so they could be protected under the First Amendment. This means that the statute could also be stricken as **overbroad** because it includes protected and unprotected conduct within its parameters. For a fuller and more detailed description of void for vagueness and overbreadth constitutional challenges, please refer to [Chapter 3 "Constitutional Protections"](#).

Figure 12.1 Potential Constitutional Challenges to Disorderly Conduct Statutes



Disorderly Conduct Grading

As stated previously, disorderly conduct is a low-level offense that is typically **graded** as a misdemeanor. N.C. Gen. Stat. § 14-132, <http://law.onecle.com/north->

[carolina/14-criminal-law/14-132.html](#). The Model Penal Code grades disorderly conduct as a petty misdemeanor if the defendant's purpose is to cause substantial harm or serious inconvenience or if the defendant persists with his or her conduct after a warning. Otherwise, the Model Penal Code grades disorderly conduct as a violation (Model Penal Code § 250.2(2)).

Vagrancy and Loitering

Although the government technically does not have an interest in punishing individuals for who they are, such as an impoverished person or a transient, the public perception of law enforcement is often affected by the presence of so-called vagrants and panhandlers in any given area. Thus virtually every jurisdiction has statutes punishing either **vagrancy**² or **loitering**³. However, these statutes are subject to constitutional attack if they are **void for vagueness, overbroad, or target status**.

Historically, vagrancy statutes were broadly drafted to allow law enforcement considerable discretion in arresting the unemployed, gamblers, drug addicts, alcoholics, and those who frequented houses of prostitution or other locations of ill repute. In a sense, vagrancy statutes attempted to incapacitate individuals *before* they engaged in criminal activity, to ensure the safety and security of any given area.

In 1972, the US Supreme Court struck down a Florida vagrancy statute in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The Court held that the statute, which prohibited night walking, living off one's spouse, and frequenting bars or liquor stores was void for vagueness and violated the due process clause in the Fourteenth Amendment. Thereafter, many states repealed or modified vagrancy statutes in lieu of more precisely drafted statutes prohibiting specific criminal conduct such as loitering. The Model Penal Code prohibits public drunkenness and drug incapacitation (Model Penal Code § 250.5) and loitering or prowling (Model Penal Code § 250.6). To summarize US Supreme Court precedent refining loitering statutes: it is unconstitutional to target those who are unemployed *Edwards v. California*, 314 U.S. 160 (1941), accessed April 5, 2011, http://scholar.google.com/scholar_case?case=6778891532287614638&hl=en&as_sdt=2&as_vis=1&oi=scholarr. or to enact a statute that is vague, such as a statute that criminalizes loitering in an area "with no apparent purpose," *City of Chicago v. Morales*, accessed April 5, 2011, 527 U.S. 41 (1999), <http://supreme.justia.com/us/527/41/case.html>. or without the ability to provide law enforcement with "credible and reliable identification." *Kolender v. Lawson*, accessed April 5, 2011, 461 U.S. 352 (1983), <http://supreme.justia.com/us/461/352>.

2. A quality-of-life crime that prohibits immoral and illegitimate behavior.


3. Loitering, wandering, or remaining in specified locations for the purpose of committing a crime or for another illegitimate reason.

In a jurisdiction that criminalizes loitering, the **criminal act** element is typically loitering, wandering, or remaining, with the **specific intent** or **purposely** to gamble, beg, or engage in prostitution. Ala. Code § 13A-11-9, accessed April 5, 2011, <http://law.onecle.com/alabama/criminal-code/13A-11-9.html>. An **attendant circumstance** could specify the location where the conduct takes place, such as a school or transportation facility. Ariz. Rev. Stat. § 13-2905, accessed April 5, 2011, <http://law.onecle.com/arizona/criminal-code/13-2905.html>. Another common attendant circumstance is being masked in a public place while loitering, with an exception for defendants going to a masquerade party or participating in a public parade. Ala. Code § 13A-11-9, accessed April 5, 2011, <http://law.onecle.com/alabama/criminal-code/13A-11-9.html>. The Model Penal Code prohibits loitering or prowling in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity (Model Penal Code § 250.6). Loitering is generally **graded** as a misdemeanor. Ariz. Rev. Stat. § 13-2905, accessed April 5, 2011, <http://law.onecle.com/arizona/criminal-code/13-2905.html>, or a violation. Ala. Code § 13A-11-9, accessed April 5, 2011, <http://law.onecle.com/alabama/criminal-code/13A-11-9.html>. The Model Penal Code grades loitering as a violation (Model Penal Code § 250.6).

Figure 12.2 Crack the Code

Crack the Code
Compare the following state laws:

La. Rev. Stat. Ann. § 14:107: Vagrancy	Ala. Code § 13A-11-9: Loitering
<p>The following persons are and shall be guilty of vagrancy:</p> <ol style="list-style-type: none"> (1) Habitual drunkards; or (2) Persons who live in houses of ill fame or who habitually associate with prostitutes; or (3) Able-bodied persons who beg or solicit alms, provided that this article shall not apply to persons soliciting alms for bona fide religious, charitable or eleemosynary organizations with the authorization thereof; or (4) Habitual gamblers or persons who for the most part maintain themselves by gambling; or (5) Able-bodied persons without lawful means of support who do not seek employment and take employment when it is available to them; or (6) Able-bodied persons of the age of majority who obtain their support gratis from persons receiving old age pensions or from persons receiving welfare assistance from the state; or (7) Persons who loaf the streets habitually or who frequent the streets habitually at late or unusual hours of the night, or who loiter around any public place of assembly, without lawful business or reason to be present; 	<p>a) A person commits the crime of loitering if he:</p> <ol style="list-style-type: none"> (1) Loiters, remains or wanders about in a public place for the purpose of begging; or (2) Loiters or remains in a public place for the purpose of gambling; or (3) Loiters or remains in a public place for the purpose of engaging or soliciting another person to engage in prostitution or deviate sexual intercourse; or (4) Being masked, loiters, remains or congregates in a public place; or (5) Loiters or remains in or about a school, college or university building or grounds after having been told to leave by any authorized official of such school, college or university, and not having any reason or relationship involving custody of or responsibility for a pupil or any other specific, legitimate reason for being there, and not having written permission from a school, college or university administrator; of value of another without authorization, or by threat or deception, and:



Louisiana has a vagrancy statute subject to constitutional challenge pursuant to *Popchristou*; Alabama has a more precise loitering statute.

Many jurisdictions also criminalize **panhandling**⁴ or **begging**. Panhandling statutes essentially criminalize speech, so they must be narrowly tailored to avoid successful constitutional challenges based on the First Amendment, void for vagueness, or overbreadth. Constitutional panhandling statutes generally proscribe aggressive conduct *Gresham v. Peterson*, 225 F.3d 899 (2000), accessed April 5, 2011, http://scholar.google.com/scholar_case?case=12046859312956994237&q=%22Gresham+v.+Peterson%22&hl=en&as_sdt=2,5. or conduct that blocks public access or the normal flow of traffic.

Sit-Lie Laws

One modern statutory approach to preventing homeless individuals and transients from congregating in cities and affecting the quality of life or the prosperity of businesses and tourism are **sit-lie laws**⁵. Sit-lie laws prohibit sitting or lying on public streets and sidewalks and thereby encourage individuals to move about, rather than block access to businesses, roadways, or transportation facilities. If precisely drafted, sit-lie laws could resemble constitutional **loitering** statutes, substituting sitting or lying down for the criminal act of loitering, wandering, or remaining. However, these statutes are susceptible to the same constitutional challenges as vagrancy and loitering statutes because they target the impoverished, addicts, and the unemployed.

Seattle was the first city in the United States to enact a sit-lie ordinance in 1993 that prohibited sitting or lying on a public sidewalk between the hours of 7 a.m. and 9 p.m. in Seattle's downtown area. The ordinance was attacked and ultimately upheld by the US Court of Appeals for the Ninth Circuit in 1996. Heather Knight, "San Francisco Looks to Seattle: Did Sidewalk Sitting Ban Help?" *seattlepi.com* website, accessed April 5, 2011, <http://www.seattlepi.com/default/article/San-Francisco-looks-to-Seattle-Did-sidewalk-888774.php>. Los Angeles thereafter enacted a more comprehensive ordinance that banned sitting, lying, or sleeping on public streets and sidewalks at all times and in all places within Los Angeles city limits. This ordinance was stricken by the same court as unconstitutional **cruel and unusual punishment** pursuant to the Eighth Amendment. *Jones v. City of Los Angeles*, 444 F.3d 1118 (2006), accessed April 5, 2011, http://scholar.google.com/scholar_case?case=4259488333208893136&q=Jones+v.+City+of+Los+Angeles+2005&hl=en&as_sdt=2,5&as_ylo=2004. The court held that the homeless in Los Angeles far outnumbered the amount of space available in homeless shelters, and therefore the ordinance punished defendants for conduct that was *involuntary*. Portland followed Los Angeles with a sidewalk-obstruction ordinance, requiring individuals to keep their personal belongings within two feet of their bodies. This ordinance was stricken as **void for vagueness** in 2009. Matt Davis, "Sit/Lie Law Unconstitutional," *Portland Mercury* website, accessed April 5,

4. Asking individuals for money in an aggressive manner or in a way that blocks public access.

5. Statutes and ordinances that prohibit sitting or lying on a public sidewalk or street.

2011, http://blogtown.portlandmercury.com/BlogtownPDX/archives/2009/02/19/judge_rules_sit_lie_law_uncons.

The most recent enactment of a sit-lie ordinance took place in San Francisco in 2010. The San Francisco ordinance is modeled after the Seattle ordinance and prohibits sitting or lying on a public sidewalk in the city limits between 7 a.m. and 9 p.m., with exceptions for medical emergencies, protests, or those who have disabilities. San Francisco Police Code § 16.8, accessed April 5, 2011, http://www.sfgov2.org/ftp/uploadedfiles/elections/candidates/Nov2010_CivilSidewalks.pdf. The first offense is an infraction, and the second offense is a misdemeanor. San Francisco Police Code § 16.8, accessed April 5, 2011, http://www.sfgov2.org/ftp/uploadedfiles/elections/candidates/Nov2010_CivilSidewalks.pdf. If the San Francisco ordinance successfully reduces the presence of transients and is upheld as constitutional, other cities that desire the same results could soon follow suit.

