

1.

Pam Protester spent the weekend protesting the involvement of the United States in overseas conflict. In her state capital, she marched with hundreds of other protesters, carrying a sign that said “End this fucking war.” Some, but not all, of the protesters were armed with handguns and rifles. At some point during the march, she amended the sign to add “Or we’ll come and get you.” After she returned home, two police officers arrived to present her with an indictment for violating a city ordinance banning “indecent and offensive language,” and for violating a state law that makes it a crime to “threaten others for political purposes.” Finding the door ajar, and hearing loud noises from within, the officers entered and observed Pam and her partner watching a pornographic film.

Pam was duly convicted of violating the city ordinance and state statute, and her sentence was enhanced by two months according to a separate state penal statute setting out additional penalties if the defendant threatened others for political reasons. Pam was also convicted under an obscure state law that makes it a crime to “possess obscene materials.” This morning, Pam engaged you as her attorney. She wants to appeal her convictions, and she asks:

- 1) Is the city ordinance prohibiting “indecent and offensive language” constitutional?
- 2) Is the state law making it a crime to threaten others for political reasons constitutional?
- 3) Is the state penal statute extending sentences for some crimes constitutional?
- 4) Is the state law prohibiting the possession of obscene materials constitutional?
- 5) Are there any other factors that will be important in Pam’s case?

2.

Gary Gunslinger participated in the same protest. He carried no sign, but did carry several weapons, including a crossbow that fires explosive bolts. Gary was immediately arrested and charged with violating a state law that forbids the carrying of crossbows without a showing of “proper cause,” and with violating another state law that prohibits the possession of explosive ammunition entirely. Your research reveals that permits for carrying crossbows are rarely granted. This afternoon, Gary hired you as his attorney. He is certain that his rights have been violated, and he asks:

- 1) Is the state law requiring a showing of “proper cause” to carry a crossbow constitutional?
- 2) Is the state law forbidding the possession of explosive ammunition constitutional?

**Commented [MD1]:** Cohen: “the expletive, while provocative, was not directed toward anyone; besides, there was no evidence that people in substantial numbers would be provoked into some kind of physical action by the words on his jacket.” Note that the ability to look away (or otherwise ignore the speech) is crucial for a finding that it is protected.

**Commented [MD2]:** Possible connection to Presser v. Illinois.

**Commented [MD3]:** Hess v. Indiana: speech protected if it advocates illegal action at an indefinite future time, not targeted at any particular group (and hence not fighting words).

**Commented [MD4]:** Virginia v. Black: state prohibitions on conduct engaged in with the intent to intimidate do not violate the first amendment, but provisions making the conduct prima facie evidence of intimidation do violate the first amendment, and are hence unconstitutional.

**Commented [MD5]:** Compare Lawrence v. Texas.

**Commented [MD6]:** Wisconsin v. Mitchell: a statute that increases penalties for selecting victims based on race does not violate the First Amendment as long as no chilling effect on others’ speech results.

**Commented [MD7]:** RAV: prohibitions on speech must be content-neutral to avoid viewpoint discrimination by the government.

**Commented [MD8]:** Stanley v. Georgia: “The Court held that the First and Fourteenth Amendments prohibited making private possession of obscene materials a crime.”

**Commented [MD9]:** US v. Miller: the second amendment protects only those weapons that could be used by a militia.

**Commented [MD10]:** McDonald: the second amendment and the right to self-defense that it protects are “fundamental to the Nation’s scheme of ordered liberty,” and “deeply rooted in this Nation’s history and tradition,” and thus applies to the states via the due process clause of the Fourteenth Amendment (not the P&I clause).

**Commented [MD11]:** Heller: bans on weapons “in common use at the time” violates the second amendment (but see O’Brien on the stun gun case).

**Commented [MD12]:** Bruen: state laws that require a special showing (“proper cause”) to get a permit to carry a concealed firearm violate the due process clause of the Fourteenth Amendment. No strict or means-ends scrutiny allowed.

**Commented [MD13]:** This is a hard question, because we didn’t specifically talk about ammunition. If we consider ...

**Commented [MD14]:** This is a factor in the Bruen test.

3.

A recent state law, passed in the wake of the Supreme Court's decision in *Dobbs v. Jackson*, prohibits abortions without any exceptions. The law also prohibits family planning services from discussing abortion with their clients, many of whom are married couples. Your clients, one such couple, are being prosecuted for obtaining an abortion illegally inside their own home (within the state's borders). They want to dispute the law's constitutionality. Because of recent changes to the composition of the Supreme Court, you think it might be possible to persuade the court to revisit the *stare decisis* analysis in *Dobbs*. Your clients ask you to:

- 1) Discuss the state law's constitutionality, given the *Dobbs* ruling.
- 2) Explain the court's *stare decisis* analysis in *Dobbs*, and suggest a different interpretation of the test that would lead the court to a result more favorable to your clients.

**Commented [MD15]:** Dobbs: the right to abortion is "neither deeply rooted in the nation's history nor an essential component of "ordered liberty."  
Maher: a state need not be neutral between abortion and natural childbirth, and may withhold Medicaid benefits for first-trimester abortions, though it may not ban them.  
Rational basis review.

**Commented [MD16]:** Students may note the balancing test in Roe. Remind them that Roe was overruled by Dobbs.

**Commented [MD17]:** Griswold: "A right to privacy can be inferred from several amendments in the Bill of Rights, and this right prevents states from making the use of contraception by married couples illegal." Note that Griswold was also about counseling married couples.

**Commented [MD18]:** Stanley v. Georgia and Lawrence v. Texas may apply.

Lawrence: "Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government...The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

**Commented [MD19]:** The standard for abandoning *stare decisis* is: The five factors that should be considered in deciding whether a precedent should be overruled support overruling Roe v. Wade and Planned Parenthood v. Casey: (1) they "short circuited the democratic process," (2) both lacked grounding in constitutional text, history, or precedent, (3) the tests they established were not "workable," (4) they caused distortion of law in other areas, and (5) overruling them would not upend concrete reliance interests.