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Acts of State, Acts of God

Sovereign Immunity of Foreign States
and Their Officials

Prisons, Punishments, and Rights

Constitutional Emergencies

Religious Accommodation and Equality

Blasphemy and Religious Hate Speech

Editor
Judith Resnik





Gruber Program for Global Justice and Women's Rights

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Twenty Years of Global Constitutionalism

This year's volume, *Acts of State, Acts of God*, marks twenty years of Yale's Global Constitutionalism Seminar. The five chapters both reflect the intense challenges of contemporary world events and continue discussions that have framed the Seminar over the decades.

We begin with *Sovereign Immunity of Foreign States and Their Officials* and the central questions of when and how courts ought to respond to claims of horrific wrongdoing going forth in the name of the state. Through materials compiled by Harold Hongju Koh and Rosalie Silberman Abella, Chapter I considers whether a consensus exists across jurisdictions about holding foreign sovereigns accountable in domestic courts as a matter of domestic or international law. As the authors explain, the absolute immunity of foreign sovereigns eroded during the twentieth century, first when sovereigns acted in a "commercial" capacity and thereafter in seeking sovereign responsibility for torts, torture, and other gross violations of human rights. Chapter I explores the impact of market forces, of self-interested actors, and of transnational human rights jurisprudence, pressing for shifts in customary international law to narrow state immunities so as to increase accountability. Debated are the respective roles of the executive branch and of legislatures in guiding judicial action on both liability and remedies.

Chapter II, *Prisons, Punishments, and Rights*, considers substantial changes in another area of law. During the last half century, constitutional courts have shaped a law of prisoners' rights by drawing on provisions at the national and transnational levels, enacted to protect individuals from torture and other cruel and degrading forms of treatment. As the materials edited by Judith Resnik, Brenda Hale, and Helen Keller explore, analyses of whether constitutions and international law limit the forms of punishment and the nature of prison conditions are continuous with inquiries into whether constitutions impose constraints on sentences. Throughout, the questions are why and when courts have a role to play in deciding the parameters and the forms that punishment takes. Examples run from whipping, solitary confinement, visitor bans, and placements in higher security settings to whole-life sentences and disenfranchisement. Some of the cases seek to overturn administrative judgments, while others challenge legislative directives. Repeatedly at issue are the burden of justification assigned to state actors, the scope of judicial review, and the range of appropriate remedies.

Chapter III, *Constitutional Emergencies*, continues the question about the role of courts through debates in four arenas—the environment, public health, the

economy, and citizenship. The materials excerpted by John Witt, Amy Kapczynski, Douglas Kysar, Patrick Weil, and András Sajó demonstrate that moments seen as emergencies regularly produce calls for the judiciary to step in, as well as arguments that judges should step aside and defer to the executive or to elected representatives. The templates range from litigation seeking courts to order action on climate change to efforts to protect individuals from quarantine, as well as from requests that courts review responses to economic dislocation and enjoin denaturalization as a sanction. Once again, questions of deference to other government actors and popular will and of remedies frame inquiries into the role that judges should play.

Religion is at the center of the concluding two chapters. In Chapter IV, *Religious Accommodation and Equality*, Reva Siegel, Douglas NeJaime and Manuel Cepeda-Espinosa take up the interaction of religious accommodation with equality claims. As the cases illustrate, when persons of faith seek exemptions from laws of general applicability, they base their claims on religiously motivated conduct. Accommodations of this kind are commonly understood to be part of religious liberty, but in some legal systems, judges view accommodation as necessary to protect the equality, as well as the liberty, of religious practitioners. It is easy to see how religious accommodation could promote equality in cases involving claimants of minority faiths. To illustrate, the Chapter examines religious accommodation challenges to laws regulating dress enforced against Muslim women from wearing the veil. But religious accommodation may also conflict with equality values, as the final section of the Chapter explores. This conflict is acute when religious claimants seek exemptions from laws that secure the equality of other members of the polity. When claimants seek religious exemptions from laws that prohibit race discrimination, recognize the rights of same-sex couples to marry, or ensure that women have equal access to health care, who is the minority and who is the majority? The Chapter explores whether judges should release religious claimants from legal duties to other members of the polity when accommodation would inflict material or dignitary harm on those who do not share the claimant's beliefs. A central question is under what conditions religious accommodation advances or inhibits pluralism.

In *Blasphemy and Religious Hate Speech*, Robert Post and Marta Cartabia consider the relationship of blasphemy to minority rights and to free expression. Chapter V examines blasphemy laws both in the context of "assimilationist" efforts to uphold an official state religion or the religious beliefs of a hegemonic group and in the "pluralist" mode respecting the equality of diverse religious groups within society. As the authors explain, by restricting defamation against religious groups, modern blasphemy law is analogous to group libel; by restricting conduct that stigmatizes or subordinates religious groups, blasphemy law is akin to antidiscrimination law as well as efforts to regulate hate speech. The excerpted

cases offer vivid examples of the roles that gender and sexuality play. The many epithets charged as being blasphemous—against different religions, in different social orders, and across the centuries—deploy descriptions of sexual identity and sexual acts to deride a particular religion. The Chapter explores how perceptions of the vulnerabilities of either the dominant religion or of minority groups as well as views on freedom of expression work to constrain or to license state responses to speech seen to be demeaning of the dignity of religion and of religious groups.

All five chapters continue the tradition, established twenty years ago, of Yale's Global Constitutionalism Seminar, which was first launched in 1996 under the leadership of Paul Gewirtz as its chair and Anthony Kronman as Dean. They worked with Bruce Ackerman, Owen Fiss, and other Yale faculty, along with a cluster of justices including Frank Iacobucci from Canada, Dieter Grimm from Germany, Aharon Barak from Israel, and Stephen Breyer from the United States, all of whom remain involved today.

The central questions, then and now, are about the role of judges in responding to constitutional conflicts that recur and that reach across borders. The method, then and now, is to work together through shared reading and discussion to understand diverse perspectives and contextualized responses. The result has been an impressive body of Seminar materials; a host of books, articles, and decisions informed by the exchanges; and bonds of friendships formed in responding to shared challenges.

When working on this year's volume, we reviewed its predecessors and learned that several of the 2016 topics echo subjects of prior Global Seminar volumes. The Seminar launched in 1996 with discussions of freedom of expression in the context of hate speech, defamation, and the media, as well as with questions of judicial review, judicial decision-making, and what was seen to be courts' countermajoritarian aspects. The Seminar also considered the practices of writing decisions, the role of dissents, and the rhetoric of opinions—topics to which we have returned in 2016 by way of a survey from Jon Newman, who has asked participants to explain their jurisdictions' methods of drafting judgments.

Reflection on the first few years shows patterns that have emerged. In 1997, accommodation for religion was in focus along with questions of separation of powers, and these issues are central to the 2016 volume. By 1998, rights became a centerpiece, as chapters addressed affirmative action, equality, sexual harassment, and sexual orientation. In 1999, the topics were abortion, the right to die, cloning, public benefits, and language rights. Extraterritoriality, which became another leitmotif, was also in focus in 1998 and many times thereafter, as we puzzled about the roles of international law, comparative law, constitutional pluralism, and federations. Criminal procedure came to the fore in 2000, when the

volume addressed defendants' rights to silence and to confrontation, as well as the impact of the media on criminal trials. That year also introduced the subject of democratic politics and the judiciary, with campaign finance as its concern, along with questions of judicial independence. The year 2001 brought law's relationship to terrorism to the table, along with questions of national security, technology, and privacy.

An account of the richness of the materials and the exchange cannot, however, only be celebratory. Two decades ago, prospects for constitutional courts and for collaborative work were not yet shadowed by frequent terrorist attacks, by economic collapses, and by the erosion of judicial independence in several jurisdictions. A sense of "emergency" has become pervasive, as well as an awareness of the fragility of institutions committed to democratic constitutionalism. Yet the hope that law is a source of stability and strength remains powerful. Hence, we meet in September of 2016 to renew efforts to understand what work law can do in mediating and mitigating some of the miseries faced by so many people around the world.

* * *

Before turning to the readings, reminders about the materials are in order, as are acknowledgments of the many people who make this work possible. As is our custom, cases and commentaries have been relentlessly pruned. Paragraphs in many excerpted opinions and articles have been combined to make for easier reading. Most footnotes and citations have been omitted. When footnotes are retained, we use their original numbers. For accessibility across jurisdictions, we add relevant excerpts of constitutional texts in footnotes, marked by asterisks that, along with square brackets, indicate our editorial additions. This book will also be published as the fifth volume in a series of Global Constitutional Seminars E-Books providing the readings from 2012 through 2016.

Because this is the twentieth year, this is the occasion on which to thank not only the current participants but also those who built the program. As noted, the Seminar was inaugurated by Paul Gewirtz and Anthony Kronman, joined by Bruce Ackerman, Akhil Amar, Robert Burt, Drew Days, Owen Fiss, Paul Kahn, Harold Hongju Koh, John Langbein, and Jed Rubenfeld. After joining the law faculty in 2003, Robert Post chaired the Seminar, followed by Bruce Ackerman and Jed Rubenfeld, who co-chaired the project through 2011. Their work, like that of this volume, was informed by a cohort of jurists, suggesting cases, providing commentary, and shaping the discussions.

Thanks for this year's volume are also in order. The readings for each topic were selected and edited by chapter authors, who patiently reviewed dozens

of editorial suggestions. As in the past, we are especially grateful for the help provided by many Seminar participants; the readings are rich because of the materials sent to us from many jurisdictions. Yale Law Librarian Michael VanderHeijden identified and gathered sources that would otherwise have been unavailable. Jason Eiseman, Yale Law School's Librarian for Emerging Technologies, provided guidance on how to turn the Seminar's volumes into E-Books, which we have done under the tutelage of our colleague Jack Balkin, in connection with the Information Society Project that he chairs, and with the support of The Oscar M. Ruebhausen Fund at Yale Law School.

