Chapter II

Constitutional Limits on Criminal Law

Chapter Overview:

The Constitution of the United States puts limits on the powers of the federal and state governments. These include the prohibition of bills of attainder and *ex post facto* laws, and the requirements for statutory clarity, equal protection, freedom of speech, and privacy. The illegality of bills of attainder and *ex post facto* laws reflect the concept of the rule of legality, expressed by the latin phrase *nullum crimen sine lege, nulla poena sine lege*, or "no crime without law, no punishment without law."

Bills of attainder are acts of the legislature that impose punishment on a specific individual or individuals without a trial. *Ex post facto* laws seek to punish the commission of a crime that occurred before the law took effect. Applying both of these concepts, "no crime without law, no punishment without law" means that if a law is not in place to prohibit an act at the time the act is committed, then the act cannot be considered criminal, nor be punished, even if legislation is later passed that criminalizes the act in question.

The ideal of the rule of legality is also carried out by the requirement for statutory clarity, whose aim is to avoid unclear legislation that could lead to uncertainty as to whether an act was against a written law at the time of its commission. A similar concept is the void-for-vagueness doctrine that limits vague statutes in cases where constitutional liberties are in danger.

The Constitution now also puts a requirement on the government to uphold an equal protection of the laws. This was not always the case, however. It was not until after the civil war that Congress added the equal protection clause to the Constitution, and it was not until many years later that the amendment was regularly invoked. Despite the importance of the equal protection clause, statutes continue to make distinctions based on factors such as age of the perpetrator and the seriousness of the crime, as long as such distinctions serve a legitimate purpose. Such statutes are subject to a minimum level of scrutiny with regards to constitutionality.

Some statutes make distinctions based on race or nation of origin. Because the danger of racial discrimination instills a rational fear in lawmakers, these types of distinctions are subject to strict scrutiny. For statutes that make distinctions based on gender the court utilizes an intermediate level of scrutiny. The reasoning behind this intermediate scrutiny is that the biological differences between the genders increases the probability that such distinctions will serve legitimate purposes.

The First Amendment to the Constitution prohibits the government from interfering with an individual's rights to free speech, peaceable assembly, and petition for redress. There are certain types of speech, however, which are not protected by the First Amendment. These include such things as incitement to illegal action, obscenity, and libel. Two important challenges lawmakers face with regard to the First Amendment are over breadth and hate speech. The doctrine of over breadth prohibits legislation that limits an excessive amount of free speech. Hate speech keeps

lawmakers questioning what kinds of speech should be protected. In this chapter of the Virginia supplement you will see how Virginia's statutes and case law uniquely reflect the issues of these constitutional limitations.

I. The Rule of Legality

Section Introduction: The rule of legality asserts that there can be no crime or punishment without law. This means that if a defendant can show that there was either no law prohibiting their action at the time of its commission or that the law was insufficient to clearly define their action as criminal, then they cannot be held accountable for the behavior. The case below addresses how this rule has been applied in Virginia.

Cook v. Commonwealth, 20 Va.App. 510, 458 S.E.2d 317, (1995)

Procedural History: Defendant was convicted by a jury of attempted second-degree murder. Defendant appealed.

Issue(s): If no attendant penalty is prescribed by statute, can a crime exist?

Holding: *Reversed and dismissed.*

Facts: Arthur Lynn Cook (defendant) was convicted by jury of attempted second degree murder. Defendant contends on appeal that the "crime did not exist" because no attendant penalty was prescribed by statute.

Opinion: BRAY, Judge.

On the date of the instant offense, August 10, 1993 Code § 18.2-32 defined "[a]ll murder[,] other than capital murder and murder in the first degree[,]" as "murder of the second degree," "punishable by confinement ... for not less than five *nor more than forty years.*" *Id.* (emphasis added). At that time, Code § 18.2-26 prescribed the several punishments for "attempts to commit an offense which is a noncapital felony," differentiating each by specific reference to the "*maximum punishment* " of the underlying consummated crime. *Id.* (emphasis added); *see also* Code § 18.2-10. However, former Code § 18.2-26 did not provide a punishment for an attempted felony which was punishable by confinement for a maximum of *forty years.* Thus, although defendant's conduct may have been proscribed by statute, it was an offense without a penalty.

A review of the legislative history of Code §§ 18.2-32 and 18.2-26 discloses that Code § 18.2-32 was amended during the 1993 session of the General Assembly, increasing the punishment for second degree murder from a Class 3 felony, "not less than five years nor more than twenty years," Code § 18.2-10, to "not less than five nor more than forty years." Code § 18.2-32. However, Code § 18.2-26 was not correspondingly amended to embrace the enhanced penalty for a violation of Code § 18.2-32 until the 1994 session of the legislature. The Commonwealth reasons that this "history ... shows that an oversight occurred" urging that we "give life to the intent of the legislature" and affirm the conviction.

We recognize that "the primary objective of statutory construction is to ascertain and give effect to legislative intent." *Crews v. Commonwealth,* 3 Va.App. 531, 535-36, 352 S.E.2d 1, 3 (1987) (citation omitted). However, "[i]t is ... fundamental ... that penal statutes 'must be strictly construed against the state and limited in application to cases falling clearly within the language of the statute.' " *Commonwealth v. Knott,* 11 Va.App. 44, 47, 396 S.E.2d 148, 150 (1990) (quoting *Crews,* 3 Va.App. at 536, 352 S.E.2d at 3). "Words of a penal law will not be extended by implication to the prejudice of the accused, and all reasonable doubt must be resolved in his favor." *Waller v. Commonwealth,* 192 Va. 83, 88, 63 S.E.2d 713, 716 (1951) (citation omitted).

"[A] crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime." Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 1.2(d) (1986); *see United States v. Evans,* 333 U.S. 483, 486, 68 S.Ct. 634, 636, 92 L.Ed. 823 (1948); *State v. Fair Lawn Serv. Ctr., Inc.,* 20 N.J. 468, 120 A.2d 233, 235 (1956); *Redding v. State,* 165 Neb. 307, 85 N.W.2d 647, 652 (1957); *State v. Ching,* 62 Haw. 656, 619 P.2d 93, 94 (1980). Criminal penalties "should be provided with that degree of clarity that characterizes all criminal law, to the end that its application must not be left to conjecture." *McNary v. State,* 128 Ohio St. 497, 191 N.E. 733, 740 (1934). If a criminal statute or ordinance does not specify a penalty, it is beyond our province to prescribe one on the assumption that the deficiency was simply an "oversight." *See Evans,* 333 U.S. at 486, 68 S.Ct. at 636; *Fair Lawn Serv. Ctr.,* 120 A.2d at 236. "[D]efining crimes and fixing penalties are legislative, not judicial, functions." *Evans,* 333 U.S. at 486, 68 S.Ct. at 636.