Figure 12.3 *Potential Constitutional Challenges to Loitering, Panhandling, and Sit-Lie Laws*

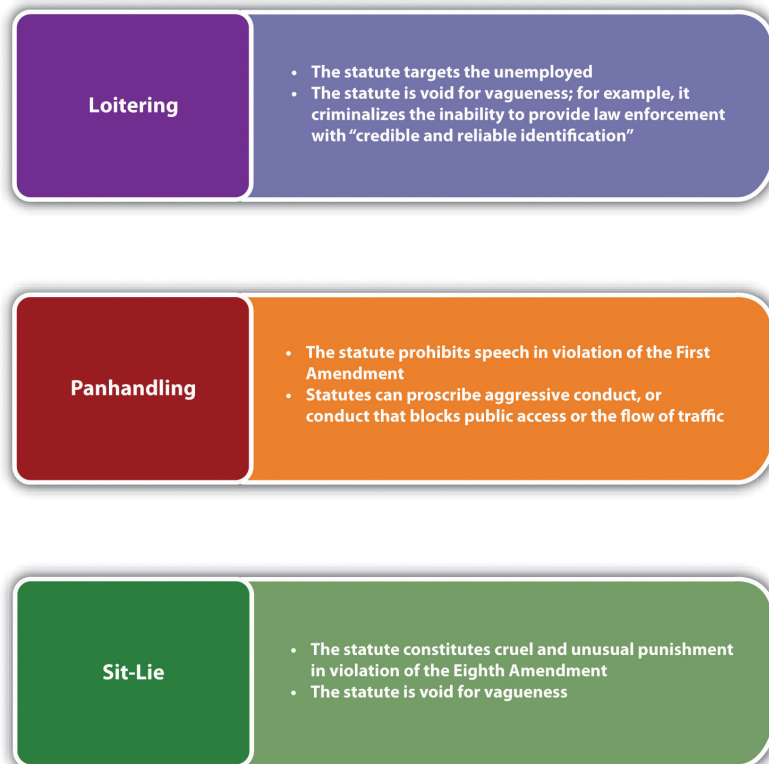


Table 12.1 Comparing Disorderly Conduct, Loitering, and Sit-Lie Laws

Crime	Criminal Act	Criminal Intent	Attendant Circumstance
Disorderly conduct	Unreasonable noise, obscene utterance or gesture, fighting, threats, fighting words, creating a hazardous condition	Specific or purposely or recklessly to disturb the public or create a risk thereof	Act takes place in public
Loitering	Loitering, wandering, remaining	Specific or purposely to beg, gamble, solicit prostitution	Act takes place near a school, transportation facility: the defendant is masked
Sit-lie law	Sitting or lying down	Strict liability*	Act takes place between certain times of day, in public, on a sidewalk, or on a street
*Exceptions for medical emergencies, people who have disabilities, protests			

KEY TAKEAWAYS

- The criminal act element required for disorderly conduct is either when the defendant (1) makes a loud and unreasonable noise, obscene utterance, or gesture, (2) engages in fighting or threatening, or states fighting words, or (3) creates a hazardous condition by an act that does not serve a legitimate purpose.
- The criminal intent element required for disorderly conduct in many jurisdictions is the specific intent or purposely to cause public inconvenience, annoyance, or alarm, or the reckless intent to cause a risk thereof.
- The disorderly conduct attendant circumstance is that the conduct occurs in a public place.
- Disorderly conduct statutes can be constitutionally challenged under the First or Fourteenth Amendments as void for vagueness or overbroad.
- Disorderly conduct is typically graded as a misdemeanor.
- Vagrancy statutes are subject to constitutional challenges if they are void for vagueness, overbroad, or target status.
- Loitering statutes are subject to constitutional challenges if they target the unemployed or are void for vagueness.
- The loitering criminal act element is typically loitering, wandering, or remaining, with the specific intent or purposely to gamble, beg, or engage in prostitution. An attendant circumstance could specify the location the conduct takes place, such as a school or transportation facility. Another common attendant circumstance is being masked in a public place while loitering, with an exception for defendants going to a masquerade party or participating in a public parade. Loitering is typically graded as a misdemeanor or a violation.
- Sit-lie laws typically prohibit sitting or lying on a public sidewalk or street, instead of loitering, wandering, or remaining like loitering statutes.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. A city enacts an ordinance that prohibits standing or remaining in a crosswalk for an extended period with a sign. What are three potential constitutional challenges to this ordinance? Can you identify a government interest supporting it?
2. Read *State v. Russell*, 890 A.2d 453 (2006). Why did the Supreme Court of Rhode Island reinstate a complaint against the defendant for disorderly conduct in this case? The case is available at this link: http://scholar.google.com/scholar_case?case=15220603438033851670&q=State+v+Russell&hl=en&as_sdt=2,5.
3. Read *People v. Hoffstead*, 905 N.Y.S.2d 736 (2010). Why did the New York Supreme Court overturn the defendant's conviction for loitering in this case? The case is available at this link: http://scholar.google.com/scholar_case?case=16147172189959232373&q=People+v.+Hoffstead&hl=en&as_sdt=2,5.

12.2 Crimes Targeting Group Conduct

LEARNING OBJECTIVES

1. Define the elements of unlawful assembly and failure to disperse.
2. Identify potential constitutional challenges to unlawful assembly and failure to disperse statutes.
3. Analyze unlawful assembly and failure to disperse grading.
4. Define the elements of riot, and analyze riot grading and the potential for constitutional challenges to riot statutes.
5. Define criminal gang and criminal gang member.
6. Compare gang participation and gang-enhancement statutes.
7. Analyze two civil responses to the criminal gang problem.
8. Identify potential constitutional challenges to gang activity statutes.

Group conduct, if criminal, can enhance the potential for violence and injury and is punishable as the crimes of unlawful assembly, riot, or criminal gangs. However, the right to *peacefully assemble* is guaranteed in the First Amendment, so statutes codifying these offenses can be subject to constitutional attack similar to disorderly conduct, vagrancy, and loitering statutes. In addition, the problem of criminal gangs has proven to be so stubborn that it has produced some novel criminal *and civil* responses. The following sections discuss group activity offenses as well as their potential constitutional defenses.

Unlawful Assembly and Failure to Disperse

Unlawful assembly⁶ can be the predicate offense to riot, which is discussed shortly. The elements required for unlawful assembly are the assembling Ala. Code § 13A-11-5, accessed April 9, 2011, <http://law.onecle.com/alabama/criminal-code/13A-11-5.html>. or meeting Fla. Stat. Ann. § 870.02, accessed April 9, 2011, <http://law.onecle.com/florida/crimes/870.02.html>. (**criminal act**) of a group, with the **specific intent** or **purposely** to commit a breach of the peace, some other unlawful act, Fla. Stat. Ann. § 870.02, accessed April 9, 2011, <http://law.onecle.com/florida/crimes/870.02.html>. or riot Ala. Code § 13A-11-5, accessed April 9, 2011, <http://law.onecle.com/alabama/criminal-code/13A-11-5.html>. Some jurisdictions and the Model Penal Code punish the **failure to disperse**⁷ (**criminal act**) when a peace officer or public servant orders a group participating in disorderly conduct likely to cause substantial harm, serious annoyance, or alarm to do so Mass. Gen. Laws ch. 269 § 1, accessed April 9, 2011, <http://law.onecle.com/massachusetts/269/1.html>. (Model Penal Code § 250.1(2)). The criminal intent element for failure to

6. Group assembly with the intent to commit breach of the peace, an unlawful act, or riot.

7. A group's failure to leave when a peace officer or public official orders it.

disperse is **general intent** or **knowingly** N.J. Stat. § 2C:33-1, accessed April 9, 2011, <http://law.onecle.com/new-jersey/2c-the-new-jersey-code-of-criminal-justice/33-1.html>. (Model Penal Code § 250.1(2)).

Jurisdictions vary as to the **attendant circumstance** for unlawful assembly and failure to disperse, which is the size of the group. Some common group minimums are **two**, Cal. Penal Code § 407, accessed April 9, 2011, <http://law.onecle.com/california/penal/407.html>. **three**, Fla. Stat. Ann. § 870.02, accessed April 9, 2011, <http://law.onecle.com/florida/crimes/870.02.html>. or **five**, N.J. Stat. § 2C:33-1, accessed April 9, 2011, <http://law.onecle.com/new-jersey/2c-the-new-jersey-code-of-criminal-justice/33-1.html>. The Model Penal Code requires three or more persons (Model Penal Code § 250.1(2)).

Example of Unlawful Assembly and Failure to Disperse

Six neighbors are sitting on their porches, peacefully chatting. One of the neighbors, Buck, notices a pro-choice group with signs in the park across the street. Annoyed, Buck tells the group, “Let’s go show those losers what it’s like to fear for your life!” He marches angrily over to the park, and the other neighbors follow. Buck begins chanting, “How would you like to be aborted?” and the other neighbors join in. The individuals in the pro-choice group stand their ground, and the decibel of the chanting increases. Buck and his neighbors form a ring around the group and move in closer, almost touching the individuals and their signs. A park ranger hears the noise, walks over to Buck and his neighbors, and tells them to “move along.” Buck spits at the ranger’s feet and starts up the chant again. The other neighbors laugh and join him.

In this scenario, Buck and his neighbors have most likely committed unlawful assembly and failure to disperse in many jurisdictions. Buck and his neighbors number six, which generally meets the minimum unlawful assembly and failure to disperse attendant circumstance requirement. When Buck and his neighbors go to the park in a group, they are assembling. Their chant, “How would you like to be aborted?” is directed at a pro-choice group, so it is evident that Buck and his neighbors have the specific intent or purposely to cause a breach of the peace. In addition, the increasing decibel of the chanting and the neighbors’ close proximity to the pro-choice group indicates an intent to intimidate, threaten, and possibly commit an unlawful act such as false imprisonment, assault, battery, or riot. When the park ranger, who is most likely a peace officer, tells Buck and his neighbors to “move along,” he is ordering them to disperse. Buck’s response in spitting at the ranger’s feet and starting up the chant again is probably a failure to disperse committed with general intent or knowingly. Thus Buck and his neighbors may be subject to prosecution for and conviction of *both* of these offenses in many jurisdictions.

Potential Constitutional Challenges to Unlawful Assembly and Failure to Disperse Statutes

The offenses of unlawful assembly and failure to disperse target conduct that, if *peaceful*, is protected by the First Amendment. Therefore, similar to disorderly conduct offenses, statutes proscribing this type of conduct are subject to strict scrutiny, must be narrowly tailored, and must be supported by a compelling government interest, or they are vulnerable to attack under the **First Amendment**. *People v. Sanchez*, 888 N.Y.S. 2d 352 (2009), accessed April 9, 2011, http://scholar.google.com/scholar_case?case=15178974598569042123&q=unconstitutional+%22unlawful+assembly+statute%22&hl=en&as_sdt=2,5&as_ylo=1992. or as **void for vagueness** and **overbroad**.

Figure 12.4 Potential Constitutional Challenges to Unlawful Assembly and Failure to Disperse Statutes



Unlawful Assembly and Failure to Disperse Grading

Unlawful assembly and failure to disperse are generally **graded** as misdemeanors. Ala. Code § 13A-11-5, accessed April 9, 2011, <http://law.onecle.com/alabama/criminal-code/13A-11-5.html>. The Model Penal Code grades failure to disperse as a misdemeanor (Model Penal Code § 250.1(2)).

Riot

Riot⁸ can be the result of an unlawful assembly that escalates, an **incitement to riot** (discussed in [Chapter 3 "Constitutional Protections"](#)), or can occur spontaneously without any planning or predicate activity. The **criminal act** element required for riot in many jurisdictions is group commission of an unlawful act of violence or a lawful act in a violent and tumultuous manner. Ga. Code tit. 16 § 16-11-30, accessed April 9, 2011, <http://law.onecle.com/georgia/16/16-11-30.html>. The Model Penal Code criminalizes riot when a group participates in a course of disorderly conduct (Model Penal Code § 250.1). The criminal intent element for riot varies, depending on the jurisdiction. Some jurisdictions and the Model Penal Code require **specific intent** or **purposely** to commit or facilitate a felony or misdemeanor, or to prevent or coerce official action, or **general intent** or **knowledge** that anyone plans to use a firearm or deadly weapon N.J. Stat. § 2C:33-1, accessed April 9, 2011, <http://law.onecle.com/new-jersey/2c-the-new-jersey-code-of-criminal-justice/33-1.html>. (Model Penal Code § 250.1). Others make riot a **strict liability** offense. Cal. Penal Code § 404, accessed April 9, 2011, <http://law.onecle.com/california/penal/404.html>; Ga. Code tit. 16 § 16-11-30, <http://law.onecle.com/georgia/16/16-11-30.html>. In many jurisdictions, riot also has the requirement that the defendant(s) be the **factual** and **legal cause** of **harm**, which is public terror and alarm or a risk thereof. Ala. Code § 13A-11-3, accessed April 9, 2011, <http://law.onecle.com/alabama/criminal-code/13A-11-3.html>.