The contributions of our students cannot be understated. But for their work, the volume would not exist. The commitment and the insights of David Louk, who graduated in 2015 and yet continues to serve as one of two Co-Executive and Co-Managing Editors, merit special mention; he has been remarkable in mixing research, editing, and analyses, and then devoting nights and weekends to superintending the accuracy and accessibility of all the chapters. David was joined in all of those activities by Eric Chung, class of 2017, who also serves as Co-Executive and Co-Managing Editor. Eric took on an extraordinary array of responsibilities, and he was tireless in his careful attention to all facets of the volume, from substantive research to editorial consistency. Eric assumed major responsibility for administration tasks, including coordinating the work of other student editors, securing permissions for the reprinting of excerpted materials, and helping to make this volume (as well as the 2012-2015 volumes) into the E-Books that all of the readings will become. Thanks are also due to an impressive group of Yale Law students—returning Senior Editors, Tal Eisenzweig, Rhea Fernandes, and April Hu, joined by new Editors, Erin Biel, Matt Butler, Kyle Edwards, Sergio Giuliano, and Beatrice Walton. They worked across time zones and continents to bring this volume to completion.

A special note is required for Renee DeMatteo, Yale Law School's talented Senior Conference and Events Services Manager; participants know her well for her advice, attention, and kindness. Renee ensures that this book is circulated in time to read and that the travelers make their way to New Haven. Other Yale staff, including Bonnie Posick and Kelly Mangs-Hernandez, lent able support. Once again, Bonnie Posick demonstrated her expertise as a proofreader and editor. We are also lucky to have the thoughtful engagement of Sara Lulo, who had served as Director of Yale Law School's International Programs and the Gruber Program for Global Justice and Women's Rights, and to welcome Mindy Jane Roseman who has since assumed that role.

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Judith Resnik
Chair, Global Constitutionalism Seminar
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November, 2016

SOVEREIGN IMMUNITY OF FOREIGN STATES
AND THEIR OFFICIALS

DISCUSSION LEADERS

HAROLD HONGJU KOH AND ROSALIE SILBERMAN ABELLA

I. SOVEREIGN IMMUNITY OF FOREIGN STATES AND THEIR OFFICIALS

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SUING SOVEREIGNS: DOCTRINES OF IMMUNITIES AND LIABILITY

How much consensus is there among states regarding the activities to which foreign sovereign immunity applies, as a matter of domestic and international law?

This Chapter addresses foreign sovereign immunity, by which we mean the immunity of sovereign states sued in courts other than their own. The Chapter first maps shifts in approaches common to the courts of states ruling on “commercial” and “non-commercial” torts. We then turn to three issues: (1) whether foreign sovereign officials can be sued for gross violations of human rights; (2) when acts of foreign officials are treated as acts of the state itself, rather than private acts; and (3) which branch of government should ultimately decide these complex questions of immunity and liability.

* * *

Before the twentieth century, most states adopted the doctrine of “absolute foreign sovereign immunity”: the principle that a foreign sovereign was absolutely immune from civil suit in another state’s courts. *See, e.g., The Schooner Exchange v. M’Faddon*, 11 U.S. 116 (1812). But over time, that absolutism eroded.

In 1952, Acting Legal Adviser of the United States’ Department of State Jack Tate* sent a famous letter to the Acting Attorney General that became known as the “Tate Letter.” Reflecting trends around the world, the Tate Letter announced in the United States what is known as the “restrictive theory” of sovereign immunity, which extended immunity to a foreign state for its public, but not for its commercial, acts. Tate pointed out that the “widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.”

The Tate Letter confirmed a tectonic shift in immunity theory by recognizing that the commercial revolution around the world had caused virtually every foreign state to enter the global marketplace. The Tate Letter reflected three trends: (1) *evolution of customary international law*: that this commercial revolution had triggered a concomitant shift away from the unyielding doctrine of

* Associate Dean, Yale Law School (1954-1968).

absolute foreign sovereign immunity toward a more nuanced doctrine of restrictive foreign sovereign immunity; (2) *reciprocal self-interest*: that the shift to restrictive immunity reflected the policy that a state should permit suit in its own courts only to the extent that it could be sued in other states' courts; and (3) *executive suggestion*: that such determinations were best made by the Executive Branch of the national government.

Over time, the rules of foreign sovereign immunity were codified in statutes around the world. Examples are excerpted below. An ambitious effort to adopt a global convention on the topic resulted in a text, also excerpted, that has so far attracted only twenty-one state parties. One continuing point of dispute concerns the scope of foreign sovereign immunity for commercial and non-commercial torts that take place abroad but have effects within a state's territory.

Treaties and Statutes

United Nations Convention on the Jurisdictional Immunities of States and Their Property

United Nations General Assembly

(adopted December 2, 2004, not yet entered into force)

. . . Article 3

Privileges and immunities not affected by the present Convention

1. The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of: (a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and (b) persons connected with them.

2. The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.

3. The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State. . . .

Article 12

Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission. . . .

* * *

State Immunity Act 1985

Canada

An Act to provide for state immunity in Canadian courts . . .

2. In this Act, . . . foreign state includes (a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity, (b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and (c) any political subdivision of the foreign state. . . .

3.1. Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

Court to give effect to immunity

3.2. In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state . . . notwithstanding that the state has failed to take any step in the proceedings.

Immunity waived

4.1. A foreign state is not immune from the jurisdiction of a court if the state waives the immunity conferred by subsection 3.1 by submitting to the jurisdiction of the court

State submits to jurisdiction

4.2. In any proceedings before a court, a foreign state submits to the jurisdiction of the court where it (a) explicitly submits to the jurisdiction of the court by written agreement or otherwise either before or after the proceedings commence; (b) initiates the proceedings in the court; or (c) intervenes or takes any step in the proceedings before the court.

Exception

4.3. Paragraph 4.2(c) does not apply to (a) any intervention or step taken by a foreign state in proceedings before a court for the purpose of claiming immunity from the jurisdiction of the court; or (b) any step taken by a foreign state in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained before the step was taken and immunity is claimed as soon as reasonably practicable after they are ascertained.

Third party proceedings and counter-claims

4.4. A foreign state that initiates proceedings in a court or that intervenes or takes any step in proceedings before a court, other than an intervention or step to which paragraph 4.2(c) does not apply, submits to the jurisdiction of the court in respect of any third party proceedings that arise, or counter-claim that arises, out of the subject-matter of the proceedings initiated by the state or in which the state has so intervened or taken a step.

Appeal and review

4.5. Where, in any proceedings before a court, a foreign state submits to the jurisdiction of the court in accordance with subsection 4.2 or 4.4, that submission is deemed to be a submission by the state to the jurisdiction of such one or more courts by which those proceedings may, in whole or in part, subsequently be considered on appeal or in the exercise of supervisory jurisdiction.

Commercial Activity

5. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

Death and property damage

6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to (a) any death or personal or bodily injury, or (b) any damage to or loss of property that occurs in Canada.

Support of terrorism

6.1.1. A foreign state that is set out on the list referred to in subsection (2) is not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985.

List of foreign states

6.1.2. The Governor in Council may, by order, establish a list on which the Governor in Council may, at any time, set out the name of a foreign state if, on the recommendation of the Minister of Foreign Affairs made after consulting with the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that the foreign state supported or supports terrorism.

Establishment of list

6.1.3. The list must be established no later than six months after the day on which this section comes into force.

Application to be removed from list

6.1.4. On application in writing by a foreign state, the Minister of Foreign Affairs must, after consulting with the Minister of Public Safety and Emergency Preparedness, decide whether there are reasonable grounds to recommend to the Governor in Council that the applicant no longer be set out on the list. . . .

Review of list

6.1.7. Two years after the establishment of the list, and every two years after that, the Minister of Foreign Affairs must (a) review the list in consultation with the Minister of Public Safety and Emergency Preparedness to determine whether there are still reasonable grounds, as set out in subsection (2), for a foreign state to be set out on the list and make a recommendation to the Governor in Council as to whether the foreign state should remain set out on the list; and (b) review the list in consultation with the Minister of Public Safety and Emergency Preparedness to determine whether there are reasonable grounds, as set out in subsection (2), for a foreign state that is not set out on the list to be set out on the list and make a recommendation to the Governor in Council as to whether the foreign state should be set out on the list. . . .

Terrorist activity

11. Where a court of competent jurisdiction has determined that a foreign state, set out on the list in subsection (2), has supported terrorism, that foreign state is also not immune from the jurisdiction of a court in proceedings against it that relate to terrorist activity by the state. . . .

The Foreign Sovereign Immunities Act of 1976*
United States

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to— . . .

* Public Law Number 94-583 (November 16, 1988), codified at 28 U.S.C. § 1605.

any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or . . .

any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section . . . , or (D) paragraph (1) of this subsection is otherwise applicable. . . .

* * *

State Immunity Act 1978

United Kingdom

1. General immunity from jurisdiction. . . .

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question. . . .

2. Submission to jurisdiction.

(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.

(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is

to be governed by the law of the United Kingdom is not to be regarded as a submission.

(3) A State is deemed to have submitted—(a) if it has instituted the proceedings; or (b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.

(4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of—(a) claiming immunity; or (b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

(5) Subsection (3)(b) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

(6) A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim.

(7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.

3. Commercial transactions and contracts to be performed in United Kingdom.

(1) A State is not immune as respects proceedings relating to—(a) a commercial transaction entered into by the State; or (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

(2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1)(b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

(3) In this section “commercial transaction” means—(a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of

any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.

4. Contracts of employment.

(1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.

(2) Subject to subsections (3) and (4) below, this section does not apply if—(a) at the time when the proceedings are brought the individual is a national of the State concerned; or (b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or (c) the parties to the contract have otherwise agreed in writing.

(3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, subsection (2)(a) and (b) above do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State. . . .