Although the amendments to Code § 18.2-26 subsequent to defendant's misconduct included attempts at Code § 18.2-32 offenses, the revised statute may not retroactively assign punishment to prior acts. *See Brushy Ridge Coal Co. v. Blevins,* 6 Va.App. 73, 78-79, 367 S.E.2d 204, 207 (1988) (quoting *Duffy v. Hartsock,* 187 Va. 406, 419, 46 S.E.2d 570, 576 (1948)).

Defendant was, therefore, convicted for conduct which constituted no crime at the time of the offense. Accordingly, we reverse the judgment of the trial court.

Critical Thinking Question(s): Does this case indicate that the come of second degree murder did "not exist" at the time of the offense? What is your interpretation of the statute on attempt as it pertains to this case? Is the attempt statute not ancillary to any crime and thus have the same impact whether it is clearly delineated for each potential offense or not?

II. Bills of Attainder and *Ex Post Facto* Laws

Section Introduction: Both bills of attainder and *ex post facto* laws are prohibited by the rule of legality. Bills of attainder are disallowed because they only seek to punish a specific individual, suggesting that there was no law in place under which to validly charge that individual. *Ex post facto* laws also seek to punish behavior which was not defined as criminal at the time it took place by attempting to apply new statutes to past acts. The following cases provide further examples of how the rule of legality is used in defense of criminal prosecution.

***Pilcher v. Commonwealth*, 41 Va.App. 158, 583 S.E.2d 70 (2003)**

Procedural History: The grand jury indicted Donald Robert Pilcher for rape of a female child under age sixteen in violation of Code § 18.1-44, Code § 18.1-212, and Code § 18.1-215. All the events were alleged to have occurred in 1969 under statutes that have since been recodified and amended. In a pretrial pleading and at a pretrial hearing, Pilcher's attorney contended that the rape shield law was *ex post facto* because "the law of evidence must be the law in effect in 1969."

Issue(s): Is the "rape shield law," as applied in this case, an *ex post facto* law?

Facts: Pilcher's daughters testified that in October 1969, when she was six years old, Pilcher was in bed with her and touched between her legs.

Holding: *Affirmed.*

Opinion: BENTON, Judge.

The issue presented by this appeal is whether, under the facts of this case, the "rape shield law" is an *ex post facto* law. We hold that it is not.

At trial, during cross-examination of the daughter, the following incidents occurred:

Q: And, as a matter of fact, your hymen was broken when you had sexual relations with Tom...

[PROSECUTOR]: This is absolutely inadmissible and [he] knows it. Judge, the Rape Shield Statute is very clear on this issue. No motion has been filed and no hearing has been had.

[JUDGE]: I sustain the objection.

[DEFENSE ATTORNEY]: This was before the Rape Shield law.

[JUDGE]: It is procedure now.

At the conclusion of the evidence the trial judge convicted Pilcher of rape of a child and of putting his hands against the sexual parts of a child, as charged in the indictments. The judge acquitted Pilcher of the charge of carnal knowledge.

The Constitution of the United States, Article 1, § 10, and the Constitution of Virginia, Article 1, § 9, prohibit the General Assembly from enacting *ex post facto* laws. The United States Supreme Court has traditionally recognized four categories of *ex post facto* criminal laws:

1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime,* or makes it *greater* than it was when committed. 3d. Every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed. 4th. Every law that

alters the *legal* rules of *evidence,* and receives less, or different, testimony, then the law required at the time of the commission of the offence, *in order to convict the offender.*
Calder v. Bull, 3 U.S. 386, 390, 3 Dall. 386, 1 L.Ed. 648 (1798). *See also Collins v. Youngblood,* 497 U.S. 37, 42, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30 (1990).

"It is equally well settled, however, that '[t]he inhibition upon the passage of *ex post facto* laws does not give a [defendant] a right to be tried, in all respects, by the law in force when the crime charged was committed.' " *Dobbert v. Florida,* 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977) (citations omitted). In addition, the Court has held that no *ex post facto* violation occurs if the change effected by the law is merely procedural and does "not increase the punishment nor change the ingredients of the offence or the ultimate facts necessary to establish guilt." *Hopt v. Utah,* 110 U.S. 574, 590, 4 S.Ct. 202, 210, 28 L.Ed. 262 (1884). For example, in *Dobbert,* the Supreme Court cited the following example of a procedural change that was not considered *ex post facto* even though it worked to the disadvantage of a defendant:

[I]n *Hopt v. Utah,* 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), as of the date of the alleged homicide a convicted felon could not have been called as a witness. Subsequent to that date, but prior to the trial of the case, this law was changed; a convicted felon was called to the stand and testified, implicating Hopt in the crime charged against him. Even though this change in the law obviously had a detrimental impact upon the defendant, the Court found that the law was not *ex post facto* because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict. *Id.,* at 589 [4 S.Ct. at 210]. *Dobbert,* 432 U.S. at 293, 97 S.Ct. at 2290. In other words, although it is possible for retroactive application of a procedural law to violate the *ex post facto* clause, a violation only occurs when one of the four recognized categories of *ex post facto* law is implicated. *Rose v. Lee,* 252 F.3d 676, 684 (4th Cir.2001).

At trial, Pilcher's attorney argued that the "rape shield" law was an *ex post facto* prohibition against his use of impeachment evidence. He also argued that the statutory requirements - that the party offering evidence file a written notice describing the evidence and that the judge conduct an evidentiary hearing - change the rules of evidence. Thus, Pilcher contends that application of the rape shield law in this prosecution was *ex post facto* because it changed the rules of evidence in effect in 1969. He also contends that, were it not for the rape shield law, he could have proved his daughter did not have sexual intercourse until she was sixteen and, thus, lied at trial.

In *Carmell v. Texas,* 529 U.S. 513, 529, 120 S.Ct. 1620, 1631, 146 L.Ed.2d 577 (2000), the Supreme Court held that a law was *ex post facto* when it "changed the quantum of evidence necessary to sustain a conviction ... [such that] under the new law, petitioner could be (and was) convicted on the victim's testimony alone, without any corroborating evidence." Reversing the conviction, the Court ruled that the Texas statute, which changed the law, was "a sufficiency of the evidence rule ... [and] does not merely 'regulat[e] ... the mode in which the facts constituting guilt may be placed before the jury.' " 529 U.S. at 545, 120 S.Ct. at 1620 (citation omitted). In so ruling, however, the Supreme Court held that "[t]he issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the general issue of guilt...." 529

U.S. at 546, 120 S.Ct. at 1640. "[I]t is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited." *Beazell v. Ohio,* 269 U.S. 167, 170, 46 S.Ct. 68, 69, 70 L.Ed. 216 (1925).