Jurisdictions vary as to the **attendant circumstance** for riot, which is the size of the group. Some common group minimums are **two**, Ga. Code tit. 16 § 16-11-30, accessed April 9, 2011, <http://law.onecle.com/georgia/16/16-11-30.html>. **five**, N.J. Stat. § 2C:33-1, accessed April 9, 2011, <http://law.onecle.com/new-jersey/2c-the-new-jersey-code-of-criminal-justice/33-1.html>. and **six**. Ala. Code § 13A-11-3, accessed April 9, 2011, <http://law.onecle.com/alabama/criminal-code/13A-11-3.html>. The Model Penal Code requires **three** or more persons (Model Penal Code § 250.1). Riot is **graded** as a misdemeanor, Ala. Code § 13A-11-3, accessed April 9, 2011, <http://law.onecle.com/alabama/criminal-code/13A-11-3.html>. or a felony if a firearm is used Va. Code Ann. § 18.2-405, accessed April 9, 2011, <http://law.onecle.com/virginia/crimes-and-offenses-generally/18.2-405.html>. or there is property damage or physical injury to an individual other than the defendants. N.Y. Penal § 240.06, accessed April 9, 2011, http://law.onecle.com/new-york/penal/PEN0240.06_240.06.html. The Model Penal Code grades riot as a felony of the third degree (Model Penal Code § 250.1).

Example of Riot

8. Group commission of an unlawful violent act or a lawful act in a violent manner.

Review the example with Buck and his neighbors in [Section 12 "Example of Unlawful Assembly and Failure to Disperse"](#). Assume that after the park ranger

orders Buck and his neighbors to disperse, Buck spits at the ranger's feet, continues chanting, and thereafter becomes so enraged that he grabs a sign out of one of the pro-choice individual's hands and begins beating him over the head with it. The other neighbors follow suit and within minutes they are all wielding signs and hitting the pro-choice individuals with them. In this scenario, Buck and his neighbors have most likely committed riot. Buck and his neighbors number six, which meets the minimum group requirement in many riot statutes. Buck and his neighbors have also *assaulted* and *battered* some of the pro-choice individuals, which are unlawful acts of violence. The statement made by Buck about showing the pro-choice group what it means to fear for your life indicates a specific intent or purposely to commit a felony or misdemeanor, which is the intent requirement in many jurisdictions. If the riot statute in Buck's state requires factual and legal causation and the harm of public terror and alarm, the beating constitutes the causation and harm requirement. Thus Buck and his neighbors' conduct probably falls within the parameters of most riot statutes, and Buck and his neighbors may be subject to prosecution for and conviction of this offense in many jurisdictions.

Potential Constitutional Challenges to Riot Statutes

Because statutes criminalizing riot include the requirement of *force* or *violence*, they do not target protected conduct under the First Amendment and are not as prone to a constitutional challenge. Of course, any criminal statute must be precisely drafted so that it is not void for vagueness. However, riot statutes are not generally subject to strict scrutiny because the First Amendment does not include forceful or violent expression within the definition of speech.

Rodney King Riots Video

KTLA News, April 30, 1992, 6:50 p.m., King Riots

News clips of the riots that occurred subsequent to the Rodney King trial are shown in this video:

[\(click to see video\)](#)

Criminal Gangs

Many jurisdictions have statutes, both criminal and civil, that address the ongoing dilemma of criminal gangs. However, gang activity remains a problem in major cities and even smaller, rural areas. Criminal gangs can create a stigma that

attaches to a location, affecting property values and residents' attitudes about the effectiveness of law enforcement and the justice system in general. Commentators and legislators differ as to the most effective remedies for the gang problem, leading to a plethora of diverse statutory responses.

What follows is a discussion of modern statutes targeting gang activity and the potential constitutional challenges.

Criminal Gang Definitions

It is important for a jurisdiction's gang statute to define **criminal gang**⁹ and **criminal gang member**¹⁰ precisely, to avoid constitutional challenges under the First Amendment or void for vagueness and overbreadth. This is because gang membership involves assembly, which, if *peaceful*, is protected under the First Amendment.

Federal law defines a criminal street gang as an ongoing group, club, organization, or association of **five** or more that has as one of its primary purposes the commission of specific criminal offenses or activities that affect interstate or foreign commerce. 18 U.S.C. 521(a), accessed April 12, 2011, http://www.law.cornell.edu/uscode/18/usc_sec_18_00000521----000-.html. Federal law defines a gang member as someone who participates in a criminal street gang with the **general intent** or **knowledge** that its members engage in a continuing series of specified crimes, or an individual who **intends to promote** or **further** the felonious activities of the criminal street gang. 18 U.S.C. 521(d), accessed April 12, 2011, http://www.law.cornell.edu/uscode/18/usc_sec_18_00000521----000-.html. One representative state statutory definition of criminal gang is a group of **three** or more persons who have in common a name, identifying sign, symbol, tattoo, style of dress, or use of hand signs and who have committed or attempted to commit specified crimes for the benefit of the group. Alaska Stat. § 11.81.900 (13), accessed April 12, 2011, <http://law.justia.com/codes/alaska/2009/title-11/chapter-11-81/article-07/sec-11-81-900>. Criminal gang member could be statutorily defined as any person who engages in a pattern of criminal gang activity and who meets two or more of the following criteria: (1) admits to gang membership; (2) is identified as a gang member; (3) resides in or frequents a particular gang's area and adopts its style of dress, use of hand signs, or tattoos; (3) associates with known gang members; or (4) has been arrested more than once in the company of identified gang members for offenses consistent with gang activity. Idaho Code Ann. § 18-8502(2), accessed April 12, 2011, <http://law.justia.com/codes/idaho/2010/title18/t18ch85sect18-8502.html>.

9. A group that engages in a pattern of criminal activity and often shares an identifying tattoo, hand sign, or style of dress.
10. An individual who commits crimes at the behest of a criminal gang and admits to criminal gang membership, is identified as a criminal gang member, shares the identifying tattoo, hand sign, or style of dress of a criminal gang, and who frequents areas where criminal gang members congregate.

Example of Criminal Gang Definitions

The North Side Boys are a group of **fifty-five** members who have a special **tattoo**, wear the **colors** black and white daily, and pride themselves on their **illegal** controlled substances distribution. Mike decides he wants to be a North Side Boy. Mike participates in a special initiation process that includes selling a specified quantity of an illegal controlled substance in a certain location over a period of two weeks. After Mike completes the initiation, he gets the North Side Boys' tattoo, wears the North Side Boys' colors daily, and spends all his time with the North Side Boys, hanging out and also contributing to their illegal activities. The North Side Boys probably meets the criteria for a **criminal gang**, and Mike is most likely a **criminal gang member** under many modern statutes. The North Side Boys has an identifiable tattoo and style of dress and furthers a criminal activity, which is the distribution of illegal controlled substances. Mike can be identified as a gang member by other North Side Boys members, frequents the North Side Boys' gang area, and adopts the gang's style of dress and tattoos along with furthering its criminal enterprise. Thus the North Side Boys and Mike fit the definition of criminal gang and gang member in many jurisdictions, and Mike may be subject to prosecution for and conviction of criminal gang activity if he commits crimes at the direction of or in furtherance of the gang, as is analyzed in Section 12 "Criminal Gang Activity".

Criminal Gang Activity

States generally criminalize gang participation, Ohio Rev. Code Ann. § 2923.42, accessed April 14, 2011, http://law.justia.com/codes/ohio/2010/title29/chapter2923/2923_42.html. *enhance the penalty* for a crime when it is committed in furtherance of a gang, Fla. Stat. Ann. § 874.04, accessed April 14, 2011, <http://law.onecle.com/florida/crimes/874.04.html>. or **both**. Cal. Penal Code § 186.22, <http://law.justia.com/codes/california/2010/pen/186.20-186.33.html>. If a state enacts a **gang participation statute**¹¹, the **criminal act** element is generally described as actively participating in a criminal gang and promoting, furthering, or assisting in any felony, with the **general intent** or **knowingly** that members of the gang engage in a pattern of criminal gang activity. Del. Code Ann. tit. 11 § 616 (2)(b), accessed April 13, 2011, <http://law.justia.com/codes/delaware/2010/title11/c005-sc02.html>. Gang participation is generally **graded** as a felony. Del. Code Ann. tit. 11 § 616 (2)(b), accessed April 13, 2011, <http://law.justia.com/codes/delaware/2010/title11/c005-sc02.html>. **Gang enhancement statutes**¹² enhance the defendant's sentence for actually committing a misdemeanor or felony with the **specific intent** or **purposely** to benefit, promote, or further the interests of the criminal gang. Fla. Stat. Ann. § 874.04, accessed April 14, 2011, <http://law.onecle.com/florida/crimes/874.04.html>. Some jurisdictions only provide gang enhancement for the commission of a felony. Del. Code Ann. tit. 11 § 616 (2)(c),

11. A statute that criminalizes promoting, assisting, or furthering the commission of a felony on behalf of a criminal gang.

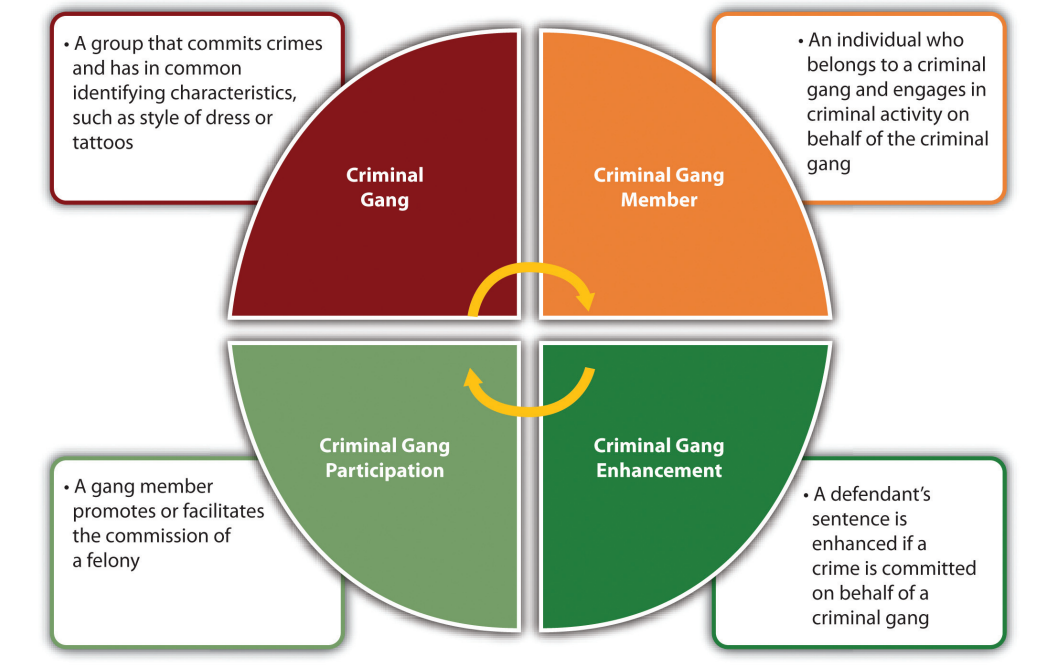
12. A statute that enhances the penalty for a crime when it is committed in furtherance of a criminal gang.

accessed April 13, 2011, <http://law.justia.com/codes/delaware/2010/title11/c005-sc02.html>.

Example of Criminal Gang Activity

Review the example with Mike and the North Side Boys given in Section 12 "Example of Criminal Gang Definitions". Assume that Mike resumes selling illegal controlled substances *at the behest* of the North Side Boys after his initiation and is arrested. If the state where Mike sells illegal controlled substances has a gang participation statute and grades the crime of sale of illegal controlled substances as a felony, Mike could be prosecuted for and convicted of this crime. He furthered and assisted in the North Side Boys' sale of illegal controlled substances with the general intent or knowingly that members of the North Side Boys engaged in this pattern of criminal gang activity. If the state also has a gang enhancement statute, Mike could have his sentence for sale of illegal controlled substances *enhanced* because he committed the sale of illegal controlled substances in furtherance of the criminal gang. In either situation, Mike will be punished *more severely* for the sale of illegal controlled substances than an individual defendant who sells illegal controlled substances on his or her own, rather than at the direction or in furtherance of a criminal gang.