6. Ownership, possession and use of property. . . .

(4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property—(a) which is in the possession or control of a State; or (b) in which a State claims an interest, if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph (b) above, if the claim is neither admitted nor supported by prima facie evidence. . . .

* * *

Foreign States Immunities Act 87 of 1981
South Africa

. . . 4. Commercial transactions.

(1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to—(a) a commercial transaction entered into by the foreign state; or (b) an obligation of the foreign state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the Republic.

(2) Subsection (1) shall not apply if the parties to the dispute are foreign states or have agreed in writing that the dispute shall be justiciable by the courts of a foreign state.

(3) In subsection (1) “commercial transaction” means—(a) any contract for the supply of services or goods; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation; and (c) any other transaction or activity or a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority, but does not include a contract of employment between a foreign state and an individual.

5. Contracts of employment

(1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to a contract of employment between the foreign state and an individual if—(a) the contract was entered into in the Republic or the work is to be performed wholly or partly in the Republic; and (b) at the time when the contract was entered into the individual was a South African citizen or was ordinarily resident in the Republic; and (c) at the time when the proceedings are brought the individual is not a citizen of the foreign state.

(2) Subsection (1) shall not apply if—(a) the parties to the contract have agreed in writing that the dispute or any dispute relating to the contract shall be justiciable by the courts of a foreign state; or (b) the proceedings relate to the employment of the head of a diplomatic mission or any member of the diplomatic mission or any member of the diplomatic, administrative, technical or service staff of the mission or to the employment of the head of a consular post or any member of the consular, labour, trade, administrative, technical or service staff of the post.

6. Personal injuries and damage to property

A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to—(a) the death or injury of any person; or (b) damage to or loss of tangible property, caused by an act or omission in the Republic.

7. Ownership, possession and use of property

(1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to—(a) any interest of the foreign state in, or its possession or use of, immovable property in the Republic; (b) any obligation

of the foreign state arising out of its interest in, or its possession or use of, such property; or (c) any interest of the foreign state in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia*.

(2) Subsection (1) shall not apply to proceedings relating to a foreign state's title to, or its use or possession of, property used for a diplomatic mission or a consular post. . . .

Nature of the Conduct: Liability for Commercial Activity

Kuwait Airways Corp. v. Republic of Iraq Supreme Court of Canada 2010 SCC 40

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

LeBel J.— . . .

1. . . . The appeal before this Court concerns an application for recognition of a judgment in which a United Kingdom court ordered the Republic of Iraq (“Iraq”) to pay the equivalent of [Can]\$84,000,000 to the appellant, Kuwait Airways Corporation (“KAC”). The Quebec Superior Court and the Quebec Court of Appeal dismissed the application on the basis of the immunity from jurisdiction granted to foreign states in the *State Immunity Act*, R.S.C. 1985, c. S-18 (“*SLA*”), for their sovereign acts. For the reasons that follow, I find that the immunity did not apply in the circumstances of the case at bar. I would therefore set aside the judgments of the Court of Appeal and the Superior Court, and would remand the case to the court of first instance to hear the application for recognition. . . .

2. At the time of the invasion and occupation of Kuwait [in 1990], the Iraqi government ordered its national airline, the Iraqi Airways Company (“IAC”), to appropriate the appellant’s aircraft, equipment and parts inventory. After the war, KAC recovered only some of its aircraft. The remainder of its equipment had been destroyed or had disappeared. KAC brought an action against IAC in the United Kingdom for damages in respect of losses sustained as a result of the appropriation of its property following the invasion. The United Kingdom courts agreed to hear the matter. After lengthy and difficult proceedings, . . . the

courts accepted KAC's position that IAC was not entitled to state immunity under the legislation of the United Kingdom, and ordered IAC to pay amounts totalling over one billion Canadian dollars to KAC. In accordance with English civil procedure, KAC applied and was granted leave to have the Republic of Iraq joined as a second defendant in order to claim from it the costs of the actions that had been brought in the United Kingdom, which totalled approximately \$84 million in Canadian currency. . . . [The High Court of Justice] granted the application and ordered Iraq to pay the amount claimed by KAC. . . . According to [the judge], Iraq controlled, funded and supervised IAC's defence throughout the proceedings against IAC. The proceedings were marked by perjury and by tactics on the part of IAC and Iraq that were intended to deceive the British courts. [The judge] held that Iraq's acts in controlling IAC's defence were not sovereign acts, but instead fell within the commercial exception to the principle of state immunity under the *State Immunity Act* 1978. . . .

33. For the purposes of this appeal, . . . the first step is to review the nature of the acts in issue in KAC's action against Iraq in the English courts in their full context, which includes the purpose of the acts. It is not enough to determine whether those acts were authorized or desired by Iraq, or whether they were performed to preserve certain public interests of that state. The nature of the acts must be examined carefully to ensure a proper legal characterization. . . .

34. . . . According to [the High Court of Justice's findings], . . . [Iraq] was responsible for numerous acts of forgery, concealing evidence and lies. These acts misled the English courts

35. . . . [Furthermore], the subject of the litigation was the seizure of the aircraft by Iraq. The original appropriation of the aircraft was a sovereign act, but the subsequent retention and use of the aircraft by IAC were commercial acts. The English litigation, in which the respondent intervened to defend IAC, concerned the retention of the aircraft. There was no connection between that commercial litigation and the initial sovereign act of seizing the aircraft. As a result, Iraq could not rely on the state immunity provided for in s. 3 of the *SIA*. The respondent's exception to dismiss the application for recognition should have been dismissed. . . .

Oleynikov v. Russia
European Court of Human Rights (First Section)
[2013] ECHR 225

. . . The European Court of Human Rights (First Section), sitting as a Chamber composed of: Isabelle Berro-Lefèvre, President, Mirjana Lazarova Trajkovska, Julia Laffranque, Linos-Alexandre Sicilianos, Erik Møse, Ksenija Turković, Dmitry Dedov, judges, and Søren Nielsen, Section Registrar. . . .

[The applicant originally sued in the Khabarovsk Industrialniy District Court against the Khabarovsk Office of the Trade Counsellor of the Embassy of the Democratic People’s Republic of Korea (DPRK) seeking repayment of a \$1,500 loan. The district court dismissed the case on the grounds that the North Korean Trade Counsellor was an organ of the North Korean state and therefore immune from suit. The regional appellate court affirmed.] . . .

57. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1.* As the right of access to court is an inherent part of the fair trial guarantee in that Article, some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the rule of State immunity. . . .

59. Therefore, in cases where the application of the rule of State immunity from jurisdiction restricts the exercise of the right of access to court, the Court must ascertain whether the circumstances of the case justified such a restriction.

60. . . . [S]uch a limitation must pursue a legitimate aim and that State immunity was developed in international law out of the principle *par in parem non habet imperium*, by virtue of which one State could not be subject to the jurisdiction of another. It has taken the view that the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international

* Article 6 § 1 of the European Convention on Human Rights provides: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

law to promote comity and good relations between States through the respect of another State's sovereignty. . . .

61. In addition, the impugned restriction must also be proportionate to the aim pursued. . . . [T]he application of absolute State immunity has, for many years, clearly been eroded, in particular with the adoption of the Convention on Jurisdictional Immunities of States and their Property by the United Nations General Assembly in 2004. This convention is based on Draft Articles adopted in 1991, of which Article 10 concerned commercial transactions and endorsed the principle of restrictive immunity, having provided that a State cannot rely upon immunity from jurisdiction if it engages in a commercial transaction with a foreign natural or juridical person. . . .

70. The domestic courts did not undertake any analysis of the nature of the transaction underlying the claim. They thus made no effort to establish whether the claim related to acts of the DPRK performed in the exercise of its sovereign authority or as a party to a transaction of a private law nature. . . .

71. Thus, the domestic courts refused to examine the applicant's claim, having applied absolute State immunity from jurisdiction without any analysis of the underlying transaction, the applicable provisions of the Annex to the Treaty on Trade and Navigation between the USSR and the DPRK of 22 June 1960 and the applicable principles of customary international law, which under Article 15 (4) of the Constitution form an integral part of the Russian legal system.

72. The Court therefore concludes that by rejecting the applicant's claim without examination of the essence of the dispute and without giving relevant and sufficient reasons, and notwithstanding the applicable provisions of international law, the Russian courts failed to preserve a reasonable relationship of proportionality. They thus impaired the very essence of the applicant's right of access to court.

73. Accordingly, there has been a violation of Article 6 § 1 of the Convention. . . .

Government of the Republic of Zimbabwe v. Fick
Constitutional Court of South Africa
[2013] ZACC 22

MOGOENG CJ (Moseneke DCJ, Froneman J, Khampepe J, Mhlantla AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J and (Zondo J except [44] to [46]) concurring): . . .

1. For the right or wrong reasons, or a combination of both, Africa has come to be known particularly by the western world as the dark continent, a continent which has little regard for human rights, the rule of law and good governance. Apparently driven by a strong desire to contribute positively to the renaissance of Africa, shed its southern region of this development-inhibiting negative image, coordinate and give impetus to regional development, Southern African States [ratified] the Southern African Development Community (SADC) [Treaty] with special emphasis on, among other things, the need to respect, protect and promote human rights, democracy and the rule of law.

2. . . . [A] regional Tribunal (Tribunal) was created to entertain, among other issues, human rights related complaints particularly by citizens against their States. It is to this Tribunal that the respondent farmers (farmers) brought their land dispossession dispute with the applicant, the Government of the Republic of Zimbabwe (Zimbabwe), for determination. They did so because their farms were expropriated by Zimbabwe . . . , which denied them compensation for their land and access to court.

3. The Tribunal decided in favour of the farmers. When Zimbabwe refused to comply with the decision, the aggrieved farmers again approached the Tribunal for further relief. The Tribunal referred the matter to the Summit for appropriate action to be taken and granted a costs order against Zimbabwe (costs order). Dissatisfied with a disregard for even this order, the farmers applied successfully to the North Gauteng High Court, Pretoria (High Court) for the registration and enforcement of the costs order, to facilitate execution against Zimbabwe's property in South Africa. . . .