As the Supreme Court of Virginia has noted, the "rape shield" law was adopted to "limit or prohibit the admission of general reputation evidence as to the prior unchastity of the complaining witness, but ... [to] permit the introduction of evidence of specific acts of sexual conduct between the complaining witness and third persons in carefully limited circumstances." *Winfield,* 225 Va. at 218, 301 S.E.2d at 19. Indeed, the Court further observed that the "law gives a defendant access for the first time to far more probative evidence: specific prior sexual conduct with third persons, if it is relevant for the purposes set forth in Code § 18.2-67.7." *Winfield,* 225 Va. at 220, 301 S.E.2d at 20. Thus, to the extent that Pilcher contends the statutory change affects the rules of evidence, we note that the United States Supreme Court also has held that "the prescribing of different modes or procedure ..., leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition." *Duncan v. Missouri,* 152 U.S. 377, 382-83, 14 S.Ct. 570, 572, 38 L.Ed. 485 (1894). Likewise, "[s]o far as mere modes of procedure are concerned a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place." *Mallett v. North Carolina,* 181 U.S. 589, 596-97, 21 S.Ct. 730, 733, 45 L.Ed. 1015 (1901) (citation omitted).

Applying these *ex post facto* principles to this case, we hold that Pilcher has not demonstrated that the statute affected his substantive rights, and we further hold that it is not an *ex post facto* law as applied in this case. In so holding, we note that courts of other jurisdictions, when confronted with similar *ex post facto* arguments regarding rape shield statutes, have reached the same result. *See Turley v. State,* 356 So.2d 1238, 1243-44 (Ala.App.1978) (holding that a rape shield statute was not *ex post facto* when it barred evidence of a prior sexual relationship that was admissible before enactment of the statute); *People v. Dorff,* 77 Ill.App.3d 882, 885-86, 33 Ill.Dec. 300, 396 N.E.2d 827 (1979) (holding that a statute is not *ex post facto* when it created an "alteration in rules of evidence ... [, which] served only to prevent use of certain evidence relating to the alleged victim's credibility, and had no bearing upon evidence relating to the crime itself"); *Finney v. State,* 179 Ind.App. 316, 385 N.E.2d 477, 480-81 (1979) (holding that the "rape shield statute affects the use of character evidence to impeach witnesses ... and is therefore procedural in nature").

In summary, we hold that the procedural change wrought by Code § 18.2-67.7 does not implicate the prohibition on *ex post facto* laws. As the Supreme Court held long ago,

> alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt ... *relate to modes of procedure only,* in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. *Hopt,* 110 U.S. at 590, 4 S.Ct. at 210 (emphasis added).

For these reasons, we affirm the convictions.

Critical Thinking Question(s): Describe the difference between substantive and procedural law. Does the Rape Shield Statute place a greater burden on the defendant to prove reasonable doubt? If so, does this lessen the substantive proofs necessary to convict? Do such statutes abridge a defendant's 6th Amendment right to confront one's accusers?

III. Statutory Clarity

Section Introduction: The rule of legality, holding that the condition of "without law" can be satisfied by a law that is unclear and so casts doubt on whether a particular action is criminal, places a requirement on statutes to maintain clarity. If an individual can show that they reasonably were not able to understand that a statute prohibited a certain act due to that statute's unclear nature then the defendant may not be held liable for the crime. Such an unclear statute will be held unconstitutional and void-for-vagueness. The following Virginia case illustrates how this principle is utilized in criminal defense.

Jaynes v. Commonwealth, 275 Va. 341, 657 S.E.2d 478 (2008)

Procedural History: Jeremy Jaynes appeals from the judgment of the Court of Appeals which affirmed his convictions in the Circuit Court of Loudoun County for violations of Code § 18.2-152.3:1, the unsolicited bulk electronic mail (e-mail) provision of the Virginia Computer Crimes Act, Code §§ 18.2-152.1 through-152.15.

Issue(s): Was the Virginia Computer Crimes Act (VCCA) unconstitutionally vague as applied to the defendant?

Facts: From his home in Raleigh, North Carolina, Jaynes used several computers, routers and servers to send over 10,000 e-mails within a 24-hour period to subscribers of America Online, Inc. (AOL) on each of three separate occasions. On July 16, 2003, Jaynes sent 12,197 pieces of unsolicited e-mail with falsified routing and transmission information onto AOL's proprietary network. On July 19, 2003, he sent 24,172, and on July 26, 2003, he sent 19,104. None of the recipients of the e-mails had requested any communication from Jaynes. He intentionally falsified the header information and sender domain names before transmitting the e-mails to the recipients, causing the Internet Protocol (IP) addresses to convey false information to every recipient about Jaynes' identity as the sender. However, investigators used a sophisticated database search to identify Jaynes as the sender of the e-mails.

Holding: *Affirmed.*

Opinion: AGEE, Justice.

Jaynes was arrested and charged with violating Code § 18.2-152.3:1, which provides in relevant part:

> A. Any person who:
> 1. Uses a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers ... is guilty of a Class 1 misdemeanor.
> B. A person is guilty of a Class 6 felony if he commits a violation of subsection A and:
> 1. The volume of UBE transmitted exceeded 10,000 attempted recipients in any 24-hour period, 100,000 attempted recipients in any 30-day time period, or one million attempted recipients in any one-year time period....

Jaynes moved to dismiss the charges against him on the grounds that the statute violated the dormant Commerce Clause, was unconstitutionally vague, and violated the First Amendment. The circuit court denied that motion.

During trial, evidence demonstrated that Jaynes knew that all of the more than 50,000 recipients of his unsolicited e-mails were subscribers to AOL, in part, because the e-mail addresses of all recipients ended in "@aol.com" and came from discs stolen from AOL. Jaynes' e-mails advertised one of three products: (1) a FedEx refund claims product, (2) a "Penny Stock Picker," and (3) a "History Eraser" product. To purchase one of these products, potential buyers would click on a hyperlink within the e-mail, which redirected them outside the e-mail, where they could consummate the purchase. Jaynes operated his enterprise through several companies which were not registered to do business in North Carolina, and evidence was introduced as to billing and payment activities for these companies, including evidence that registration fees were paid to AOL with credit cards held by fictitious account holders.