Figure 12.5 Diagram of Typical Modern Gang Statutes

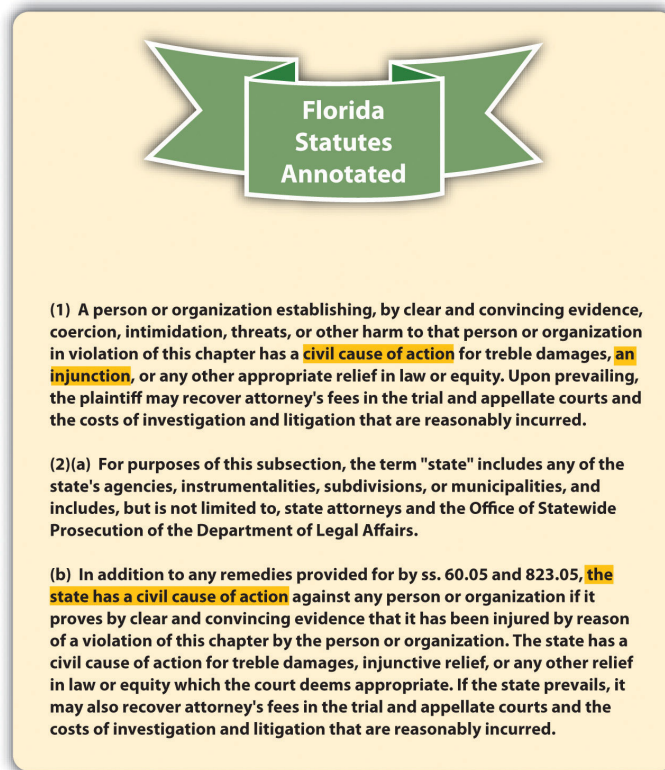


Civil Responses to Gang Activity

As stated previously, the problem of criminal gangs is challenging and has proven resistant to criminal remedies. Thus many jurisdictions have also enacted **civil gang control statutes**¹³, along with resorting to the remedy of **civil gang injunctions**¹⁴ to try to curb the multitude of harms that gangs inflict.

Civil gang control statutes generally provide for damages, often enhanced, for coercion, intimidation, threats, or other harm caused by a gang or gang member. Fla. Stat. Ann. § 874.06, accessed April 14, 2011, <http://law.onecle.com/florida/crimes/874.06.html>. A common provision of civil gang control statutes is the ability of a resident or state agency to sue as a plaintiff. Fla. Stat. Ann. § 874.06, accessed April 14, 2011, <http://law.onecle.com/florida/crimes/874.06.html>.

Figure 12.6 Example of a Civil Gang Control Statute



- 13. A statute that provides a civil remedy of enhanced damages for a criminal gang or criminal gang member's intimidation or infliction of physical injury.
- 14. A court order that prohibits gang members from associating with each other or assembling in areas frequented by criminal gangs.

Civil gang injunctions (CGIs) are precisely drafted orders prohibiting gang members from associating with other gang members or entering certain areas known for gang activity. Tex. Penal Code § 125.065, accessed April 14, 2011, <http://law.onecle.com/texas/civil/125.065.00.html>. A state agency or an individual resident can typically make a motion requesting a CGI. Tex. Penal Code § 125.064,

accessed April 14, 2011, <http://law.onecle.com/texas/civil/125.064.00.html>. The basis for a CGI motion is the tort of **public nuisance**¹⁵, which requires proof that the gang is disturbing the enjoyment of life and property for those living in the community. *People v. Acuna*, 14 Cal. 4th 1090 (1997), accessed April 14, 2011, http://scholar.google.com/scholar_case?case=10825872110148502169&hl=en&as_sdt=2&as_vis=1&oi=scholar (accessed April 15, 2011). Common provisions of CGIs are a prohibition on associating with known gang members, wearing gang colors, flashing gang hand signs, or loitering in areas known for gang activity. Max Shiner, "Civil Gang Injunctions a Guide for Prosecutors," Ndaa.org website, accessed April 14, 2011, http://www.ndaa.org/pdf/Civil_Gang_Injunctions_09.pdf. Violation of a CGI could constitute the crime of **contempt**, resulting in fines or incarceration. Tex. Penal Code § 125.066, accessed April 14, 2011, <http://law.onecle.com/texas/civil/125.066.00.html>.

Example of Civil Responses to Gang Activity

Review the example with Mike and the North Side Boys in [Section 12 "Example of Criminal Gang Definitions"](#). Mike and the North Side Boys are subject to a criminal prosecution for gang **participation** for their sale of illegal controlled substances. They also are subject to gang *enhancements* for any felony committed at the direction or in furtherance of the North Side Boys. In addition, if the state where Mike and the North Side Boys are located has statutes providing **civil** remedies and **CGIs**, both Mike and the North Side Boys members are subject to a civil suit for damages if they coerce, intimidate, or injure another. They also are subject to an injunction constraining their ability to meet, associate, wear black and white, flash gang hand signs, or loiter in certain areas. If a CGI is in place, and Mike or the North Side Boys violate it, a potential exists for criminal charges of **contempt**, leading to fines or incarceration.

Colton Gang Injunction

News Story of the Colton Civil Gang Injunction

The civil gang injunction in Colton, California, is discussed in this video:

[\(click to see video\)](#)

15. A tort that forms the basis of the civil gang injunction motion and requires proof that the gang is disturbing the enjoyment of life and property for those living in the community.

Potential Constitutional Challenges to Gang Statutes

Gang activity and gang association require assembly, which, if *peaceful*, is protected by the First Amendment. Thus statutes proscribing gang conduct are subject to attack under the **First Amendment** or **void for vagueness** and **overbreadth**. CGIs have the same constitutional concerns as criminal gang activity statutes because their violation can lead to a criminal prosecution for contempt. *People v. Acuna*, 14 Cal. 4th 1090 (1997), http://scholar.google.com/scholar_case?case=10825872110148502169&hl=en&as_sdt=2&as_vis=1&oi=scholar (accessed April 15, 2011).

In *City of Chicago v. Morales*, 527 U.S. 41 (1999), the US Supreme Court struck down Chicago's Gang Congregation Ordinance as void for vagueness. The ordinance prohibited criminal street gang members from "loitering in public." The term *loitering* was defined as remaining in any one place with *no apparent purpose*. When a Chicago law enforcement officer observed a gang member loitering, he was obligated to order the gang member to disperse, and if the gang member refused, the gang member was subject to arrest for violating the ordinance. The Court held that the ordinance did not give the public notice of what was criminal, as required by the due process clause of the Fourteenth Amendment, and allowed too much discretion to law enforcement to unevenly enforce its provisions.

Under *Morales*, modern statutes targeting gang activity and association must precisely define criminal conduct, avoid vague terms such as "no apparent purpose," and ensure that First Amendment protected activity is not included within the statute's reach. CGIs should support a significant government interest, be narrowly tailored to avoid constitutionally protected activity, and be buttressed by evidence that the CGI is the least restrictive means to carry out the interest stated. Max Shiner, "Civil Gang Injunctions a Guide for Prosecutors," Ndaa.org website, accessed April 14, 2011, http://www.ndaa.org/pdf/Civil_Gang_Injunctions_09.pdf.

Figure 12.7 Potential Constitutional Challenges to Statutes Targeting Gangs

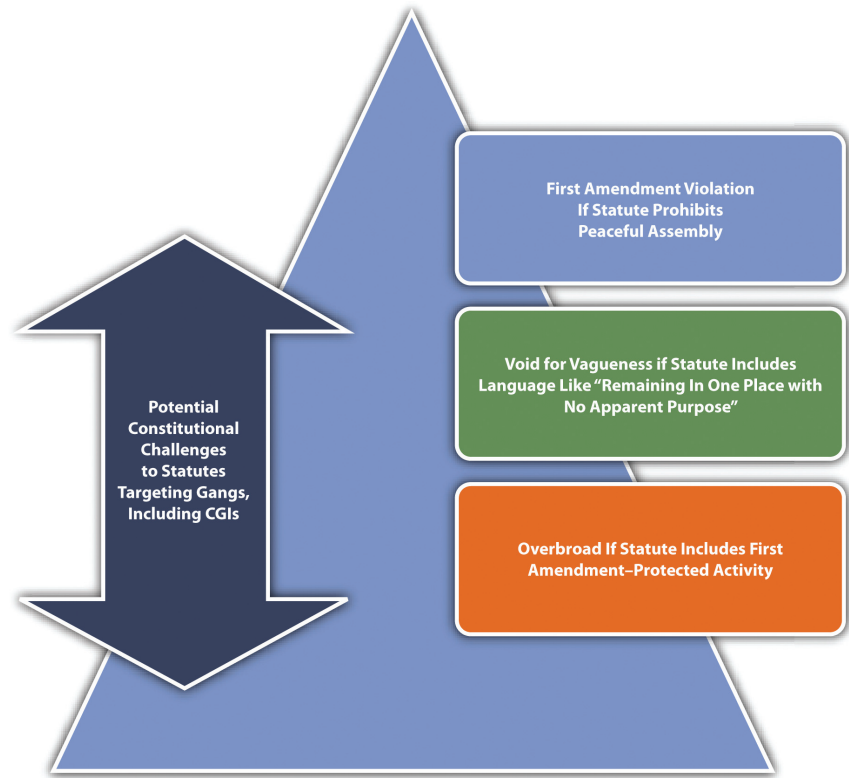
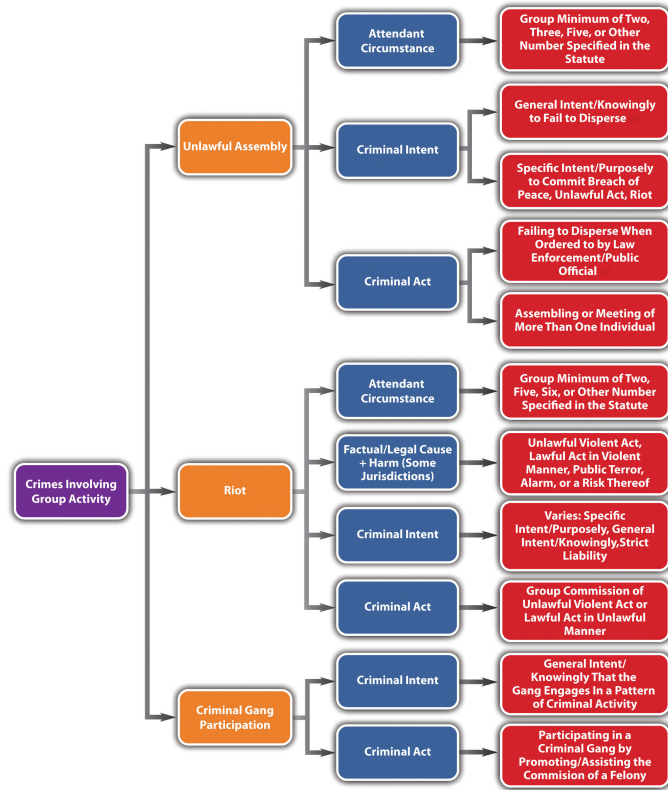


Figure 12.8 Diagram of Crimes Involving Group Activity



KEY TAKEAWAYS

- The elements of unlawful assembly are the assembling or meeting of a group (criminal act) with the specific intent or purposely to commit breach of the peace, some other unlawful act, or riot. Some jurisdictions punish the failure to disperse (criminal act) with general intent or knowingly when a peace officer or public servant orders a group likely to cause substantial harm, serious annoyance, or alarm to do so. Jurisdictions vary as to the attendant circumstance, which is the group minimum, identifying two, three, five, or some similar number, depending on the statute.
- Unlawful assembly and failure to disperse statutes can be constitutionally challenged under the First Amendment, as void for vagueness, or overbroad.
- Unlawful assembly and failure to disperse are typically graded as misdemeanors.
- Riot is group commission of an unlawful violent act or a lawful act in a violent manner (criminal act) with either the specific intent or purposely to commit a felony or misdemeanor or prevent official action, or the general intent or knowingly that someone in the group possesses a firearm, or with strict liability intent. Some jurisdictions require the criminal act and intent to be the factual and legal cause of harm, which is public terror, alarm, or a risk thereof. The attendant circumstance, which is the group minimum, could be two, five, six, or some similar number, depending on the statute. Riot is often graded as a misdemeanor, or a felony if a firearm is used or there is property damage or physical injury to someone other than a defendant. Because riot statutes criminalize conduct involving force or violence, riot statutes are not as prone to constitutional challenges as disorderly conduct, vagrancy, loitering, and unlawful assembly statutes.
- Criminal gang could be defined as a group of a statutorily specified number that engages in a pattern of criminal activity and has in common hand signs, tattoos, and style of dress. Criminal gang member could be defined as someone who is identified as a gang member, admits to gang membership, associates with gang members, adopts the hand signs, tattoos, and style of dress of gang members, and commits crimes at the behest of the gang.
- Gang participation statutes criminalize actively participating in a criminal gang and promoting, furthering, or assisting (criminal act) the commission of a felony on behalf of a criminal gang with the general intent or knowingly that the gang participates in a pattern of criminal activity. Gang participation is typically graded as a felony. Gang enhancement statutes enhance a sentence for a misdemeanor or felony

committed with the specific intent or purposely to promote or further a criminal gang. Some states only provide gang enhancement statutes for the commission of a felony.