32. Zimbabwe ordinarily enjoys immunity against civil suits in South Africa in terms of section 2 of the Immunities Act. Section 2(1) provides that "[a] foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder." Section 3(1) of the Immunities Act, however, provides that immunity shall be forfeited in proceedings in respect of which the State expressly waived its immunity.

33. Zimbabwe contends that none of the exceptions to sovereign immunity applies to it in this matter. This cannot be correct. Article 32 of the [Protocol on Tribunal in the Southern African Development Community] imposes an obligation on Member States to take all steps necessary to facilitate the enforcement of judgments and orders of the Tribunal. It also makes these decisions binding and enforceable “within the territories of the States concerned.” . . .

34. Subject to compliance with the law on the enforcement of foreign judgments in force in South Africa, Zimbabwe is duty-bound to act in accordance with the provisions of article 32. That obligation stems from its ratification of the Treaty and the adoption of the Amending Agreement. For the sake of completeness, the Tribunal Protocol is, in terms of the Amending Agreement, to be treated as part of the original Treaty.

35. In sum, Zimbabwe’s agreement to be bound by the Tribunal Protocol, including article 32, constitutes an express waiver in terms of section 3(1) of the Immunities Act. It is a waiver by Zimbabwe of its right to rely on its sovereign immunity from the jurisdiction of South African courts to register and enforce decisions of the Tribunal made against it. . . .

39. . . . The questions that remain are whether: (a) the Tribunal had jurisdiction; (b) the costs order constitutes a “foreign judgment” that can be enforced in terms of our common law; and if not, (c) the common law needs to be developed. . . .

54. The development of the common law revolves around the resolution of the question whether the concept of “foreign judgment or order” ought also to apply to a judgment of the Tribunal. What would help us to solve this issue is the answer to the question, “what was the mischief sought to be addressed by developing the common law to empower our domestic courts to enforce or facilitate the execution of orders made outside the borders of our country?” It appears to me that that development was driven by the need to ensure that lawful judgments are not to be evaded with impunity by any State or person in the global village. . . .

56. Other reasons are: (i) the principle of comity, which requires that a State should generally defer to the interests of foreign States, with due regard to the interests of its own citizens and the interests of foreigners under its jurisdiction, in order to foster international cooperation and (ii) the principle of reciprocity, the import of which is that courts of a particular country should enforce judgments of foreign courts in the expectation that foreign courts would reciprocate.

57. Another important factor is that certain provisions of the Constitution facilitate the alignment of our law with foreign and international law. This promotes comity, reciprocity and the orderly conduct of international trade, which is central to the enforcement of decisions of foreign courts. . . .

59. Article 32 imposes a duty upon Member States, including South Africa, to take all execution-facilitating measures, such as the development of the common law principles on the enforcement of foreign judgments, to “ensure execution of decisions of the Tribunal.” . . .

60. The rule of law is a foundational value of our Constitution and an integral part of the Amended Treaty. And it is settled law that the rule of law embraces the fundamental right of access to courts in section 34 of the Constitution which provides:

Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

61. The right to an effective remedy or execution of a court order is recognised as a crucial component of the right of access to courts. . . .

The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order.

62. . . . [S]ection 34 of the Constitution must be interpreted generously to grant successful litigants access to our courts for the enforcement of orders, particularly those stemming from human rights or rule of law violations provided for in treaties that bind South Africa. In this matter, this would be achieved by construing . . . “foreign courts” to include the Tribunal. . . .

66. When courts are required to develop the common law or promote access to courts, they must remember that their “obligation to consider international law when interpreting the Bill of Rights is of pivotal importance.” This is an obligation imposed on them by . . . the Constitution. Measures to be taken by this Court in fulfilling its obligations . . . in relation to this matter, are to

be informed by international law, . . . which obliges South Africa to facilitate the enforcement of decisions of the Tribunal. . . .

68. Not only must the relevant provisions of the Treaty be taken into account as we develop the common law, but so must the spirit, purport and objects of the Bill of Rights be promoted. A construction of the Amended Treaty as well as the right of access to courts, with due regard to the constitutional values of the rule of law, human rights, accountability, responsiveness and openness, enjoins our courts to be inclined to recognise the right of access to our courts to register and enforce the Tribunal’s decision. This will, as indicated above, be achieved by extending the meaning of “foreign court” to the Tribunal. The need to do so is even more pronounced since Zimbabwe, against which an order sanctioned by the Treaty was made by the Tribunal, does, in terms of its Constitution, deny the aggrieved farmers access to domestic courts and compensation for expropriated land. Of importance also is the fact that a further resort to the Tribunal was necessitated by Zimbabwe’s refusal to comply with the decision of the Tribunal. . . .

70. We thus conclude . . . that the right of access to South African courts is applicable to the farmers as well. To this end, the concept of a “foreign court” will henceforth include the Tribunal. . . .

71. When the farmers’ rights to property, their human rights in general and the right of access to courts in particular were violated, Zimbabwe was . . . obliged to cooperate with the Tribunal in the adjudication of the dispute . . . [and] to assist in the execution of that judgment and so is South Africa.

[Justice Zondo concurred in the relevant parts of the judgment. Justice Jafta wrote separately to “agree that the matter raises constitutional issues but [to] disagree that it is in the interests of justice to grant leave.” In his opinion, the “application must be dismissed on the basis that it is not in the interests of justice to grant leave in the present circumstances.”]

Location of the Conduct: Liability for Territorial Non-commercial “Torts” that Cause Personal Injury or Death

In addition to the commercial activity exception, some states have come to recognize an exception to sovereign immunity for “territorial torts”—non-commercial torts committed on home territory by foreign states. This exception

typically applies when foreign states or their agencies or instrumentalities have caused injuries or destruction to locally located persons or physical property.

Letelier v. Republic of Chile

United States District Court for the District of Columbia
488 F. Supp. 665 (D.D.C. 1980)

JOYCE HENS GREEN, District Judge.

Presently before the Court is the question of its subject matter jurisdiction to entertain this action against defendant Republic of Chile. Despite the previous entry of a default against that foreign state that plaintiffs argue precludes further judicial scrutiny of this issue, the Court . . . is persuaded that the jurisdictional question must now be given careful consideration, and, having examined the relevant congressional enactment, the Foreign Sovereign Immunities Act of 1976 [(FSIA)], is convinced that such jurisdiction does indeed exist, entitling plaintiffs to proceed to seek a judgment against the Chilean Republic.

Filed in August 1978 by . . . the widow, sons, and personal representative of Orlando Letelier, as well as by . . . the widower-personal representative and parents of Ronni Karpen Moffitt, the complaint herein, as amended, seeks recompense for tortious injuries connected with the deaths of both former Chilean ambassador and foreign minister Orlando Letelier and Ronni Moffitt in the District of Columbia on September 21, 1976, when Letelier's car, in which they were riding to work with Michael Moffitt, was destroyed by an explosive device. Plaintiffs allege that the bomb was constructed, planted, and detonated by [defendants purportedly acting in concert and at the direction of the Republic of Chile and its intelligence agency]

[As articulated in the Tate Letter, the key issue is whether acts of a] friendly foreign state were of a public or sovereign nature (*jure imperii*) rather than being simply private or commercial (*jure gestionis*).

The distinction between a state's public actions and its private or commercial activities was found to be one that often was easier to proclaim than to apply. The determination of the executive about what constituted a public, as opposed to a private or commercial act, frequently was subject to diplomatic rather than strictly legal considerations, thereby resulting in suggestions of immunity that were not in conformity with the policy articulated in the Tate letter. Moreover, even in those instances when executive suggestions were not involved, there was a lack of uniform judicial interpretation.

It is against this background that the Congress considered and enacted the Foreign Sovereign Immunities Act of 1976. . . . As is made clear both in the Act and in its legislative history, one of its principal purposes was to reduce the foreign policy implications of sovereign immunity determinations and assure litigants that such crucial decisions are made on purely legal grounds, an aim that was to be accomplished by transferring responsibility for such a decision from the executive branch to the judiciary. In addition, the Act itself is designed to codify the restrictive principle of sovereign immunity that makes a foreign state amenable to suit for the consequences of its commercial or private, as opposed to public acts. . . .

In the instant action, relying on section 1605(a)(5) as their basis for combatting any assertion of sovereign immunity, plaintiffs have set forth several tortious causes of action arising under international law, the common law, the Constitution, and legislative enactments, all of which are alleged to spring from the deaths of Orlando Letelier and Ronni Moffitt. The Republic of Chile, while vigorously contending that it was in no way involved in the events that resulted in the two deaths, further asserts that, even if it were, the Court has no subject matter jurisdiction in that it is entitled to immunity under the Act, which does not cover political assassinations because of their public, governmental character.

As supportive of its conclusion that political, tortious acts of a government are to be excluded, the Republic of Chile makes reference to the reports of the House and the Senate Judiciary Committees with regard to the Act, in which it was stated:

Section 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages. . . .

Although the unambiguous language of the Act makes inquiry almost unnecessary, further examination reveals nothing in its legislative history that contradicts or qualifies its plain meaning. The relative frequency of automobile accidents and their potentially grave financial impact may have placed that problem foremost in the minds of Congress, but the applicability of the Act was not so limited, for the committees made it quite clear that the Act “is cast *in general terms* as applying to *all tort actions* for money damages” so as to provide recompense for “the victim of a traffic accident or *other noncommercial tort.*” Further, any notion that the Congress wished the courts to go outside the scheme promulgated by legislative action to determine the extent to which the defense of sovereign immunity could be invoked is foreclosed by the committee reports that not only state that “[t]his bill . . . sets forth the *sole and exclusive* standard to be

used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States,” but also provide that the burden of proof shall be upon the foreign state to present evidence “that the plaintiff’s claim relates to a *public act* of the foreign state that is, *an act not within the exceptions in section 1605-1607.*” Thus, it is apparent that the terms of section 1605(a)(5) set the sole standard under which any claim of sovereign immunity must be examined.