While executing a search of Jaynes' home, police discovered a cache of compact discs (CDs) containing over 176 million full e-mail addresses and 1.3 billion e-mail user names. The search also led to the confiscation of a storage disc which contained AOL e-mail address information and other personal and private account information for millions of AOL subscribers. Police also discovered multiple storage discs which contained 107 million AOL e-mail addresses. Richard Rubenstein, manager of technical security investigations at AOL, testified that the discs recovered at Jaynes' home "contained proprietary information" of "pretty near all" AOL account customers. The AOL user information had been stolen from AOL by a former employee and was in Jaynes' possession.

Dr. John Levine, a consultant and author, testified as an expert witness and explained that the e-mails sent by Jaynes were not consistent with solicited bulk e-mail, but rather constituted unsolicited bulk e-mail (sometimes referred to as "spam" e-mail) because Jaynes had disguised the true sender and header information and used multiple addresses to send the e-mails. He explained:

> [H]ere the [e-mail] has been spread around nearly a thousand addresses. Where it's reasonable that you might use maybe a dozen addresses if you have a really big system and you're sending it from a dozen computers, I can't think of a valid reason why you

> would need to spread your e-mail over a thousand different addresses unless, again, you're trying to disguise the source.
>
> The fact - both the fact that the domains do not seem plausible, they don't seem familiar, and the fact that it's spread out in a way that seems intended to disguise the origin of the mail, is what tells me this is not solicited e-mail.

AOL, which houses all of its e-mail servers in Virginia, was directly affected by Jaynes' spam e-mail attack. Brian Sullivan, the senior technical director for mail operations at AOL, testified that bulk e-mail "tends to create a lot of confusion" for AOL customers and that AOL receives "7 to 10 million complaints per day" regarding spam e-mails. Sullivan also described the impact of spam e-mails, explaining that "[i]f someone's mailbox is full because they got a truckload of spam and there's no more room, a message coming from Grandma is returned back to the sender. We can't take it at that point."

A jury convicted Jaynes of three counts of violating Code § 18.2-152.3:1, and the circuit court sentenced Jaynes to three years in prison on each count, with the sentences to run consecutively for an active term of imprisonment of nine years. The Court of Appeals affirmed his convictions, Jaynes v. Commonwealth, 48 Va.App. 673, 634 S.E.2d 357 (2006). We awarded Jaynes an appeal.

Jaynes also contends that Code § 18.2-152.3:1 is unconstitutionally void for vagueness and that the Court of Appeals erred in not reversing the judgment of the circuit court on that basis. He argues that the as-applied standard for vagueness used by the Court of Appeals was improper because his challenge was to the facial validity of the statute. The Commonwealth responds that Jaynes does not have standing to bring a vagueness challenge to the statute because the statute clearly applied to him. We agree with the Commonwealth.

The United States Supreme Court, in Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) explained the standard for a vagueness challenge:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law. Id. at 494-95, 102 S.Ct. 1186 (emphasis added).

Additionally, the United States Supreme Court stated in Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), that: "[o]ne to whose conduct a statute clearly

applies may not successfully challenge it for vagueness." This Court, citing Hoffman Estates and Parker, restated this principle in Commonwealth v. Hicks, 267 Va. 573, 596 S.E.2d 74 (2004), "[i]t is clear that [one] who ... engaged in conduct prohibited [by the statute] may not complain that the [statute] is purportedly vague." Id. at 581, 596 S.E.2d at 78.

As the United States Supreme Court in Parker and Hoffman Estates, as well as this Court in Hicks II, has made consistently clear, one does not have standing to make a facial challenge to a statute on the basis of unconstitutional vagueness if the statute plainly applies to that person on the facts of the case. As the Supreme Court further stated in Parker, "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." 417 U.S. at 757, 94 S.Ct. 2547 (citation omitted). Jaynes cannot make this claim.

Jaynes was convicted under the felony provisions of Code § 18.2-152.3:1(B), which clearly sets out what constitutes unsolicited bulk e-mail. Jaynes could not reasonably be unaware from the language of the statute that his multiple transmissions of more than 10,000 e-mails within the proscribed period violated subsection (B). His claim that he would not understand what constituted "unsolicited bulk electronic mail" is without merit in the clear context of subsection (B) of the statute.

The bulk e-mails were plainly unsolicited given the evidence at trial that Jaynes had received a list of stolen e-mail addresses of AOL customers and there was no evidence any recipient requested or consented to the e-mails. In the context of this record, Jaynes' claim of vagueness for the term "unsolicited" is devoid of merit. Evidence at trial indicated no basis upon which Jaynes could claim vagueness as to the meaning of "falsify" or "electronic mail transmission information." Thus, the statute undoubtedly applies to Jaynes' conduct, and therefore, he has no standing to challenge the statute for vagueness. Hicks II, 267 Va. at 580-81, 596 S.E.2d at 78.

In conclusion … we hold that Jaynes' vagueness argument is without merit, and the statute does not violate the Commerce Clause. We will therefore affirm the judgment of the Court of Appeals upholding these convictions and sentences.

Critical Thinking Question(s): Does this statute, the way it is presently written, present a clear definition to the reader? Do you believe the courts are more "flexible" when interpreting statues that address constantly evolving abuses of technology? How can the law keep up with the creativity of the human mind and invention?

IV. Equal Protection

Subsection Introduction: The U.S. Constitution grants individuals equal protection of the laws. This means that statutes may not unlawfully discriminate against any individual. The Constitution of Virginia addresses these constitutional requirements in the Bill of Rights.

Virginia Constitution - Article I. Bill of Rights, section 1. Equality and rights of men. That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

V. Freedom of Speech

Section Introduction: Both the United States Constitution and the Virginia Constitution, cited below, provide for a protection of freedom of speech. What types of speech fall under this protection, however, is not always clear. This issue is left to be decided by the courts in cases such as the one that follows.

Virginia Constitution - Article I. Bill of Rights, section 12. Freedom of speech and of the press; right peaceably to assemble, and to petition. That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

Boyd v. County of Henrico, 42 Va.App. 495, 592 S.E.2d 768 (2004).