- Civil responses to the gang problem include civil gang control statutes that allow plaintiffs, including state agencies, to sue for enhanced damages for threats, intimidation, or physical injury caused by a gang or gang member and civil gang injunctions (CGIs) that prohibit gang members from associating or congregating in certain areas frequented by criminal gangs.
- Statutes targeting gangs can be constitutionally challenged under the First Amendment or as void for vagueness or overbroad.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. A law enforcement officer arrests a group of individuals for standing outside a Jewish temple with signs that indicate a disbelief in the holocaust. The officer tells the individuals that he is arresting them for unlawful assembly. What are some potential constitutional problems with this arrest?
2. Read *Ortiz v. NYS Parole in Bronx*, 586 F.3d 149 (2009). In *Ortiz*, the defendant was found guilty of several counts of riot under New York's first-degree riot statute for conduct that occurred *after* he left the scene of the riot. Did the US Court of Appeals for the Second Circuit uphold the defendant's conviction? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=2710893752280724993&q=%22riot+statute%22&hl=en&as_sdt=2,5&as_ylo=2002.
3. Read *People v. Englebrecht*, 88 Cal. App. 4th 1236 (2001). Did the California Court of Appeal hold that the defendant, an alleged gang member, had the right to a jury trial on the issue of his gang membership for the purpose of a civil gang injunction? The case is available at this link: http://scholar.google.com/scholar_case?case=449430704300565285&q=unconstitutional+%22civil+gang+injunction%22&hl=en&as_sdt=2,5&as_ylo=1997.

12.3 Vice Crimes

LEARNING OBJECTIVES

1. Identify the sources of federal and state drug laws.
2. Describe a drug schedule.
3. Analyze various drug crimes and their grading.
4. Identify two modern trends in state drug crimes statutes.
5. Identify a potential constitutional challenge to a state's medical marijuana statute.
6. Analyze prostitution, pimping, and pandering and their grading.

Vice crimes offend the sensibilities, yet are often *victimless* and *harmless*, other than harm done to the defendant or society in general. [Section 12.3.1 "Drug Crimes"](#) explores drug crimes, including manufacture or cultivation, possession, sale, and under the influence offenses. Upcoming sections analyze prostitution, pimping, and pandering. In the final section, various vice statutes are available for review, including statutes criminalizing gambling and conduct involving alcohol.

Drug Crimes

All states and the federal government criminalize the **manufacture** or **cultivation**, **possession**, **sale**, and **use** of specified drugs. Many modern statutes focus on **rehabilitation** for *nonviolent* drug offenders, rather than incarceration, because this has proven effective in reducing recidivism and freeing up jails and prisons for defendants who pose a greater security risk to society. In addition, marijuana, a drug that has demonstrated valid therapeutic qualities, has been legalized by many states for **medicinal** purposes, which poses interesting constitutional questions, as is discussed in [Section 12 "Modernization of Drug Crimes Statutes"](#).

Federal and State Drug Schedules

Federal criminal statutes targeting illegal drugs are part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, commonly known as the **Controlled Substances Act**¹⁶. 21 U.S.C. § 801 et seq., accessed April 17, 2011, <http://www.deadiversion.usdoj.gov/21cfr/21usc/index.html>. The states follow one of the three versions of the Uniform Controlled Substances Act, Uniform Controlled Substances Act (1994), accessed April 17, 2011, <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ucsa94.pdf>, which was drafted by a commission

16. The federal statutory scheme criminalizing conduct involving specified drugs.

striving for uniformity in state and federal laws. For the purpose of drug crimes, the states and the federal government categorize illegal drugs in **drug schedules**¹⁷. 21 U.S.C. § 812, accessed April 17, 2011, http://www.law.cornell.edu/uscode/21/usc_sec_21_00000812----000-.html. The schedules generally focus on the harmful or addictive qualities of the drug, with Schedule I drugs being the most harmful or addictive; the remaining schedules reflect less harmful or addictive drugs, including drugs that are legal with a prescription. Minn. Stat. Ann. § 152.02, accessed April 17, 2011, <https://www.revisor.mn.gov/statutes/?id=152.02> (accessed April 17, 2011).

Example of a Drug Schedule

The North Carolina drug schedule is located in N.C. Gen. Stat. § 90-89-90-94. N.C. Gen. Stat. § 90-89-90-94, accessed April 17, 2011, http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_90/Article_5.html. Review the schedule and note that heroin, a highly addictive drug that can cause death if a user ingests too much, is listed in Schedule I, while marijuana, a less addictive drug that is generally not as harmful as heroin, is listed in Schedule VI.

Federal and State Drug Crimes

The federal government and all fifty states criminalize the manufacture and cultivation, possession, sale, and use of drugs categorized in a jurisdiction's drug schedule, with exceptions for validly prescribed drugs and drugs involved in scientific or medical research. As discussed in Chapter 4 "The Elements of a Crime", the government cannot criminalize the *status* of being a drug addict. *Robinson v. California*, 370 U.S. 660 (1962), accessed April 18, 2011, http://scholar.google.com/scholar_case?case=3358010003227436496&hl=en&as_sdt=2&as_vis=1&oi=scholarr. However, there is no constitutional impediment to punishing **criminal acts** involving controlled substances, even though it may be more difficult for an addict to control drug-related criminal behavior.

In most jurisdictions, the **manufacture**¹⁸ of scheduled drugs is a felony, Ala. Code § 13A-12-217, accessed April 17, 2011, <http://law.onecle.com/alabama/criminal-code/13A-12-217.html>. with a more severe penalty for the accompanying use of a firearm or the furtherance of a clandestine laboratory operation. Ala. Code § 13A-12-218, accessed April 17, 2011, <http://law.onecle.com/alabama/criminal-code/13A-12-218.html>. **Cultivation of marijuana**¹⁹, which must be done with **general intent** or **knowingly**, can be a misdemeanor or a felony, depending on the quantity cultivated. Ohio Rev. Code Ann. § 2925.04, accessed April 17, 2011, <http://codes.ohio.gov/orc/2925.04>.

17. A federal or state statute categorizing illegal drugs based on their potential for addiction and harmful qualities.

18. A drug offense targeting the creation of drugs listed in a state or federal drug schedule.

19. A drug offense targeting the planting and growing of marijuana.

Possession²⁰ of scheduled drugs is typically **graded** based on the quantity possessed, the drug’s classification in the schedule, and whether or not the possession is for the purpose of distribution, with the penalties ranging from a misdemeanor for simple possession to a serious felony for possession with intent to sell. Ohio Rev. Code Ann. § 2925.11, accessed April 17, 2011, <http://codes.ohio.gov/orc/2925>. As is discussed more fully in **Chapter 4 "The Elements of a Crime"**, possession can be *actual*, meaning the drug is located on or very near the defendant’s person, or *constructive*, meaning the drug is within the defendant’s control. Connecticut Jury Instructions No. 2.11-1, <http://www.jud.ct.gov/ji/criminal/part2/2.11-1.htm> (accessed February 13, 2010). Constructive possession can be *joint*, meaning between two or more. Connecticut Jury Instructions No. 2.11-1, <http://www.jud.ct.gov/ji/criminal/part2/2.11-1.htm> (accessed February 13, 2010). Simple possession typically must be with **general intent** or **knowingly**, while possession for the purpose of distribution or sale must be with **specific intent** or **purposely**. *People v. Parra*, 70 Cal. App. 4th 222 (1999), accessed April 17, 2011, http://scholar.google.com/scholar_case?case=5809016451778310933&q=People+v.+Parra+70+Cal.+App.+4th+222&hl=en&as_sdt=2,5. In many states, possession of marijuana is graded lower than possession of other scheduled drugs—even as low as an *infraction* if the quantity is less than one ounce. Cal. Health and Safety Code § 11357(b), accessed April 18, 2011, <http://www.canorml.org/laws/hsc11357.html#b>.

The **sale**²¹, **distribution**, or **trafficking** of scheduled drugs is generally a felony, with more severe penalties for drugs in a higher schedule. N.C. Gen. Stat. § 90-95, accessed April 17, 2011, http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_90/Article_5.html. the sale of larger quantities, Ala. Code § 13A-12-231, accessed April 17, 2011, <http://law.onecle.com/alabama/criminal-code/13A-12-231.html>. a sale by an adult to a minor, Ala. Code § 13A-12-215, accessed April 17, 2011, <http://law.onecle.com/alabama/criminal-code/13A-12-215.html>. or a sale near school grounds. Ala. Code § 13A-12-250, accessed April 17, 2011, <http://law.onecle.com/alabama/criminal-code/13A-12-250.html>

20. A drug offense targeting the actual or constructive possession of scheduled drugs for personal use, sale, or distribution.

21. A drug offense targeting the sale, distribution, or trafficking of scheduled drugs.

22. A drug offense targeting the use or ingestion of scheduled drugs, also called under the influence of a controlled substance.

Scheduled drug **use**²², also designated as being **under the influence of a controlled substance**, is typically a misdemeanor with more severe penalties for habitual offenders. Cal. Health and Safety Code § 11550, accessed April 17, 2011, <http://law.onecle.com/california/health/11550.html>.

Example of Drug Crimes

Charlene decides she wants to make some extra money by growing and selling marijuana. Charlene acquires some marijuana seeds and plants a marijuana garden in her backyard. Once her plants are ready for harvest, Charlene harvests some buds, weighs and packages them, and then puts some of the packages into her

backpack and walks to a street corner known for drug sales. After she arrives at the street corner, Rick drives up, rolls down his window, and asks Charlene if she knows where he can “score.” Charlene replies, “I have some pot if that is what you are looking for.” Rick responds affirmatively, so Charlene gets into Rick’s car and they drive to a local park. Rick insists on trying the marijuana before he buys it. Charlene takes out a joint, and Rick and Charlene smoke it. Thereafter, Rick buys one of Charlene’s packages that weighs half an ounce and drops Charlene off back at the street corner.

In this example, Charlene has probably committed *every* drug crime discussed in Section 12 "Federal and State Drug Crimes". When Charlene planted the marijuana garden, she committed cultivation of a scheduled drug. Harvesting and packaging the marijuana is possession for sale. Smoking the marijuana with Rick is use, or under the influence of a controlled substance. Selling Rick a half-ounce of marijuana is drug sale, distribution, or trafficking. Rick has also probably committed two drug offenses. Smoking the marijuana with Charlene is use, or under the influence of a controlled substance. When Rick took the package of marijuana from Charlene, he committed possession (which may be an infraction in some states because he bought less than an ounce). Thus, in this example, Charlene and Rick may be subject to prosecution for and conviction of the stated drug offenses in most jurisdictions.