Examining then the specific terms of section 1605(a)(5), despite the Chilean failure to have addressed the issue, the Court is called upon to consider whether either of the exceptions to liability for tortious acts found in section 1605(a)(5) applies in this instance. It is readily apparent, however, that the claims herein did not arise “out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights,” and therefore only the exemption for claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused,” can be applicable. . . .

While it seems apparent that a decision calculated to result in injury or death to a particular individual or individuals, made for whatever reason, would be one most assuredly involving policy judgment and decision and thus exempt as a discretionary act under section 1605(a)(5)(A), that exception is not applicable to bar this suit. . . . [T]here is no discretion to commit, or to have one’s officers or agents commit, an illegal act. Whatever policy options may exist for a foreign country, it has no “discretion” to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law. Accordingly there would be no “discretion” within the meaning of section 1605(a)(5)(A) to order or to aid in an assassination and were it to be demonstrated that a foreign state has undertaken any such act in this country, that foreign state could not be accorded sovereign immunity under subsection (A) for any tort claims resulting from its conduct. As a consequence, the Republic of Chile cannot claim sovereign immunity under the Foreign Sovereign Immunities Act for its alleged involvement in the deaths of Orlando Letelier and Ronni Moffitt. . . .

Although the acts allegedly undertaken directly by the Republic of Chile to obtain the death of Orlando Letelier may well have been carried out entirely within that country, that circumstance alone will not allow it to absolve itself under the act of state doctrine if the actions of its alleged agents resulted in tortious injury in this country. To hold otherwise would totally emasculate the purpose and effectiveness of the Foreign Sovereign Immunities Act by permitting a foreign state to reimpose the so recently supplanted framework of sovereign

immunity as defined prior to the Act ““through the back door, under the guise of the act of state doctrine.”” . . .

In the United States, limitation on non-commercial tort suits to local acts prompted some litigants to pursue claims under the commercial activity exception, which is not as territorially limited as the tort exception.

Saudi Arabia v. Nelson
Supreme Court of the United States
507 U.S. 349 (1993)

Justice SOUTER delivered the opinion of the Court. . . .

[In 1988, Scott Nelson, a monitoring systems engineer, filed an action in the United States District Court for the Southern District of Florida against the Kingdom of Saudi Arabia seeking damages for personal injury. The plaintiff alleged being detained, shackled, tortured, and beaten while in the country after reporting unsafe hospital conditions.]

The Foreign Sovereign Immunities Act “provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.” Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.

Only one such exception is said to apply here. The first clause of § 1605(a)(2) of the Act provides that a foreign state shall not be immune from the jurisdiction of United States courts in any case “in which the action is based upon a commercial activity carried on in the United States by the foreign state.” . . .

The Nelsons have not, after all, alleged breach of contract, but personal injuries caused by petitioners’ intentional wrongs and by petitioners’ negligent failure to warn Scott Nelson that they might commit those wrongs. Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons’ suit.

Petitioners’ tortious conduct itself fails to qualify as “commercial activity” within the meaning of the Act, although the Act is too “obtuse” to be of much help in reaching that conclusion. We have seen already that the Act defines

“commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act,” and provides that “[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” If this is a definition, it is one distinguished only by its diffidence; as we observed in our most recent case on the subject, it “leaves the critical term ‘commercial’ largely undefined.” We do not, however, have the option to throw up our hands. The term has to be given some interpretation, and congressional diffidence necessarily results in judicial responsibility to determine what a “commercial activity” is for purposes of the Act. . . . We [previously] held that the meaning of “commercial” for purposes of the Act must be the meaning Congress understood the restrictive theory to require at the time it passed the statute. . . .

[T]he intentional conduct alleged here (the Saudi Government’s wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state’s exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature. Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce. “[S]uch acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such.”

The Nelsons and their amici urge us to give significance to their assertion that the Saudi Government subjected Nelson to the abuse alleged as retaliation for his persistence in reporting hospital safety violations, and argue that the character of the mistreatment was consequently commercial. One amicus, indeed, goes so far as to suggest that the Saudi Government “often uses detention and torture to resolve commercial disputes.” But this argument does not alter the fact that the powers allegedly abused were those of police and penal officers. In any event, the argument is off the point, for it goes to purpose, the very fact the Act renders irrelevant to the question of an activity’s commercial character. Whatever may have been the Saudi Government’s motivation for its allegedly abusive treatment of Nelson, it remains the case that the Nelsons’ action is based upon a sovereign activity immune from the subject-matter jurisdiction of United States courts under the Act.

In addition to the intentionally tortious conduct, the Nelsons claim a separate basis for recovery in petitioners’ failure to warn Scott Nelson of the hidden dangers associated with his employment. The Nelsons allege that, at the time petitioners recruited Scott Nelson and thereafter, they failed to warn him of

the possibility of severe retaliatory action if he attempted to disclose any safety hazards he might discover on the job. In other words, petitioners bore a duty to warn of their own propensity for tortious conduct. But this is merely a semantic ploy. For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity. . . .

The Nelsons' action is not "based upon a commercial activity" within the meaning of the first clause of § 1605(a)(2) of the Act

[Justice White, with whom Justice Blackmun joined, filed a concurring opinion that the conduct was indeed commercial activity, but that there was still no jurisdiction because the action lacked a sufficient nexus to the United States. Justice Kennedy, with whom Justice Blackmun and Justice Stevens joined in part, filed an opinion concurring in part and dissenting in part. They argued that failing to warn of foreseeable dangers fell in the commercial activity exception. Justice Stevens filed a dissenting opinion arguing both that the conduct fell in the commercial activity exception and that sufficient contact had been established with the United States to justify the exercise of federal jurisdiction.]

SUING SOVEREIGNS: CIVIL LIABILITY FOR GROSS VIOLATIONS OF HUMAN RIGHTS?

Was Justice Souter correct to say in *Saudi Arabia v. Nelson* that "however monstrous such abuse [of sovereign power] undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature"?

If suits based on contracts can proceed, why not suits based on torture? If a private individual can sue a foreign sovereign entity for breach of contract, should there also be an exception to foreign state immunity for a *jus cogens* (peremptory norm) violation? Should a state be able to claim a grossly illegal act such as genocide as an "official" act, a "sovereign" act, or as an "act of state"? Should civil immunities be determined based on the nature of the conduct, status of the actor, or both?

Courts have recently contemplated whether states have a right, or even an obligation, to deny sovereign immunity in cases of severe violations of international human rights such as torture. The International Court of Justice seemed to rule against such an exception in its 2012 decision in *Jurisdictional Immunities of the State (Germany v. Italy)*, excerpted below. At the same time, as is also illustrated below, some domestic courts have held that in certain circumstances, state violations of *jus cogens* human rights norms must be denied immunity under domestic law.

Al-Adsani v. United Kingdom
European Court of Human Rights (Grand Chamber)
ECHR 2001-XI 79

. . . The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges: Mr L. WILDHABER, *President*, Mrs E. PALM, Mr C.L. ROZAKIS, Mr J.-P. COSTA, Mr L. FERRARI BRAVO, Mr GAUKUR JÖRUNDSSON, Mr L. CAFLISCH, Mr L. LOUCAIDES, Mr I. CABRAL BARRETO, Mr K. JUNGWIERT, Sir Nicolas BRATZA, Mr B. ZUPANČIČ, Mrs N. VAJIĆ, Mr M. PELLONPÄÄ, Mr M. TSATSANIKOLOVSKA, Mr E. LEVITS, Mr A. KOVLER, and also of Mr P.J. MAHONEY, *Registrar*

1. The case originated in an application against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights . . . by a dual British/Kuwaiti national, Mr Sulaiman Al-Adsani (“the applicant”), on 3 April 1997. . . .

10. The applicant, who is a trained pilot, went to Kuwait in 1991 to assist in its defence against Iraq. During the Gulf War he served as a member of the Kuwaiti Air Force and, after the Iraqi invasion, he remained behind as a member of the resistance movement. During that period he came into possession of sex videotapes involving Sheikh Jaber Al-Sabah Al-Saud Al-Sabah (“the Sheikh”), who is related to the Emir of Kuwait and is said to have an influential position in Kuwait. By some means these tapes entered general circulation, for which the applicant was held responsible by the Sheikh.

11. After the Iraqi armed forces were expelled from Kuwait, on or about 2 May 1991, the Sheikh and two others gained entry to the applicant’s house, beat him and took him at gunpoint in a government jeep to the Kuwaiti State Security Prison. The applicant was falsely imprisoned there for several days during which

he was repeatedly beaten by security guards. He was released on 5 May 1991, having been forced to sign a false confession.

12. On or about 7 May 1991 the Sheikh took the applicant at gunpoint in a government car to the palace of the Emir of Kuwait's brother. At first the applicant's head was repeatedly held underwater in a swimming-pool containing corpses, and he was then dragged into a small room where the Sheikh set fire to mattresses soaked in petrol, [burning the applicant]

13. Initially the applicant was treated in a Kuwaiti hospital, and on 17 May 1991 he returned to England where he spent six weeks in hospital being treated for burns covering 25% of his total body surface area. He also suffered psychological damage and has been diagnosed as suffering from a severe form of post-traumatic stress disorder, aggravated by the fact that, once in England, he received threats warning him not to take action or give publicity to his plight. . . .

18. . . . [T]he Court of Appeal examined the case on 12 March 1996. The court held that the applicant had not established on the balance of probabilities that the State of Kuwait was responsible for the threats made in the United Kingdom. The important question was, therefore, whether State immunity applied in respect of the alleged events in Kuwait. Lord Justice Stuart-Smith finding against the applicant, observed:

The argument is . . . that international law against torture is so fundamental that it is a *jus cogens*, or compelling law, which overrides all other principles of international law, including the well-established principles of sovereign immunity. No authority is cited for this proposition. . . . At common law, a sovereign State could not be sued at all against its will in the courts of this country. The 1978 Act, by the exceptions therein set out, marks substantial inroads into this principle. It is inconceivable, it seems to me, that the draughtsman, who must have been well aware of the various international agreements about torture, intended section 1 to be subject to an overriding qualification. . . .