Procedural History: After being found guilty in general district court, appellants appealed to circuit court. In the meantime, the owners of Gold City and two erotic dancers filed a civil action in United States District Court for the Eastern District of Virginia asserting that the ordinance should be declared unconstitutional and the state prosecution enjoined. The federal district court abstained from ruling on this issue. *Colonial First Props., LLC v. Henrico County Virginia*, 166 F.Supp.2d 1070 (E.D.Va.2001). The state circuit court case went to trial in late 2001. The parties to the criminal case agreed that depositions taken in the federal case could be submitted *de bene esse* to the state court. The parties, however, did not agree to submit to the state trial court the transcript of the federal court proceeding. Nor did they stipulate to any factual findings made by the federal district court during the abstention hearing.

The trial court rejected appellants' constitutional challenges and heard the cases on the merits. At trial, appellants admitted the dancers wore “pasties” and “G-strings” on July 6 and July 8, 2001. The dancers conceded that their state of undress violated the public nudity ordinance, but instead claimed that their striptease act fell within the exemption in the ordinance for the performance of “any play, ballet, drama, tableau, production or motion picture” in a theater, concert hall, or the like. Henrico County Code § 13-107(c). After hearing testimony from eight dancers and the two owners of Gold City, the trial court found as a fact that Gold City was not a “theater” under the ordinance and the dancers were not engaged in any “theatrical performance either.”

Issue(s): Did Henrico County’s ordinance prohibiting public nudity constitute an infringement on the right of free speech?

Facts: On July 6, 2001, officers from the Henrico County Police Department went to a newly opened erotic club named Gold City Showgirls. While there, the officers observed ten female dancers strip down to "pasties" and "G-strings" in exchange for tips. The officers issued summonses to the ten dancers they observed, including Boyd, for violating the public nudity ordinance and to a club manager, Donna White, for aiding and abetting the violations. On July 8, 2001, the officers returned and observed the same type of semi-nude dancing. The officers issued a summons to Dianna White, the manager on duty, and a second summons to Boyd.

Holding: *Affirmed.*

Opinion: UPON REHEARING EN BANC, KELSEY, Judge.

Statutes prohibiting public nudity are of "ancient origin" and "reflect moral disapproval of people appearing in the nude among strangers in public places." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568, 111 S.Ct. 2456, 2461, 115 L.Ed.2d 504 (1991) (plurality). For this reason, it has been the traditional view that whatever natural law construct exists to support the "right to appear *au naturel* at home," that right is "relinquished when one sets foot" outside. *Richards v. Thurston*, 424 F.2d 1281, 1285 (1st Cir.1970). Even so, in the "outer ambit" of constitutional theory, the erotic speech component of a particular form of public nakedness - nude dancing at strip clubs - receives "some measure" of First Amendment protection. *Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 1391, 146 L.Ed.2d 265 (2000) (plurality); *see also Barnes*, 501 U.S. at 566, 111 S.Ct. at 2460. The right, however, is hardly a robust one. At best, it receives a "diminished form of protection under the First Amendment," *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 707 (7th Cir.2003), because it involves the "barest minimum of protected expression," *Barnes*, 501 U.S. at 565, 111 S.Ct. at 2460 (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975)). Put another way, the right is only "marginally" within the "outer perimeters" of the First Amendment. *Barnes*, 501 U.S. at 566, 111 S.Ct. at 2460.

Appellants claim the Henrico public nudity ordinance violates the marginal free speech rights inherent in erotic dancing. They rest this claim on two assertions. First, appellants contend the ordinance constitutes the most serious of all First Amendment violations: a content-based restriction on free speech. Second, appellants argue that the public nudity ordinance - even if not content based - still works such a hardship on their free speech rights that it must be declared unconstitutional. We reject both arguments, finding they reflect a basic misunderstanding of First Amendment law.

A law regulating expressive activity should be deemed content neutral "so long as it is '*justified* without reference to the content of the regulated speech.' " *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989) (emphasis in original and citation omitted). Because such regulations are "unrelated to [the suppression of] expression," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567, 121 S.Ct. 2404, 2428, 150 L.Ed.2d 532 (2001), they are subjected to a "less-rigorous analysis," *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 213, 117 S.Ct. 1174, 1198, 137 L.Ed.2d 369 (1997). Sufficient government interests justifying content-neutral regulations include "preventing harmful secondary effects," *Erie*, 529 U.S. at 293, 120

S.Ct. at 1393, and "protecting order and morality," *Barnes,* 501 U.S. at 569, 111 S.Ct. at 2462, both classic expressions of state police powers.

The Henrico public nudity ban regulates conduct - not the content of anyone's speech. In this respect, the ordinance is no different from either of the two public nudity laws deemed content neutral in *Barnes* and *Erie.* As the United States Supreme Court said in *Erie:*

> The ordinance here, like the statute in *Barnes,* is on its face a general prohibition on public nudity. By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. *Erie,* 529 U.S. at 290, 120 S.Ct. at 1391. The same can be said of the Henrico ordinance.

True, some may "view restricting nudity on moral grounds as necessarily related to expression." *Barnes,* 501 U.S. at 570, 111 S.Ct. at 2462. And, in an abstract sense, it is entirely fair to say that people "who go about in the nude in public may be expressing something about themselves by so doing." *Id.* This point, however, proves too much. Taken to its logical limits, it obliterates any First Amendment distinctions between speech and conduct. A flasher in a public mall may genuinely intend to communicate a message - whether erotic, neurotic, or both. But the communicative element in his conduct should receive no constitutional protection. Despite the libertarian traditions animating the First Amendment, we are not dealing here with protecting the societal value of "untrammeled political debate" and "few of us would march our sons and daughters off to war to preserve a citizen's right" to unlimited expression of public sexuality. *Erie,* 529 U.S. at 294, 120 S.Ct. at 1394 (quoting *Young v. Am. Mini Theatres, Inc.,* 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976)).

Appellants take no issue with *Erie* or *Barnes,* but instead seek to distinguish them on the ground that the Henrico ordinance contains an exemption for theatrical performances. The public nudity ban in *Erie,* appellants argue, applied to theaters. From there, appellants reason that the theatrical nudity exemption in the Henrico ordinance transforms an otherwise permissible, content-neutral public nudity ban into a thinly disguised content-based restriction. We disagree.
Despite the fact that the public nudity ban in *Erie* did not include an express exemption, the prosecutor in *Erie* stipulated that the ban did not apply to theatrical and artistic nudity. Making the same argument as appellants do here, the dissent in *Erie* seized upon this stipulation:

> In an earlier proceeding in this case, the Court of Common Pleas asked Erie's counsel "what effect would this ordinance have on theater ... productions such as Equus, Hair, O[h!] Calcutta[!]? Under your ordinance would these things be prevented ... ?" Counsel responded: "No, they wouldn't, Your Honor." App. 53. Indeed, as stipulated in the record, the city permitted a production of Equus to proceed without prosecution, even after the ordinance was in effect, and despite its awareness of the nudity involved in the production.... As presented to us, the ordinance is deliberately targeted at Kandyland's type of nude dancing (to the exclusion of plays like Equus), in terms of both its applicable scope and the city's enforcement.