Modernization of Drug Crimes Statutes

Two new trends in state drug crimes statutes are the emphasis on *rehabilitation* for nonviolent drug offenders and the legalization of **marijuana** for **medical** use.

Modern statutes allow nonviolent drug offenders to go through a specialized **drug court**²³ that typically sentences the offenders to probation and rehabilitation, rather than incarceration. Ariz. Rev. Stat. § 13-3422, accessed April 17, 2011, <http://law.onecle.com/arizona/criminal-code/13-3422.html>. Common offenses for drug courts are simple possession and use of drugs listed in a jurisdiction’s drug schedule. Ariz. Rev. Stat. § 13-3422, accessed April 17, 2011, <http://law.onecle.com/arizona/criminal-code/13-3422.html>. Typically, the drug court offender must participate in a rehabilitation program that includes counseling and detoxification within a specified time period. Tex. Penal Code § 469.001, accessed April 17, 2011, <http://codes.lp.findlaw.com/txstatutes/HS/6/B/469/469.001>. During the rehabilitation, the offender is frequently drug tested to ensure compliance. If the drug offender tests positive, reoffends, or does not complete the program within the specified time limits, the offender will be found guilty of the original nonviolent drug offense and sentenced accordingly. Ariz. Rev. Stat. § 13-3422, accessed April 17, 2011, <http://law.onecle.com/arizona/criminal-code/13-3422.html>.

23. A modern court procedure that sentences nonviolent drug offenders to probation and rehabilitation, rather than incarceration.

Legalization of marijuana for medical use is another modern statutory trend among the states. Currently, sixteen states and the District of Columbia legalize medical marijuana. "Medical Marijuana Summary Chart," Procon.org website, accessed April 17, 2011, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>. The criteria under these statutes vary, but in general a qualified individual can gain a prescription for marijuana from a caregiver, usually a physician, and thereafter obtain, possess, and use a specified quantity of marijuana. Alaska Stat. §§ 17.37.010-17.37.070, accessed April 17, 2011, <http://medicalmarijuana.procon.org/sourcefiles/alaska-ballot-measure-8.pdf>. In some states, limited cultivation is also permissible. Cal. Health and Safety Code §§ 11362.7-11362.83, accessed April 17, 2011, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881#California>.

The legalization of marijuana for medical use presents an interesting constitutional dilemma because federal law lists marijuana as a Schedule 1 drug and does not permit its possession, use, or sale for medicinal purposes. 21 U.S.C. § 812, accessed April 17, 2011, http://www.law.cornell.edu/uscode/21/usc_sec_21_00000812---000-.html. Technically, the legalization of marijuana for medical use violates the **Supremacy Clause** in the federal Constitution, which [Chapter 2 "The Legal System in the United States"](#) and [Chapter 3 "Constitutional Protections"](#) discuss in detail. However, the US Supreme Court has not invalidated any state's medical marijuana statutory scheme on this basis, although the Court has upheld federal Congress's authority to prohibit the possession and use of small quantities of marijuana under the Federal Controlled Substances Act *Gonzales v. Raich*, 545 U.S. 1 (2005), accessed April 17, 2011, http://www.oyez.org/cases/2000-2009/2004/2004_03_1454. and has rejected a medical necessity exception for the possession and use of marijuana. *U.S. v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), accessed April 17, 2011, http://www.oyez.org/cases/2000-2009/2000/2000_00_151.

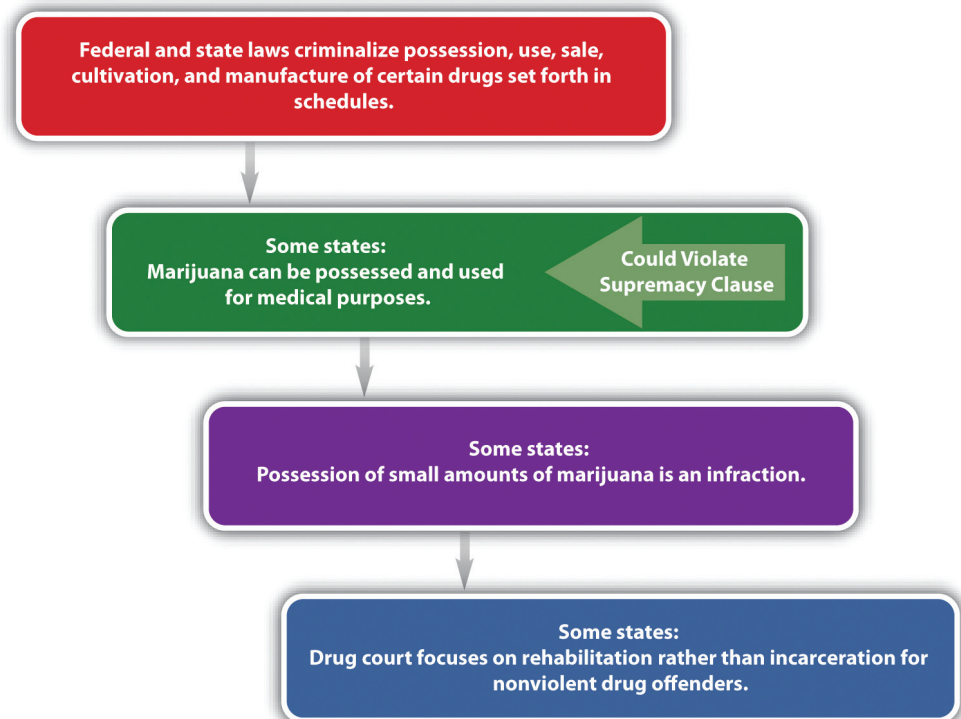
Example of the Modernization of Drug Crimes Statutes

Remy lives in a state that legalizes marijuana for medical use and also has a drug court program. Remy obtains a prescription from an authorized caregiver and then buys the maximum amount of marijuana permitted under her state's medical marijuana statute at a medical marijuana distribution center. As Remy leaves the distribution center, Donny, a drug dealer standing nearby, asks Remy if she would like to buy some cocaine. Remy agrees and buys a gram of cocaine from Donny. Unfortunately for Remy, Donny is a federal Drug Enforcement Agent who thereafter arrests Remy for possession of marijuana and cocaine.

In this example, the federal government can most likely prosecute Remy for possession of both *marijuana and cocaine*, even though her state legalizes marijuana for medical use and Remy has complied with the requirements of the state medical

marijuana statute. The US Supreme Court has held that the federal government may criminalize the possession of small amounts of marijuana, and there is no federal medical necessity exemption. Thus Remy may be subject to prosecution for and conviction of both of these offenses under **federal law**. Remy’s state also can prosecute Remy for possession of cocaine. Remy’s state has a drug court program, so Remy may be qualified to go through drug court for the possession of cocaine charge and may face only probation and rehabilitation for this offense rather than incarceration.

Figure 12.9 *Diagram of Modern Drug Crimes Statutes*



Crimes Involving Prostitution

Every state except Nevada criminalizes **prostitution**²⁴. In Nevada, legal prostitution must follow specific guidelines and can occur only in a licensed house of prostitution.N.R.S. 201.354, accessed April 18, 2011, <http://law.onecle.com/nevada/crimes/201.354.html>.

24. An offer, agreement, or participation in sexual conduct in exchange for something of value.

The **criminal act** element required for prostitution varies, depending on the jurisdiction. In many states, prostitution is offering, agreeing, or engagingN.Y. Penal Law § 230.00, accessed April 21, 2011, http://law.onecle.com/new-york/penal/PEN0230.00_230.00.html. in sexual conduct for money,N.Y. Penal Law

§ 230.00, accessed April 21, 2011, http://law.onecle.com/new-york/penal/PEN0230.00_230.00.html. property, or anything of value.720 ILCS § 5/11-14, accessed April 21, 2011, <http://law.onecle.com/illinois/720ilcs5/11-14.html>. Agreeing and engaging are both considered prostitution, so the prostitute and the prostitute's *client* could be prosecuted for and convicted of prostitution in most jurisdictions. The Model Penal Code criminalizes loitering in or within view of any public place for the purpose of being hired to engage in sexual activity and an inmate of a house of prostitution engaging in sexual activity as a business (Model Penal Code § 251.1(1)). The sexual conduct or sexual activity specified in statutes criminalizing prostitution generally includes sexual penetration, touching, or fondling sexual organs for sexual gratification.720 ILCS § 5/11-14, accessed April 21, 2011, <http://law.onecle.com/illinois/720ilcs5/11-14.html>. The Model Penal Code includes homosexual and deviate activity (Model Penal Code § 251.1).

The criminal intent element required for prostitution is either **strict liability**N.Y. Penal Law § 230.00, accessed April 21, 2011, http://law.onecle.com/new-york/penal/PEN0230.00_230.00.html. or **general intent** or **knowingly** in most jurisdictions.N.M. Stat. § 30-9-2, accessed April 21, 2011, <http://law.justia.com/codes/new-mexico/2009/chapter-30/article-9/section-30-9-2>. The Model Penal Code requires **purposeful intent** if the defendant is loitering to engage in prostitution or **strict liability** if an inmate in a house of prostitution engages in prostitution as a business (Model Penal Code § 251.1). Prostitution is typically **graded** as a misdemeanor, with sentencing enhancements for habitual offenders, prostitution that occurs near a school,720 ILCS § 5/11-14, accessed April 21, 2011, <http://law.onecle.com/illinois/720ilcs5/11-14.html>. or clients who patronize juvenile prostitutes.N.Y. Penal Law § 230.06, accessed April 21, 2011, http://law.onecle.com/new-york/penal/PEN0230.06_230.06.html. The Model Penal Code grades prostitution as a petty misdemeanor (Model Penal Code § 251.1(1)).

Two crimes associated with prostitution are **pimping**²⁵ and **pandering**²⁶. Although the elements of these offenses vary depending on the jurisdiction, in general, the **criminal act** element required for pimping is receiving anything of value from a prostitute with the **general intent** or **knowingly** that it was earned by prostitution.720 ILCS § 5/11-19, accessed April 21, 2011, <http://law.onecle.com/illinois/720ilcs5/11-19.html>. Pimping is generally **graded** as a misdemeanor720 ILCS § 5/11-19, accessed April 21, 2011, <http://law.onecle.com/illinois/720ilcs5/11-19.html>. or felony,N.M. Stat. § 30-9-4.1, accessed April 21, 2011, <http://law.justia.com/codes/new-mexico/2009/chapter-30/article-9/section-30-9-4-1>. with sentencing enhancements if intimidation or force is used to compel an act of prostitutionN.Y. Penal Law § 230.33, accessed April 21, 2011, http://law.onecle.com/new-york/penal/PEN0230.33_230.33.html. or if the prostitute is a juvenile.N.Y. Penal Law § 230.32, accessed April 21, 2011, http://law.onecle.com/new-york/penal/PEN0230.32_230.32.html.

25. Receiving something of value from a prostitute with knowledge that it was earned by prostitution, or forcing someone to engage in prostitution.

26. Procuring another to commit an act of prostitution.

Pandering is generally procuring another (**criminal act**) with the **specific intent** or **purposely** to commit an act of prostitution. Cal. Penal Code § 266 i, accessed April 21, 2011, <http://law.onecle.com/california/penal/266i.html>. Pandering is typically **graded** as a felony, with sentencing enhancement if the pandering occurs near a school. 720 ILCS § 5/11-16, accessed April 21, 2011, <http://law.onecle.com/illinois/720ilcs5/11-16.html>. The Model Penal Code criminalizes a broad spectrum of conduct as promoting prostitution, including encouraging and inducing another purposely to become or remain a prostitute (Model Penal Code § 251.1(2) (c)). The Model Penal Code grades these acts of promoting prostitution as felonies of the third degree (Model Penal Code § 251.1(3) (a)).