A moment's reflection is enough to show that the practical consequences of the Plaintiff's submission would be dire. The courts in the United Kingdom are open to all who seek their help, whether they are British citizens or not. A vast number of people come to this country each year seeking refuge and asylum, and many of these allege that they have been tortured in the country whence they came. Some of these claims are no

doubt justified, others are more doubtful. Those who are presently charged with the responsibility for deciding whether applicants are genuine refugees have a difficult enough task, but at least they know much of the background and surrounding circumstances against which the claim is made. The court would be in no such position. The foreign States would be unlikely to submit to the jurisdiction of the United Kingdom court, and in its absence the court would have no means of testing the claim or making a just determination. . . .

59. Within the Convention system it has long been recognised that the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society.* It is an absolute right, permitting of no exception in any circumstances. Of all the categories of ill-treatment prohibited by Article 3, “torture” has a special stigma, attaching only to deliberate inhuman treatment causing very serious and cruel suffering.

60. Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. . . .

61. While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not . . . the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. . . .

66. The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within

* Article 3 of the European Convention on Human Rights provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

67. In these circumstances, the application by the English courts of the provisions of the 1978 Act to uphold Kuwait's claim to immunity cannot be said to have amounted to an unjustified restriction on the applicant's access to a court.

It follows that there has been no violation of Article 6 § 1 of the Convention in this case. . . .

[Judge Zupančič and Judge Pellonpää (with whom Judge Bratza joined) filed concurring opinions emphasizing the practical constraints against and consequences of allowing the application.]

JOINT DISSENTING OPINION OF JUDGES ROZAKIS AND
CAFLISCH JOINED BY JUDGES WILDHABER, COSTA, CABRAL
BARRETO AND VAJIĆ

We regret that we are unable to concur with the Court's majority in finding that, in the present case, there has not been a violation of Article 6 of the Convention in so far as the right of access to a court is concerned. Unlike the majority, we consider that the applicant was unduly deprived of his right of access to English courts to entertain the merits of his claim against the State of Kuwait although that claim was linked to serious allegations of torture. To us the main reasoning of the majority—that the standards applicable in civil cases differ from those applying in criminal matters when a conflict arises between the peremptory norm of international law on the prohibition of torture and the rules on State immunity—raises fundamental questions, and we disagree for the following reasons. . . .

4. . . . Firstly, the English courts, when dealing with the applicant's claim, never resorted to the distinction made by the majority. They never invoked any difference between criminal charges or civil claims, between criminal and civil proceedings, in so far as the legal force of the rules on State immunity or the applicability of the 1978 Act was concerned. . . . Secondly, the distinction made by the majority between civil and criminal proceedings, concerning the effect of the rule of the prohibition of torture, is not consonant with the very essence of the operation of the *jus cogens* rules. It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all

its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial. The jurisdictional bar is lifted by the very interaction of the international rules involved, and the national judge cannot admit a plea of immunity raised by the defendant State as an element preventing him from entering into the merits of the case and from dealing with the claim of the applicant for the alleged damages inflicted upon him. . . .

DISSENTING OPINION OF JUDGE FERRARI BRAVO

What a pity! The Court, whose task in this case was to rule whether there had been a violation of Article 6 § 1, had a golden opportunity to issue a clear and forceful condemnation of all acts of torture. . . . [T]he prohibition of torture is now *jus cogens*, so that torture is a crime under international law. It follows that every State has a duty to *contribute* to the punishment of torture and cannot hide behind formalist arguments to avoid having to give judgment. . . .

Jurisdictional Immunities of the State (Germany v. Italy)

International Court of Justice

99 I.C.J. 1 (2012)

Present: President OWADA; Vice-President TOMKA; Judges KOROMA, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE; Judge ad hoc GAJA; Registrar COUVREUR. . . .

1. On 23 December 2008, the Federal Republic of Germany (hereinafter “Germany”) filed in the Registry of the Court an Application instituting proceedings against the Italian Republic (hereinafter “Italy”) in respect of a dispute originating in “violations of obligations under international law” allegedly committed by Italy through its judicial practice “in that it has failed to respect the jurisdictional immunity which . . . Germany enjoys under international law.” . . .

15. In its Application, Germany made the following requests:

Germany prays the Court to adjudge and declare that the Italian Republic: (1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed

violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law; (2) by taking measures of constraint against 'Villa Vigoni,' German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity; (3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity. . . .

82. . . . [T]he proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.

83. . . . [T]he Court must nevertheless inquire whether customary international law has developed to the point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict. Apart from the decisions of the Italian courts which are the subject of the present proceedings, there is almost no State practice . . . to support the proposition that a State is deprived of its entitlement to immunity in such a case. Although the Hellenic Supreme Court in the *Distomo* case [(2000)] adopted a form of that proposition, the Special Supreme Court in *Margellos* [(2002)] repudiated that approach two years later. . . . [U]nder Greek law . . . *Margellos* . . . must be followed . . . unless the Greek courts find that there has been a change in customary international law since 2002, which they have not done. As with the territorial tort principle, the Court considers that Greek practice, taken as a whole, tends to deny that the proposition advanced by Italy has become part of customary international law.

84. . . . [A] substantial body of State practice . . . demonstrates that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.

85. That practice is particularly evident in the judgments of national courts. Arguments to the effect that international law no longer required State immunity in cases of allegations of serious violations of international human rights law, war crimes or crimes against humanity have been rejected by the courts in Canada, France, Slovenia, New Zealand, Poland, and the United Kingdom. . . .

95. . . . A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application. The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which a *jus cogens* rule might be enforced was rendered unavailable. . . . [In 2005], it held that the fact that a rule has the status of *jus cogens* does not confer upon the Court a jurisdiction which it would not otherwise possess. . . .

The ICJ expressed concern about breaching immunities based on allegations, rather than proof. The ICJ saw this as a “chicken-and-egg” problem: on the one hand, a national court must determine whether or not a foreign state is entitled to immunity before it can hear the merits and before the facts have been established, but on the other hand, if immunity depends on the seriousness of the tortious violation, then a court could not determine whether it had jurisdiction without examining the merits.

Three further policy issues emerge: first, the reciprocal implications of permitting such suits in domestic courts; second, whether suits based on a particular kind of tort claim—state-sponsored terrorism—might become a tool disruptive of diplomacy and foreign policy; and third, whether courts, legislators, or executive officials should therefore decide these thorny questions.

* * *

The Debate over the Justice Against Sponsors of Terrorism Act (“JASTA”) (United States, 2016)

As one example, these issues have arisen in the U.S. legislative context where debate continues over a congressional bill, S. 2040: Justice Against Sponsors of Terrorism Act (JASTA), which would create an exception to sovereign immunity where “money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States” either caused by an act of international terrorism or a tortious act or acts of “the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.” The bill is widely understood as having the purpose of exposing Saudi Arabia to lawsuits in American courts for alleged connection to the September 11th attacks. The U.S. Senate passed the bill and referred it to the U.S. House of Representative for consideration on May 17, 2016, where it currently remains with the House Committee on the Judiciary.

As the bill was being debated and revised, Curtis Bradley and Jack Goldsmith wrote in the *New York Times* that the bill would “violate a core principle of international law” and “would jeopardize the effectiveness of American foreign aid and the legitimacy of the United States’ actions in the war on terrorism.”^{*} According to the two professors, foreign sovereign immunity is important for the purposes of reciprocal self-interest, and the bill’s exceptions could lead to lawsuits against the United States for its provision of military and other foreign aid, as well as for its airstrikes against Al Qaeda, the Islamic State, and other groups. Others such as William Dodge, whose blog post we excerpt below, are not convinced that JASTA would violate international law and expressed a different view, as illustrated in the excerpt below. The bill that the Senate passed narrowed the exceptions that had originally been considered, but the debate over whether the bill violates international law remains.^{**}

^{*} Curtis Bradley and Jack Goldsmith, *Don’t Let Americans Sue Saudi Arabia*, NEW YORK TIMES (April 22, 2016), available at <http://www.nytimes.com/2016/04/22/opinion/dont-let-americans-sue-saudi-arabia.html>.

^{**} See, e.g., Steve Vladeck, *The Senate Killed JASTA, Then Passed It...*, JUST SECURITY (May 18, 2016, 5:15 PM), available at <https://www.justsecurity.org/31156/senate-killed-jasta-passed-it/>; Curtis Bradley and Jack Goldsmith, *How to Limit JASTA’s Adverse Impact?*, LAWFARE (June 3, 2016, 10:00 AM); William Dodge, *JASTA and Reciprocity*, JUST SECURITY (June 9, 2016, 4:00 PM), available at <https://www.justsecurity.org/31445/jasta-reciprocity>.

Would JASTA Violate International Law? William Dodge (2016)*

. . . Curt Bradley and Jack Goldsmith argued that the Justice Against State Sponsors of Terrorism Act (JASTA) would “violate a core principle of international law,” the principle of foreign sovereign immunity. . . . [I]n my view, there are serious problems with the assertion that JASTA would violate customary international law governing sovereign immunity, problems that raise more general questions of how one identifies rules of customary international law. . . .

The first question to ask is where this fundamental tenet of international law comes from. I believe it is common ground that—as the Restatement (Third) of Foreign Relations Law puts it—“[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” If one looks at state practice with respect to foreign sovereign immunity, one finds some situations in which states are consistently held to be immune from the jurisdiction of the courts of other states, other situations in which states are consistently held not to be immune, other situations in which the practice is mixed, and still other situations in which there is no practice at all. How should one make sense of this practice?