* * * * * *

Nor could it be contended that selective applicability by stipulated enforcement should be treated differently from selective applicability by statutory text. *See Barnes,* 501 U.S. at 574[, 111 S.Ct. at 2464-65] (Scalia, J., concurring in judgment) (selective enforcement may affect a law's generality). Were it otherwise, constitutional prohibitions could be circumvented with impunity.

Id. at 328 n. 12, 120 S.Ct. at 1412 n. 12 (Stevens, J., dissenting). The plurality in *Erie* rejected this argument and acknowledged that its own analysis presupposed that the public nudity ban had "the effect of limiting one particular means of expressing the kind of erotic message being disseminated at Kandyland." *Id.* at 293, 120 S.Ct. at 1393.

The same is true of the public nudity ban in *Barnes.* Notwithstanding the absence of any express exemption, the public nudity ban there had been construed by the state courts to exclude theatrical nudity. The Supreme Court acknowledged this limiting construction on the ordinance as a legitimate effort by the state courts to "save it from a facial overbreadth attack." *Barnes,* 501 U.S. at 564 n. 1, 111 S.Ct. at 2459 n. 1.

* * * * * *

By including an express exemption for theatrical nudity, Henrico merely put in writing what was implicit in both the *Erie* and *Barnes* public nudity bans. The exemption in the Henrico ordinance does nothing more than ensure that the ordinance incidentally restricts the least amount of expressive conduct, and thus, protects the ordinance against an overbreadth challenge. *See, e.g., Giovani Carandola, Ltd. v. Bason,* 303 F.3d 507, 517-19 (4th Cir.2002) (holding lack of a theater exemption raised overbreadth problems sufficient to warrant a preliminary injunction).

In addition, the theatrical nudity exemption reflects a legitimate recognition of the unique secondary effects associated with erotic clubs. "Establishments that purvey erotica, live or pictorial, tend to be tawdry, to be offensive to many people, and to attract a dubious, sometimes a disorderly, clientele." *Blue Canary Corp. v. City of Milwaukee,* 251 F.3d 1121, 1124 (7th Cir.2001). The impact of erotic dancing and other sexually oriented businesses on the surrounding community is "all too real." *Alameda Books, Inc.,* 535 U.S. at 444, 122 S.Ct. at 1739 (Kennedy, J., concurring).

A public nudity ban should be "properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing." *Erie,* 529 U.S. at 296, 120 S.Ct. at 1394; *see also Clark v. City of Lakewood,* 259 F.3d 996, 1004 (9th Cir.2001). So, while the messages conveyed by erotic dancing and theatrical nudity may be similar, the social by-products of each medium may be considerably different. *See DLS, Inc. v. Chattanooga,* 107 F.3d 403, 412 n. 9 (6th Cir.1997). Within the "limited field of regulations on public exhibitions of adult entertainment," therefore, the presence of negative secondary effects permits public nudity regulations to be treated "as content-neutral and so subject only to intermediate scrutiny." *Giovani Carandola, Ltd.,* 303 F.3d at 515.

All of this leads to the application of the four-part test governing content-neutral restrictions on speech. Under that test, the Henrico ordinance survives scrutiny if it (i) falls within "the constitutional power" of the county, (ii) furthers an "important or substantial government interest," (iii) furthers that interest in a manner "unrelated to the suppression of free expression," and (iv) imposes no greater incidental restriction on protected speech "than is essential to the furtherance of that interest." *Erie,* 529 U.S. at 296-301, 120 S.Ct. at 1394-97; *see also Barnes,* 501 U.S. at 567, 111 S.Ct. at 2461 (quoting *United States v. O'Brien,* 391 U.S. 367, 376-77, 88 S.Ct. 1673, 1678-79, 20 L.Ed.2d 672 (1968)). Appellants concede the Henrico public nudity ban satisfies prong one. They make no mention of prong two, except to mischaracterize it as requiring a "compelling" state interest, a requirement reserved only for content-based restrictions. Appellants focus their challenge on prongs three and four.

On the third prong, appellants argue that the purpose of the ordinance is unrelated to the suppression of free expression, but its application is not. In support, appellants again assert that the theatrical exemption (written into the text of the ordinance) requires law enforcement officials to make content-based distinctions. As noted earlier, however, the same exemption was present in *Barnes* and *Erie.* It serves an important limiting function and thereby avoids potential overbreadth problems with the ordinance. *See Barnes,* 501 U.S. at 564 n. 1, 111 S.Ct. at 2459 n. 1. The exemption also rests on a valid assessment of the differing secondary effects between the two venues. The focus on secondary effects was at the heart of the *Erie* holding:

Even if we had not already rejected the view that a ban on public nudity is necessarily related to the suppression of the erotic message of nude dancing, we would do so now because the premise of such a view is flawed. The State's interest in preventing harmful secondary effects is not related to the suppression of expression.

Erie, 529 U.S. at 293, 120 S.Ct. at 1393. The theatrical exemption, therefore, does not violate the third prong of the content-neutral test any more than it did in *Barnes* or *Erie.*

Appellants also contend that the Henrico ordinance violates the fourth prong. On this issue, appellants claim that the legislative intent of the ordinance was merely "to prevent urinating in public and similar problems." But, because the literal text of the ordinance also applies to erotic dancing, appellants reason, the ordinance goes further than necessary "to prevent or deter public urination, 'mooning' or skinny dipping."

We cannot accept this analysis for several reasons. To begin with, the trial court made no factual finding that the purpose of the ordinance was limited to public urination, mooning, and skinny dipping. Appellants' assertion appears to be taken from a memo from a lieutenant in the county police department to the police chief. The memo mentions the need for an ordinance to outlaw public urination, mooning, and skinny dipping. The same memo, however, also adds that the ordinance should prohibit "generally being nude in public." Appellants' assertion, therefore, relies on a non-legislative source that, in any event, contemplates a greater scope than merely proscribing mooning, public urination, and skinny dipping.