Example of Crimes Involving Prostitution

Daniel approaches Penelope, a sixteen-year-old, as she wanders down the sidewalk. Daniel asks Penelope if she would like to earn a little extra cash. Penelope responds affirmatively, and Daniel asks her if she will have sexual intercourse with John (who is an adult) for one hundred and fifty dollars. Penelope eagerly agrees. Daniel walks Penelope over to the entrance of a motel where John is waiting. John and Penelope enter the motel, and John rents a room where they engage in sexual intercourse. Afterward, John pays Penelope the one hundred and fifty dollars. As Penelope leaves the motel, Daniel swiftly walks over, grabs Penelope by the wrist, and demands the one hundred and fifty dollars. Penelope protests, but Daniel twists her arm behind her back, and she grudgingly hands him the money. Daniel removes twenty dollars, hands it to Penelope, and informs her that it is her “share,” and if she wants more, she needs to engage in another act of sexual intercourse.

In this example, Penelope and John have probably committed prostitution, and Daniel has most likely committed pimping and pandering in many jurisdictions. When Penelope has sexual intercourse with John for one hundred and fifty dollars, she is engaging in sexual conduct for money with general intent or knowingly, which constitutes prostitution in most jurisdictions. When John has sexual intercourse with Penelope and thereafter pays her one hundred and fifty dollars, he is engaging in sexual conduct for money with general intent or knowingly, which is also generally criminal prostitution. Penelope is a juvenile, so John’s sentence may be **enhanced** and more severe than Penelope’s. When Daniel procures John and Penelope for the purpose of committing prostitution, he is most likely committing pandering. When Daniel takes money from Penelope with the general intent or knowingly that it was earned by prostitution, he is probably committing pimping. The use of *force* to obtain the money and Penelope’s *age* could **enhance** Daniel’s sentence for both crimes in many jurisdictions. Thus Penelope, John, and Daniel may be subject to prosecution for and conviction of the stated crimes of prostitution, pimping, and pandering in most jurisdictions.

Prostitution Video

“The Yard Blues”: A Reality of Drugs and Prostitution

A prostitute’s life is described in this video:

[\(click to see video\)](#)

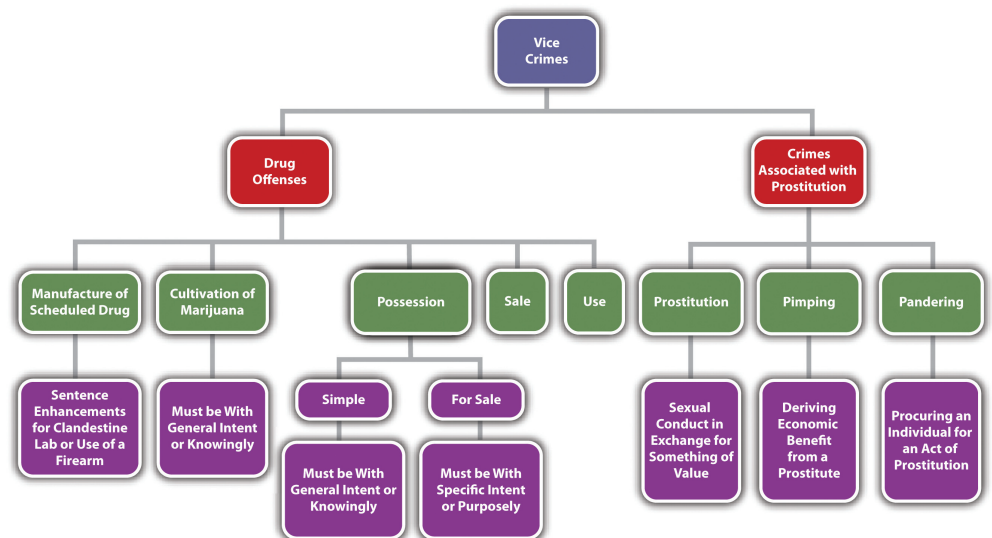
Eliot Spitzer Video

New York Governor Eliot Spitzer Resigns after Sex Scandal

This video shows former New York Governor Spitzer resigning after being exposed for his connection with a prostitution ring: Danny Hakim, William K. Rashbaum, “Spitzer Is Linked to Prostitution Ring,” *New York Times* website, accessed September 4, 2011, <http://www.nytimes.com/2008/03/10/nyregion/10cnd-spitzer.html>.

[\(click to see video\)](#)

Figure 12.10 Diagram of Vice Crimes



Various Vice Statutes

Most states criminalize **gambling**, 18 Pa. C.S. § 5513, accessed April 21, 2011, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.055.013.000.html>. **drunkenness in public**, Cal. Penal Code § 647(f), accessed April 21, 2011, <http://law.onecle.com/california/penal/647.html>. and **driving while under the influence**. Or. Rev. Stat. § 813.010, et seq., accessed April 21, 2011, <http://law.onecle.com/oregon/813-driving-under-the-influence-of/index.html>. Review the representative state statutes in the Notes for the elements of these vice crimes.

KEY TAKEAWAYS

- Federal criminal statutes targeting illegal drugs are part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, commonly known as the Controlled Substances Act. The states follow one of the three versions of the Uniform Controlled Substances Act, which was drafted by a commission striving for uniformity in state and federal laws.
- For the purpose of drug crimes, the states and the federal government categorize illegal drugs in schedules. The schedules generally focus on the harmful or addictive qualities of the drug, with Schedule I drugs being the most harmful or addictive, and the remaining schedules reflecting less harmful or addictive drugs, including drugs that are legal with a prescription.
- In most jurisdictions, the manufacture of scheduled drugs is a felony, and cultivation of marijuana, which must be done with general intent or knowingly, can be a misdemeanor or a felony, depending on the quantity cultivated. Possession of scheduled drugs is typically graded based on the quantity, schedule classification, and whether or not the possession is for sale, with penalties ranging from a misdemeanor for simple possession to a serious felony for possession with intent to sell. Possession of less than an ounce of marijuana is graded lower than possession of other scheduled drugs in many jurisdictions. Sale, distribution, or trafficking of scheduled drugs is generally graded as a felony, with sentencing enhancements for drugs in a higher schedule, the sale of larger quantities, a sale by an adult to a minor, or a sale near school grounds. Scheduled drug use is typically a misdemeanor with more severe penalties for habitual offenders.
- Two modern trends in state drug crimes statutes are the emphasis on rehabilitation for nonviolent drug offenders, which drug courts provide through sentencing, and the legalization of marijuana for medical use in sixteen states and the District of Columbia.
- Technically, a state's legalization of marijuana for medical use violates the Supremacy Clause because federal law classifies marijuana as a Schedule I drug and does not allow its possession, sale, or use for any purpose.
- Prostitution is generally offering, agreeing, or engaging in sexual conduct for money or anything of value (criminal act), with general intent or knowingly, or strict liability. Prostitution is typically graded as a misdemeanor, with sentencing enhancements for habitual offenders, prostitution that occurs near a school, or clients who patronize juvenile prostitutes. Pimping is generally receiving anything of value from a prostitute (criminal act), with general intent or knowingly that it was

earned by prostitution in many jurisdictions, and is typically graded as a misdemeanor or felony, with sentencing enhancements if intimidation or force is used to compel an act of prostitution or if the prostitute is a juvenile. Pandering is generally procuring another (criminal act) with specific intent or purposely to commit an act of prostitution and is typically graded as a felony with sentencing enhancement if the pandering takes place near a school.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Anita lives in a state that permits the possession and use of marijuana for medical reasons. Anita obtains some marijuana and uses it to treat her medical condition, carefully following her state's statutory requirements. Has Anita committed a crime(s)?
2. Read *Poindexter v. State*, 153 S.W. 3d 402 (2005). In *Poindexter*, the defendant purchased cocaine from a confidential informant inside his house. After the defendant left, a subsequent law enforcement search uncovered the cocaine inside a tin breath mints can hidden in the ceiling of the master bedroom closet. The defendant was convicted at trial, but the appellate court reversed, based on the fact that another individual was seen on the premises, so there was *insufficient* proof of the defendant's possession. Did the Court of Criminal Appeals of Texas affirm the court's reversal? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=10968287895213637721&q=possession+of+drugs+roommate+control+%22joint+possession%22&hl=en&as_sdt=2,5&as_ylo=2002.
3. Read *People v. Watson*, No. 90962 (Ohio 2120 2009). In *Watson*, the defendant was convicted of compelling prostitution. The defendant appealed on the grounds that the proper interpretation of compelling prostitution under the Ohio statute requires force, duress, or coercion and the defendant merely arranged it so that the prostitute had no money for shelter, clothes, and food if she did not continually commit prostitution. Did the Court of Appeals of Ohio uphold the defendant's conviction? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=5203798681398361958&q=prostitution+client+acquitted+%22convicted+of+prostitution+%22&hl=en&as_sdt=2,5&as_ylo=2002.

LAW AND ETHICS

Should Convicted Prostitutes Be Subjected to Involuntary AIDS Testing?

Read *Love v. Superior Court*, 226 Cal. App. 3d 736 (1990). The case is available at this link: http://scholar.google.com/scholar_case?case=16603325888575880385&q=Love+v.+Superior+Court&hl=en&as_sdt=2,5. In *Love*, the defendants, convicted prostitutes, challenged the constitutionality of a California statute that required AIDS testing and counseling for those convicted of prostitution and other sex offenses. Cal. Penal Code § 1202.1, accessed April 22, 2011, <http://law.onecle.com/california/penal/1202.1.html>. The defendants claimed the statute was an unreasonable search pursuant to the Fourth Amendment and also violated the due process and the equal protection clauses. The California Court of Appeals upheld the statute, holding that the “special need” of preventing the spread of AIDS was a valid exercise of state police power, and the statute was a reasonable means to effectuate that interest. In California, soliciting or agreeing to exchange sexual conduct for money constitutes prostitution, Cal. Penal Code § 647(b), accessed April 2, 2011, <http://law.onecle.com/california/penal/647.html>. so a conviction for prostitution does not necessarily indicate an exchange of bodily fluids that could spread AIDS.

1. Do you think it is ethical to require all convicted prostitutes to submit to AIDS testing, whether or not they engaged in sexual intercourse? Why or why not?

Check your answer using the answer key at the end of the chapter.

12.4 End-of-Chapter Material

Summary

States have an interest in protecting the quality of life of citizens, and therefore prohibit crimes against the public. Most jurisdictions criminalize disorderly conduct, which is making a loud and unreasonable noise, obscene utterance or gesture, fighting, threatening or stating fighting words, or creating a hazardous condition in public, with the specific intent or purposely or reckless intent to cause public inconvenience and alarm or a risk thereof. Disorderly conduct statutes target speech, so they are subject to constitutional challenges under the First and Fourteenth Amendments. Disorderly conduct is typically graded as a misdemeanor.

Unconstitutionally vague statutes criminalizing vagrancy have been supplanted by precisely drafted statutes criminalizing loitering, which is loitering, wandering, or remaining with specific intent or purposely to gamble, beg, or commit prostitution in a specified area. Loitering is typically graded as a misdemeanor or a violation. Panhandling or begging is also criminal in many jurisdictions, and panhandling statutes should be narrowly tailored to target aggressive conduct or conduct that blocks public access or the normal flow of traffic. Sit-lie laws prohibit sitting or lying down with strict liability intent in public or on a sidewalk during specified times in certain areas. Sit-lie laws are subject to constitutional challenges as cruel and unusual punishment or void for vagueness and are typically graded as an infraction.