[Bradley and Goldsmith’s] approach with respect to foreign sovereign immunity seems to be to infer a general rule of immunity based on state practice granting immunity and to treat the state practice denying immunity as establishing exceptions to the general rule. Where the practice is mixed or non-existent, the general rule of immunity would govern because there is not a “general and consistent practice of states” sufficient to create an exception. Of course, this is not the only possible way to read the existing state practice. One could instead infer specific rules of immunity only in those situations where there is a general and consistent practice of granting immunity. Under this approach, where the practice is mixed or non-existent, a general rule of non-immunity would govern. . . .

One way to defend their approach would be to invoke the International Court of Justice’s 2012 decision in the *Jurisdictional Immunities Case (Germany v. Italy)*, which took a similar approach to questions of sovereign immunity. But the ICJ took this approach because the state parties to the dispute both agreed on it. . . .

* Excerpted from William Dodge, *Would JASTA Violate International Law?*, JUST SECURITY (April 26, 2016, 10:59 AM), available at <https://www.justsecurity.org/30755/jasta-violate-international-law>.

Even if one adopts [Bradley and Goldsmith's] basic approach to sovereign immunity, there remains the question of how broadly or narrowly to read the state practice creating exceptions to the general rule. There is lots of state practice supporting a territorial tort exception to sovereign immunity—that is, an exception for torts that occur in the nation that would exercise jurisdiction over the foreign state. This is what allows Americans injured in traffic accidents by a foreign government employee to sue the foreign state for damages. One might argue that this state practice should be read narrowly to apply only in these sorts of situations. But states that have codified the exception have done so in general terms applicable to any tort.

The US Foreign Sovereign Immunities Act (FSIA) also codifies the territorial tort exception in general terms. But US courts have interpreted it to require that the “entire tort” occurs within the United States. It is this limitation that JASTA would remove. JASTA would still require that there be “physical injury or death, or damage to or loss of property, occurring in the United States,” but it would make clear that the territorial tort exception applies “regardless of where the underlying tortious act or omission occurs.”

Customary international law does not seem to require the “entire tort” limitation. Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Properties would apply the territorial tort exception if the act or omission occurred “in whole or in part” in the territory of the state exercising jurisdiction. Most nations that have codified the exception appear to require some act or omission in their territories, but it is not clear that these nations have done so from a sense of international legal obligation rather than from comity. Even if customary international law were properly read to preclude a nation from applying the territorial tort exception solely on the basis of death and damage within its territory, the application of JASTA to the 9/11 cases would still not violate international law, since the 9/11 attacks clearly involved tortious acts in the United States.

Another, more controversial, path would be to expand the FSIA's terrorism exception, so that it covers state-sponsored terrorism even when the foreign state has not been designated by the State Department as a state-sponsor of terrorism, as is currently required under the FSIA. JASTA would *not* do this, but Curt and Jack discuss it at some length, so it is worth considering. They assert that the current exception “is almost certainly contrary to international law.” If this is true of the existing exception, then it would also be true of an expanded exception.

But I am not so sure that the terrorism exception violates customary international law. First, the United States is not alone in having adopted such an exception—Canada has done so too in Section 6.1 of its State Immunity Act. Second, to my knowledge, these exceptions have not provoked the sorts of widespread protests one might expect from other nations in the event of a clear violation of customary international law. . . . Whether customary international law requires immunity for state-sponsored terrorism depends on whether one begins from a baseline of immunity . . . or from a baseline of non-immunity. . . .

[T]heir reciprocity argument against JASTA depends on several propositions. First, it depends on the proposition that other states would view the immunity that the United States currently extends (and that JASTA would take away) as required by international law. If not, then they are already free to reduce the immunity they extend the United States, whether JASTA passes or not. Second, it depends on the proposition that other countries would read JASTA broadly to authorize exceptions to sovereign immunity in non-identical situations. . . . A broad reading of JASTA is possible, but certainly not inevitable, and the United States would have strong arguments that its practice should be read more narrowly. . . . [A] reciprocity argument depends on the proposition that international law influences the behavior of other states. . . .

Jones v. United Kingdom

European Court of Human Rights (Fourth Section)
[2014] ECHR 32

. . . The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of: Ineta Ziemele, *President*, Päivi Hirvelä, George Nicolaou, Ledi Bianku, Zdravka Kalaydjieva, Vincent A. De Gaetano, Paul Mahoney, *judges*, and Françoise Elens-Passos, *Section Registrar*

[Three applicants from the United Kingdom sued the Kingdom of Saudi Arabia in British courts after allegedly being detained and systematically tortured by Saudi Arabian officials. The Court of Appeal dismissed the suit against the state but permitted the suits to proceed against individual defendants, including Lieutenant Colonel Abdul Aziz, two policemen, the deputy governor of the prison where they were held, and the Minister of Interior who was alleged to have sanctioned the torture. Saudi Arabia appealed, and the House of Lords dismissed the suits.] . . .

186. Article 6 § 1 secures to everyone the right to have any legal dispute (“*contestation*” in the French text of Article 6 § 1) relating to his civil rights and obligations brought before a court. The right of access to a court is not, however, absolute. It may be subject to limitations since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention’s requirements rests with the Court. . . .

191. In *Al-Adsani* [(2001)] . . . , the Court found that it had not been established that there was yet acceptance in international law of the proposition that States were not entitled to immunity in respect of civil claims for damages concerning alleged torture committed outside the forum State. . . . The same conclusion was reached in 2002 in *Kalogeropoulou and Others* . . . in respect of the refusal of the Greek Minister of Justice to grant leave to the applicants to expropriate German property in Greece following a judgment in their favour concerning crimes against humanity committed in 1944. However, the Court there indicated that its finding in *Al-Adsani* did not preclude a development in customary international law in the future.

192. In a number of later cases . . . , the Court found a violation of Article 6 § 1 on the basis that the provisions of the UN Jurisdictional Immunities Convention applied to the respondent State under customary international law and that the grant of immunity was not proportionate as it was either not compatible with the customary international law rule or was ordered without proper consideration by the domestic courts of the rule in question. . . .

196. Mr Jones’ complaint concerning the striking out of his claim against Saudi Arabia is identical in material facts to the complaint made in *Al-Adsani*, cited above. . . . The sole question for the Court is whether there had been, at the time of the decision of the House of Lords in 2006 in the applicants’ case, an evolution in the accepted international standards as regards the existence of a torture exception to the doctrine of State immunity since its earlier judgment in *Al-Adsani* such as to warrant the conclusion that the grant of immunity in this case did not reflect generally recognised rules of public international law on State immunity.

197. In recent years, both prior to and following the House of Lords judgment in the present case, a number of national jurisdictions have considered whether there is now a *jus cogens* exception to State immunity in civil claims against the State

198. However, it is not necessary for the Court to examine all of these developments in detail since the recent judgment of the International Court of

Justice in *Germany v. Italy*—which must be considered by this Court as authoritative as regards the content of customary international law—clearly establishes that, by February 2012, no *jus cogens* exception to State immunity had yet crystallised. The application by the English courts of the provisions of the 1978 Act to uphold the Kingdom of Saudi Arabia’s claim to immunity in 2006 cannot therefore be said to have amounted to an unjustified restriction on the applicant’s access to a court. It follows that there has been no violation of Article 6 § 1 of the Convention as regards the striking out of Mr Jones’ complaint against the Kingdom of Saudi Arabia. . . .

202. The first question is whether the grant of immunity *ratione materiae* to State officials reflects generally recognised rules of public international law. The Court has previously accepted that the grant of immunity to the State reflects such rules. Since an act cannot be carried out by a State itself but only by individuals acting on the State’s behalf, where immunity can be invoked by the State then the starting point must be that immunity *ratione materiae* applies to the acts of State officials. If it were otherwise, State immunity could always be circumvented by suing named officials. This pragmatic understanding is reflected by the definition of “State” in the 2004 UN Convention . . . , which provides that the term includes representatives of the State acting in that capacity. The ILC Special Rapporteur, in his second report, said that it was “fairly widely recognised” that immunity of State officials was “the norm,” and that the absence of immunity in a particular case would depend on establishing the existence either of a special rule or of practice and *opinion juris* indicating that exceptions to the general rule had emerged.

203. There is also extensive case-law at national and international level which concludes that acts performed by State officials in the course of their service are to be attributed, for the purposes of State immunity, to the State on whose behalf they act. . . .

204. The weight of authority at [the] international and national level . . . appears to support the proposition that State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State under the same cloak as protects the State itself. . . .

205. It is clear from the foregoing that individuals only benefit from State immunity *ratione materiae* where the impugned acts were carried out in the course of their official duties. The UN Jurisdictional Immunities Convention refers to representatives of the State “acting in that capacity.” The fact that there

is no general *jus cogens* exception as regards State immunity rules is therefore not determinative as regards claims against named State officials. . . .

208. It has been argued that any rule of public international law granting immunity to State officials has been abrogated by the adoption of the Convention against Torture which . . . provides in its Article 14 for universal civil jurisdiction.* This argument finds support from the Committee Against Torture, which may be understood as interpreting Article 14 as requiring that States provide civil remedies in cases of torture no matter where that torture was inflicted. However, the applicants have not pointed to any decision of the ICJ or international arbitral tribunals which has stated this principle. This interpretation has furthermore been rejected by courts in both Canada and the United Kingdom. The United States has lodged a reservation to the Convention to express its understanding that the provision was only intend[ed] to require redress for acts of torture committed within the forum State. The question whether the Convention against Torture has given rise to universal civil jurisdiction is therefore far from settled. . . .

210. There appears to be little national case-law concerning civil claims lodged against named State officials for *jus cogens* violations. Few States have been confronted with this question in practice. . . .

212. Outside the civil context, some support can be found for the argument that torture cannot be committed in an “official capacity” in criminal cases. . . .