The only reliable source for legislative intent in this record can be found in a memo of the Henrico County Board of Supervisors accompanying the proposed ordinance at the time of its

enactment. It makes clear that the stated purpose of the public nudity ban involves broad concerns over "public morality" and the need to regulate conduct that the legislative body deemed "injurious to the health, safety and general welfare" of the community. It was exactly these concerns over "secondary effects, such as the impacts on public health, safety, and welfare," *Erie* explained, "which we have previously recognized are 'caused by the presence of even one such' establishment." *Erie,* 529 U.S. at 291, 120 S.Ct. at 1392 (citation omitted). *Barnes* likewise found that an identical expression of the "traditional police power" of a state to "provide for the public health, safety, and morals" may serve as a permissible legislative goal for the enactment of a public nudity ordinance applicable to erotic dancing. *Barnes,* 501 U.S. at 569, 111 S.Ct. at 2462.

Properly applied, the fourth prong of the *Erie* content-neutral test requires us to consider whether the ordinance imposes too great an incidental burden on speech. Before engaging in this analysis, we must first frame the issue precisely. The only constitutional right here (albeit one "marginally" within the "outer perimeters" of the First Amendment, *Barnes,* 501 U.S. at 566, 111 S.Ct. at 2460) is the erotic message implicit in nude or semi-nude dancing. There is no general right to take one's clothes off in public. Nor is there a constitutional right to wear pasties and G-strings rather than the lingerie-like tops and bottoms required by the Henrico ordinance. Thus, we cannot ask whether requiring slightly more clothes restricts the erotic dancer's right to be less clothed. "Being 'in a state of nudity,' " after all, "is not an inherently expressive condition." *Erie,* 529 U.S. at 289, 120 S.Ct. at 1391. Instead, we must ask whether the ordinance unduly burdens the dancer's ability to express her erotic message by requiring her to cover up slightly more of her body with slightly more fabric.

Erie held that going from complete nudity to being partly clothed (with pasties and a G-string) involved a *de minimis* impact on the ability of a dancer to express eroticism. *Erie,* 529 U.S. at 294, 120 S.Ct. at 1393-94. The Henrico ordinance, in contrast, does not involve a transition from totally nude to partly clothed, but rather one from partly clothed to slightly more partly clothed. If going from naked to non-naked involves a constitutionally insignificant difference in degree, then the incrementally more fabric required by the Henrico ordinance can hardly constitute a constitutionally fatal difference. In this respect, the Henrico ordinance involves no more of a burden on the dancer's free speech than the *Erie* requirement to wear some form of clothing in the first place. The dancer's erotic message still reaches its intended audience. The additional clothing just "makes the message slightly less graphic." *Barnes,* 501 U.S. at 571, 111 S.Ct. at 2463.

In other words, the pasties and G-string requirement should be understood as the "bare minimum necessary to achieve the state's purpose." *Barnes,* 501 U.S. at 572, 111 S.Ct. at 2463. It necessarily follows that this requirement does not represent "the maximum requirements of dress that an anti-nudity ordinance may impose." *Café 207 v. St. Johns County,* 856 F.Supp. 641, 645-46 (M.D.Fla.1994), *aff'd,* 66 F.3d 272 (11th Cir.1995); *see also Bright Lights v. City of Newport,* 830 F.Supp. 378, 383-84 (E.D.Ky.1993). Thus, by going slightly beyond the pasties and G-string requirement, the Henrico public nudity ordinance did not so prejudice the eroticism inherent in the dancer's expressive conduct as to run afoul of the First Amendment.

Moreover, in determining whether "particular conduct possesses sufficient communicative elements to bring the First Amendment into play," we should consider not only the messenger's intent but also whether "the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842 (1974)). Along these same lines, we do not accept appellants' unstated assumption that the more graphic the dancer's display of nudity the more erotic her message necessarily becomes. While that may be true at the extremes (like the contrast between a dancer in a snow skiing suit and one completely naked), it is not true at the margins (like the contrast between a dancer wearing almost nothing and one wearing slightly more than almost nothing).

Critical Thinking Question(s): Do you believe that a real objective difference exists between the two venues – theater and erotic dance club? Does the ordinance inhibit the "dancers" freedom of expression? If so, how? Is it appropriate to design a statute virtually aimed at the type of audience rather than the performers?

VII. Privacy

Section Introduction: Protection of privacy rights is also provided for, indirectly, in both the United States Constitution and the Virginia Constitution.. As in the case of free speech, this right of privacy is not all encompassing. Courts must use their discretion to determine what is and is not a violation of the constitutional right to privacy in individual cases like the one you will find in this section.

***Paris v. Commonwealth*, 35 Va.App. 377, 545 S.E.2d 557 (2001).**

Procedural History: Douglas A. Paris (appellant) was convicted of two counts of carnal knowledge. On appeal, he contends that Code § 18.2-361(A) violates Article 1, Section 1 of the Virginia Constitution and that the trial judge erred by refusing his proffered jury instruction on criminal intent.

Issue(s): Does the defendant's constitutional right to privacy extend to his engaging in oral sodomy with his 15-year-old nephew?

Facts: Appellant's fifteen-year-old nephew (J.P.) came to Virginia to spend a part of his summer vacation with appellant. J.P. testified that between July 12 and July 28, 1998, he drank beer given to him by his uncle until he passed out on the couch. When J.P. awoke, his uncle was touching J.P.'s genitals and placing J.P.'s penis in his mouth. J.P. described several additional times during the course of his vacation when appellant entered his bedroom and performed oral sodomy upon him. J.P. testified that it was non-consensual, but he did not report it because he was afraid of his parents' reaction and wanted to continue his vacation.

Appellant admitted that on at least two occasions, he performed oral sex on his nephew. However, he testified that he did so with the consent of J.P.

Counsel for appellant proffered a jury instruction that included as an element of the offense that appellant knew his nephew did not consent "to his penis being in the mouth of the defendant." The trial judge refused the jury instruction, stating it was an inaccurate statement of the law. Appellant was convicted of two counts of carnal knowledge under Code § 18.2-361(A).

Holding: *Affirmed.*

Opinion: FITZPATRICK, Chief Judge.

Appellant … contends Code § 18.2-361(A) violates Article 1, Section 1 of the Virginia Constitution because consensual acts of sodomy are protected thereunder. "Before considering these arguments, we note that generally, a litigant may challenge the constitutionality of a law only as it applies to him or her." *Coleman v. City of Richmond,* 5 Va.App. 459, 463, 364 S.E.2d 239, 241-42 (1988) (citing *Grosso v. Commonwealth,* 177 Va. 830, 839, 13 S.E.2d 285, 288 (1941)). "That the statute may apply unconstitutionally to another is irrelevant. One cannot raise third party rights." *Id.* at 463, 364 S.E.2d at 242. We therefore address appellant's argument only as it applies to his conduct in this case.