Group conduct tends to enhance the potential for force and violence. Most jurisdictions criminalize unlawful assembly, which is purposefully assembling or meeting to cause a breach of the peace, and failure to disperse, which is the knowing refusal or failure to disperse when ordered to by law enforcement. Both unlawful assembly and failure to disperse statutes are subject to constitutional challenges under the First Amendment or as void for vagueness and overbroad, require the attendant circumstance of a group minimum of two, three, or five, and are graded as a misdemeanor. Most jurisdictions also criminalize riot, which is group commission of an unlawful act of violence or a lawful act in an unlawful manner, with the specific intent or purposely to commit or facilitate a misdemeanor or felony or prevent official action, or the general intent or knowingly that one of the group plans to use a firearm or deadly weapon. In some jurisdictions, riot is a strict liability offense. A few jurisdictions require the defendants to be the factual and legal cause of riot harm, which is public terror and alarm. Riot typically requires the attendant circumstance of a group minimum of two, five, or six and is graded as a misdemeanor or a felony if a firearm is used or if there is property damage or physical injury to someone other than the defendants.

Gang conduct is prohibited federally and in state statutes. States either criminalize gang conduct as gang participation, enhance a penalty for a crime committed by a criminal gang or gang member, or both. Gang participation is generally furthering the commission of a felony for the benefit of a criminal gang with the general intent or knowingly that other members participate in gang activity and is a felony. Gang enhancement statutes enhance the penalty for the commission of a felony or misdemeanor at the direction of or to further a criminal gang. Civil responses to gang conduct are civil gang activity statutes providing for damages and civil gang injunctions, which prohibit gang association, hand signs, wearing of gang colors, and loitering in areas known for gang activity. Statutes regulating gangs are subject to constitutional challenges under the First Amendment and as void for vagueness or overbroad.

All states and the federal government criminalize specific controlled substances offenses. Jurisdictions classify drugs in schedules, based on their harmful or addictive qualities, and punish drug offenses accordingly. Common offenses are the manufacture, cultivation, possession for personal use or sale, sale, and use of scheduled drugs, with the grading ranging from a felony to an infraction, depending on the offense and the drug. Some jurisdictions provide rehabilitation combined with probation as a penalty for nonviolent offenders through a drug court procedure. Some jurisdictions also legalize marijuana for medical use, which could violate federal supremacy because the federal government does not legalize marijuana for this purpose.

All states except Nevada criminalize prostitution. In Nevada, only prostitution that occurs in a licensed house of prostitution is noncriminal. Prostitution is offering, agreeing, or engaging in specified sexual conduct for money or anything of value, with strict liability or general intent or knowingly in most jurisdictions, and is typically graded as a misdemeanor with sentencing enhancements for habitual offenders, prostitution that occurs near a school, or patronizing a juvenile prostitute. Pimping is generally receiving something of value from a prostitute, with general intent or knowingly that it was earned by prostitution, and is graded as a misdemeanor or a felony with sentencing enhancements if the defendant uses force or the prostitute is a juvenile. Pandering is generally procuring another for an act of prostitution with specific intent or purposely and is typically graded as a felony with sentencing enhancement if the pandering takes place near a school.

YOU BE THE LEGISLATOR

You are a legislator with a perfect record for voting on statutes that are constitutional. You have been presented with four proposed statutes. Read each one, and then read the case analyzing a replica statute for constitutionality. Decide whether you should vote **for** or **against** the proposed statute if you want to keep your perfect record. Check your answers using the answer key at the end of the chapter.

1. The proposed statute is *Disorderly Conduct* and reads as follows: It is a misdemeanor to engage in indecent or disorderly conduct in the presence of another in a public place. This statute was analyzed for constitutionality by *Satterfield v. State*, 395 S.E. 2d 816 (1990). The case is available at this link: http://scholar.google.com/scholar_case?case=8539981756406627329&q=Satterfield+v.+State+395&hl=en&as_sdt=2,5. Should you vote **for** or **against** the statute?
2. The proposed statute is *Loitering for prostitution* and reads as follows: It is unlawful for any person to loiter in or near any public place in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting for or procuring another to commit an act of prostitution. Among the circumstances that may be considered in determining whether such purpose is manifested are that such person repeatedly beckons to, stops, or attempts to stop or engages persons passing by in conversation, or repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or any other bodily gesture. This statute was analyzed for constitutionality by *Silvar v. Dist. Ct.*, 129 P.3d 682 (2006). The case is available at this link: http://scholar.google.com/scholar_case?case=15323479136078401167&q=Silvar+v.+Dist.+Ct.&hl=en&as_sdt=2,5. Should you vote **for** or **against** the statute?
3. The proposed statute is *Gang Violence and Juvenile Crime Prevention Act* and reads as follows: State Prosecutors are hereby authorized to bring specified crime charges against minors fourteen and older in the criminal division of adult court rather than in the juvenile division without a judicial determination that the minor is unfit for a juvenile court disposition. This statute was analyzed for constitutionality by *Manduley v. Superior Court*, 41 P.3d 3 (2002). The case is available at this link: http://scholar.google.com/scholar_case?case=14196981766707899172&q=Manduley+v.+Superior+Court&hl=e.n&as_sdt=2,5. Should you vote **for** or **against** the statute?

4. The proposed statute is *Mere Possession* and reads as follows: It is a crime to possess an unprescribed controlled substance. This statute was analyzed for constitutionality by *State v. Bradshaw*, 98 P.3d 1190 (2004). The case is available at this link: http://scholar.google.com/scholar_case?case=33245956757868529&q=State+v.+Bradshaw+98&hl=en&as_sdt=2,5. Should you vote for or against the statute?

Cases of Interest

- *Roulette v. City of Seattle*, 97 F.3d 300 (1996), discusses sit-lie laws: http://scholar.google.com/scholar_case?case=11766310634401293489&q=%22sit+lie+%22&hl=en&as_sdt=2,5.
- *Noy v. State*, 83 P.3d 538 (2003), discusses Alaska's possession of marijuana law: http://scholar.google.com/scholar_case?case=17763301345063946977&q=%22Noy+v.+State%22&hl=en&as_sdt=2,5.
- *Phillips v. State*, 25 So. 3d 404 (2010), discusses the right to participate in drug court: http://scholar.google.com/scholar_case?case=706671360238134410&q=%22drug+court%22&hl=en&as_sdt=2,5&as_ylo=2009.
- *In re BW*, 313 S.W. 3d 818 (2010), discusses juvenile prostitution: http://scholar.google.com/scholar_case?case=13593192130854531269&q=%22prostitution+statute%22&hl=en&as_sdt=2,5&as_ylo=2009.

Articles of Interest

- True threats and the First Amendment: http://works.bepress.com/cgi/viewcontent.cgi?article=1018&context=mark_strasser
- Gang injunctions: <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1736&context=ggulrev>
- Substance abuse in America: http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=edward_perez

Websites of Interest

- Information about the homeless: <http://www.nationalhomeless.org>
- Information about gangs: <http://www.nationalgangcenter.gov>
- Information about the legalization of prostitution: <http://prostitution.procon.org>

Statistics of Interest

- Homelessness: <http://www.nationalhomeless.org/factsheets>
- Gang violence: <http://www.ncjrs.gov/app/QA/Detail.aspx?Id=11&context=9>
- Drug crime: <http://www.justice.gov/dea/statistics.html>

Answers to Exercises

From Section 12.1 "Quality-of-Life Crimes"

1. The ordinance can be challenged under the **First Amendment**, as **void for vagueness**, and as **overbroad**. A sign is expressive, so a First Amendment challenge is appropriate. The words “extended period” are vague, which can lead to uneven application by law enforcement and a failure to provide notice to the public of what behavior is criminal. Holding a sign such as a school crossing sign is protected activity, so an overbreadth challenge is also in order. The government has an interest in keeping the roadways *safe*, and in preventing dangerous distractions that could occur when drivers try to read signs while approaching a crosswalk.
2. The Supreme Court of Rhode Island held that the disorderly conduct statute was not vague or overbroad simply because it does not require conduct to occur in **public**, and therefore the defendant’s attack of his spouse in a private residence could be prosecuted as “creating a hazardous condition.”
3. The Supreme Court of New York held that “begging” is constitutionally protected expression under the First Amendment, and thereafter reversed the defendant’s conviction under New York’s loitering for the purpose of begging statute.

Answers to Exercises

From Section 12.2 "Crimes Targeting Group Conduct"

1. The First Amendment protects an individual's right to stand in a public place and hold a sign as long as the sign is not *obscene*, *fighting words*, or a *true threat*. Signs indicating a disbelief in the holocaust are most likely upsetting to Jewish individuals attending temple, but they must constitute fighting words or a true threat if they are to be constitutionally prohibited. If the law enforcement officer arrests the individuals for unlawful assembly pursuant to a statute that arguably prohibits such conduct, the statute is subject to constitutional attack under the **First Amendment** or for **overbreadth**.
2. The US Court of Appeals for the Second Circuit upheld the defendant's conviction. The court held that the lower court's interpretation of New York's first-degree riot statute did not violate **due process** by denying the defendant notice that his conduct was criminal, even though the interpretation extended the statute's reach by including conduct that occurred *after* the defendant left the scene of the riot.
3. The California Court of Appeal held that the defendant was not entitled to a jury trial on his gang membership for purposes of a civil gang injunction because of the **civil** nature of the action and the fact that his *physical liberty* was not directly at stake.

Answers to Exercises

From Section 12.3 "Vice Crimes"

1. Anita has committed the federal crimes of **possession** and **use** of marijuana. Although Anita's state has legalized marijuana for medical use, and Anita complied with her state's statutory requirements, the Federal Controlled Substances Act criminalizes the possession and use of marijuana, and there is no federal medical necessity exemption.
2. The Court of Criminal Appeals of Texas reversed, holding that evidence of the cocaine's presence in a hidden location accessible only to someone exercising control over the house, the defendant's ownership of the house, and evidence that the cocaine was conveniently accessible to the defendant was sufficient to convict the defendant of possession of cocaine.
3. The Court of Appeals of Ohio reversed, finding no evidence of force, duress, or coercion because the prostitute's testimony indicated that "nothing would happen" if she refused to turn money earned from prostitution over to the defendant.

Answer to Law and Ethics Question

1. Combating a syndrome like AIDS is clearly a legitimate state concern, and, generally, individual protections can be sublimated constitutionally as long as they are outweighed by the government interest at stake. In this case, the individual interest in avoiding a potentially life-saving blood test is not nearly as paramount as the government interest in preventing the spread of a communicable disease. Neither the risk of a stigma nor the ethics involved in targeting prostitutes are outweighed by the government interest. It is reasonable to infer, as the court stated, that convicted prostitutes have been or will be sexually active with multiple partners. Thus the California statutory scheme appears to be a minimally invasive and reasonable method to protect the health and well-being of California citizens, which makes it as ethical as statutes targeting the homeless, for example, **sit-lie laws**.

Answers to You Be the Legislator

1. The Supreme Court of Georgia held that the statute fails to define in any manner what is meant by indecent or disorderly conduct, so it does not provide fair warning to persons of ordinary intelligence of what is criminal, gives too much discretion to law enforcement, and is therefore void for vagueness. Thus you should vote **against** the proposed statute if you want to keep your perfect record.
2. The Nevada Supreme Court held that the statute is void for vagueness because it does not adequately specify the circumstances for which a person could be arrested, thus failing to provide fair warning to persons of ordinary intelligence of what is criminal and giving too much discretion to law enforcement. The court also held that the statute is overbroad because it criminalizes protected conduct like waving and beckoning. Thus you should vote **against** the proposed statute if you want to keep your perfect record.
3. The California Supreme Court held that the statute did not violate separation of powers and was not unconstitutionally discriminatory pursuant to the equal protection clause, even though filing charges in adult court affects a juvenile's sentencing because this is incidental to the prosecutor's traditional role in charging individuals with crimes. In addition, the court held that juveniles were subject to concurrent jurisdiction between juvenile and adult court, so the statute did not deprive them of rights guaranteed by due process of law, nor did it subject them to cruel and unusual punishment. Thus you should vote **for** the proposed statute and you will keep your perfect record.
4. The Washington Supreme Court found that the legislature had revised the statute to omit a criminal intent requirement, and this revision is constitutional even though the law disfavors strict liability criminal statutes. Thus you should vote **for** the proposed statute and you will keep your perfect record.