> Article 1, Section 1 of the Constitution of Virginia provides as follows:
>
> > That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

* * * * * * *

In drafting the 1971 Constitution, the Commission on Constitutional Revision was aware of proposals that all language not judicially enforceable be eliminated from the Bill of Rights. It recommended, however, that Mason's words be retained as a reminder of the Commonwealth's ideological heritage: "Section 1 has often been discussed in decisions of the Virginia Supreme Court of Appeals, but its language, strictly speaking, is more exhoratory than enforceable."A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 58-65 (1974).

Appellant argues that his acts of oral sodomy on his fifteen-year-old nephew are protected by "the enjoyment of life and liberty" and "the pursuing and obtaining happiness" clauses outlined above. Additionally, he contends that the protections afforded to him by Article 1, Section 1 are broader than those privacy rights set out in the United States Constitution. We disagree.

"Our courts have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution." *Bennefield v. Commonwealth,* 21 Va.App. 729, 739-40, 467 S.E.2d 306, 311 (1996). *See also Lowe v. Commonwealth,* 230 Va. 346, 348 n. 1, 337 S.E.2d 273, 275 n. 1 (1985) (explaining that protections under Virginia's Constitution and statutes are "substantially the same as those contained in the Fourth Amendment"); *O'Mara v. Commonwealth,* 33 Va.App. 525, 535 S.E.2d 175 (2000) (explaining that the protection of the right to free speech is co-extensive with federal constitutional

protection). Because the rights guaranteed by the Virginia Constitution and the United States Constitution are co-extensive, we use the same analysis.

When the constitutionality of a statute is questioned, "the burden is on the challenger to prove the alleged constitutional defect." *Woolfolk v. Commonwealth,* 18 Va.App. 840, 848, 447 S.E.2d 530, 534 (1994). "Every act of the legislature is presumed to be constitutional, and the Constitution is to be given a liberal construction so as to sustain the enactment in question, if practicable." *Moses v. Commonwealth,* 27 Va.App. 293, 298-99, 498 S.E.2d 451, 454 (1998) (quoting *Bosang v. Iron Belt Bldg. & Loan Ass'n,* 96 Va. 119, 123, 30 S.E. 440, 441 (1898)). "It has long been established that every presumption is to be made in favor of an act of the legislature, and it is not to be declared unconstitutional except where it is clearly and plainly so. Courts uphold acts of the legislature when their constitutionality is debatable, and the burden is upon the assailing party to prove the claimed invalidity." *Peery v. Virginia Bd. of Funeral Dir. and Embalmers,* 203 Va. 161, 165, 123 S.E.2d 94, 97 (1961).

The seminal Virginia case interpreting the right to "life, liberty and the pursuit of happiness" under both the United States and Virginia Constitutions is *Young v. Commonwealth,* 101 Va. 853, 45 S.E. 327 (1903).

The word "liberty" as used in the Constitution of the United States and the several states, has frequently been construed, and means more than mere freedom from restraint. It means not merely the right to go where one chooses, but to do such acts as he may judge best for his interest, *not inconsistent with the equal rights of others;* that is, to follow such pursuits as may be best adapted to his faculties, and which will give him the highest enjoyment. The liberty mentioned is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; *to be free to use them in all lawful ways;* to live and work where he will; to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned. These are individual rights, formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which begins with the fundamental proposition that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

Id. at 862-63, 45 S.E. at 328-29 (emphasis added). In a further analysis of the scope of Article 1, Section 1 protections, the Virginia Supreme Court stated:

> However, section 1, article I, of the Virginia Constitution is relied upon here as having been violated by the Virginia act [creation of the Milk Commission]. The challenged provisions of the Virginia and Federal Constitution are quite similar. Both guarantee to the citizen certain inherent rights, and, in our opinion, if the act violates the Federal Constitution it also will violate the Virginia Constitution. On the other hand, if it does not offend the Federal Constitution, then it will not offend the Virginia Constitution. *Reynolds v. Milk Comm.,* 163 Va. 957, 963, 179 S.E. 507, 509 (1935).

The United States and Virginia Constitutions provide for substantive due process which "protects those fundamental rights and liberties which are, objectively, deeply rooted in this [n]ation's

history and tradition, ... and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 2268 (1997) (citations and internal quotations omitted). In addressing due process concerns, the Court looks to the "[n]ation's history, legal traditions, and practices." *Id.* at 710, 117 S.Ct. at 2262.

In *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), the Supreme Court of the United States defined the types of interests that are protected under a due process analysis. They are rights without which "neither liberty nor justice would exist if [they] were sacrificed."*Id.* at 191-92, 106 S.Ct. at 2844. The Supreme Court has held that various privacy rights, such as marriage, use of contraceptives, abortion, and child-rearing, are fundamental rights protected by the Constitution. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (use of contraceptives); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (abortion); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (marriage); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (use of contraceptives by married persons); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (family relationships); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (right to educate children).

In the instant case, appellant seeks to extend the right to privacy as well as the right to "happiness" to cover an individual who engages in oral sodomy, consensual or not, with a minor who is also a relative. Such conduct was not contemplated by the drafters of Article 1, Section 1 of the Virginia Constitution.

In *Santillo v. Commonwealth*, 30 Va.App. 470, 517 S.E.2d 733 (1999), we held that sodomy does not fall into any constitutionally protected area when the conduct involved a minor. The facts in this case parallel those of *Santillo*, except that *Santillo* dealt with an adult godfather and a minor female godchild and the instant case involves an adult uncle and minor nephew. The facts, reviewed in the light most favorable to the Commonwealth, establish in both cases that the minor victim was dependent on the perpetrator, did not explicitly agree with the conduct, and trusted the perpetrator, who was closely involved with the victim's family. On these facts, we hold that appellant's actions in the instant case are not within the parameters of any constitutionally protected area. As in *Santillo*, the appellant has failed to establish that Code § 18.2-361(A) is unconstitutional as applied to him.

For the foregoing reasons, we affirm appellant's convictions.

Critical Thinking Question(s): Should the appellant be afforded the right to privacy if the minor, in fact, consented to his actions? Why have there been so many cases involving the issue of privacy, yet they deal with specific factual scenarios rather than providing a general analysis applicable as a concept in and of itself? Can you provide an all-encompassing definition of privacy which would avoid a case by case analysis?