214. In the present case, it is clear that the House of Lords fully engaged with all of the relevant arguments concerning the existence, in relation to civil claims of infliction of torture, of a possible exception to the general rule of State immunity . . . [I]t concluded that customary international law did not admit of any exception—regarding allegations of conduct amounting to torture—to the general rule of immunity *ratione materiae* for State officials in the sphere of civil claims where immunity is enjoyed by the State itself. . . .

215. In these circumstances, the Court is satisfied that the grant of immunity to the State officials in the present case reflected generally recognised rules of public international law. The application of the provisions of the 1978 Act to grant immunity to the State officials in the applicants’ civil cases did not

* Article 14 of the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Punishment provides: “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”

therefore amount to an unjustified restriction on the applicants' access to a court. There has accordingly been no violation of Article 6 § 1 However, in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States. . . .

[Judge Bianku wrote a concurring opinion highlighting the developments in the law since *Al-Adsani* and expressing hesitation at not relinquishing the case to the Grand Chamber.]

DISSENTING OPINION OF JUDGE KALAYDJIEVA

. . . The essence of the majority's conclusion that granting immunity from suit to States as well as to State officials in respect of such a claim constitutes a legitimate and proportionate restriction on the right of access to court which cannot be regarded as incompatible with Article 6 § 1 of the Convention follows the conclusions of the narrow majority in the case of *Al-Adsani* and what the majority view as the current state of public international law.

To my regret, I find myself unable to agree. . . . The present cases raise for the first time the question whether State officials can benefit from State immunity in civil torture claims, which has not yet been examined by the Court. . . .

I find the conclusions of the majority on this issue regrettable and contrary to essential principles of international law concerning the personal accountability of torturers that is reflected unequivocally in Article 3 taken together with Article 1 of the European Convention on Human Rights,* in the UN Convention against Torture and in the very concept establishing the International Criminal Court (ICC). Contrary to the view of the majority, in my understanding these principles were intended and adopted specifically as special rules for *ratione materiae* exceptions from immunity in cases of alleged torture.

In that regard I find myself unable to agree with the findings of the majority that "since an act cannot be carried out by a State itself but only by individuals acting on the State's behalf, where immunity can be invoked by the State then the starting point must be that immunity *ratione materiae* applies to the acts of [torture committed by] State officials." This appears to suggest that torture is by definition an act exercised on behalf of the State. That is a far cry from all international standards, which not only analyse it as a personal act, but require the States to identify and punish the individual perpetrators of torture—contrary to

* Article 1 of the European Convention on Human Rights provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

the “pragmatic understanding” of the majority that “[i]f it were otherwise, State immunity could always be circumvented by suing named officials.” I fear that the views expressed by the majority on a question examined by this Court for the first time not only extend State immunity to named officials without proper distinction or justification, but give the impression of also being capable of extending impunity for acts of torture globally. . . .

Kazemi Estate v. Islamic Republic of Iran and Others
Supreme Court of Canada
2014 SCC 62 (2014)

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. . . .

LEBEL J.— . . .

4. Zahra Kazemi, a Canadian citizen, visited Iran in 2003 as a freelance photographer and journalist. . . . Ms. Kazemi went to take photographs of individuals protesting against the arrest and detention of their family members outside the Evin prison in Tehran. During that time, Ms. Kazemi was ordered arrested and detained by Mr. Mortazavi, Tehran’s Chief Public Prosecutor. . . .

5. During her time in custody, Ms. Kazemi was not permitted to contact counsel, the Canadian embassy, or her family. She was interrogated by Iranian authorities. She was beaten. She was sexually assaulted. She was tortured.

6. Eventually . . . Ms. Kazemi was taken from the prison and transferred to a hospital in Tehran. She was unconscious upon her arrival. She had suffered a brain injury [among other physical injuries]. . . .

8. . . . Canadian officials visited the hospital in which Ms. Kazemi was receiving care. Doctors informed these officials that Ms. Kazemi was medically brain dead and had no expectation of recovery. . . . [Approximately two days later,] the Iranian government officially announced Ms. Kazemi’s death through the Islamic Republic News Agency. A later report confirmed that Ms. Kazemi had died as a result of sustaining a blow to the head while in custody. . . .

10. . . . [T]he Iranian government commissioned an investigation into Ms. Kazemi’s death. Despite a report linking members of the judiciary and the Office of the Prosecutor to Ms. Kazemi’s torture and subsequent death, only one

individual, Mr. Reza Ahmadi, was tried. The trial was marked by a lack of transparency. Mr. Ahmadi was acquitted. In short, it was impossible for Ms. Kazemi and her family to obtain justice in Iran.

11. . . . [As Ms. Kazemi's son and only child,] Mr. Hashemi moved to institute proceedings in the Superior Court of the Province of Quebec on his own behalf and in his capacity as liquidator for the estate of his mother. Mr. Hashemi brought proceedings against (1) the Islamic Republic of Iran, (2) Iran's head of state, the Ayatollah Sayyid Ali Khamenei, (3) Saeed Mortazavi, the Chief Public Prosecutor of Tehran, and (4) Mohammad Bakhshi, the former Deputy Chief of Intelligence of the Evin Prison. The action sought: (a) \$5,000,000 for the estate of the late Zahra Kazemi as a result of her physical, psychological, and emotional pain and suffering, plus \$5,000,000 in punitive damages, and (b) \$5,000,000 for the psychological and emotional prejudice caused to Mr. Hashemi personally by the loss of his mother, plus \$2,000,000 in punitive damages.

12. The defendants, named as respondents in this appeal, brought a motion to dismiss the action on the basis of state immunity. . . .

42. In Canada, state immunity from civil suits is codified in the [*State Immunity Act (SIA)*]. The purposes of the Act largely mirror the purpose of the doctrine in international law: the upholding of sovereign equality. . . .

45. . . . [S]tate immunity is not solely a rule of customary international law. It also reflects domestic choices made for policy reasons, particularly in matters of international relations. . . . In Canada, . . . it is first towards Parliament that one must turn when ascertaining the contours of state immunity. . . .

46. . . . [I]n drafting the *SIA*, Canada has made a choice to uphold state immunity as the oil that allows for the smooth functioning of the machinery of international relations. Canada has given priority to a foreign state's immunity over civil redress for citizens who have been tortured abroad. This policy choice is not a comment about the evils of torture, but rather an indication of what principles Parliament has chosen to promote given Canada's role and that of its government in the international community. The *SIA* cannot be read as suggesting that Canada has abandoned its commitment to the universal prohibition of torture. This commitment is strong, and developments in recent years have confirmed it. . . .

49. The prohibition of torture is a peremptory international norm. But, in Canada, torture is also clearly prohibited by conventions and legislation. Canada is a party to the [*Convention against Torture and Other Cruel, Inhuman, or*

Degrading Treatment and Punishment (CAT)], which has been in force for over twenty years. . . .

53. Canada does not condone torture, nor are Canadian officials permitted to carry out acts of torture. However, the issue in the present case is not whether torture is abhorrent or illegal. That is incontestably true. The question before the Court is whether one can sue a foreign state in Canadian courts for torture committed abroad. The answer to that question lies in the interpretation of the *SIA*, and its interaction with international law, the *Charter* and the *Bill of Rights*. . . .

54. In my view, the *SIA* is a complete codification of Canadian law as it relates to state immunity from civil proceedings. In particular, s. 3(1) of the Act exhaustively establishes the parameters for state immunity and its exceptions. . . .

56. . . . I am of the view that the *SIA* provides an exhaustive list of exceptions to state immunity. . . . [R]eliance . . . cannot . . . be placed on the common law, *jus cogens* norms or international law to carve out additional exceptions to the immunity granted to foreign states pursuant to s. 3(1) of the *SIA*. The *SIA*, in its present form, does not provide for an exception to foreign state immunity from civil suits alleging acts of torture occurring outside Canada. This conclusion does not freeze state immunity in time. Any ambiguous provisions of the Act remain subject to interpretation, and Parliament is at liberty to develop the law in line with international norms as it did with the terrorism exception. . . .

64. . . . If Mr. Hashemi's psychological suffering is captured by the personal injury exception to state immunity set out at s. 6(a), . . . the estate's constitutional challenge may proceed. . . .

73. . . . The "personal or bodily injury" exception to state immunity does not apply where the impugned events, or the tort causing the personal injury or death, did not take place in Canada. . . .

79. The final issue relating to statutory interpretation is whether Saeed Mortazavi and Mohammad Bakhshi are immune from legal action by operation of the *SIA*. . . .

85. At the outset, I note that the definition of the term "foreign state" at s. 2 of the *SIA* is open-ended, as indicated by the use of the word "includes." When this statutory language is placed in context, in conjunction with the purpose of the Act, it becomes clear that public officials must be included in the meaning of "government" in s. 2 of the *SIA*. The reality is that governmental decisions are carried out by a state's servants and agents. States are abstract entities that can

only act through individuals. . . . It is difficult to conceive of a reason for which “persons” might be regarded as “government” under the Act if not to be provided immunity pursuant to s. 3(1). . . .

87. Excluding public officials from the meaning of government would completely thwart the purposes of the *SIA*. . . .

93. . . . [P]ublic officials, being necessary instruments of the state, are included in the term “government” as used in the *SIA*. That being said, public officials will only benefit from state immunity when acting in their official capacity. This conclusion leads me to the question of whether the individual respondents were acting in their official capacity when they allegedly tortured Ms. Kazemi so as to render them immune from civil proceedings in Canada. . . .

95. Though the acts allegedly committed by Mr. Mortazavi and Mr. Bakhshi shock the conscience, I am not prepared to accept that the acts were unofficial merely because they were atrocious. The question to be answered is not whether the acts were horrific, but rather, whether the acts were carried out by the named respondents in their role as “government.” The heinous nature of torture does not transform the actions of Mr. Mortazavi and Mr. Bakhshi into private acts, undertaken outside of their official capacity. On the contrary, it is the state-sanctioned or official nature of torture that makes it such a despicable crime.

96. Unsurprisingly, the very definition of torture contained in the *CAT* requires that it be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” . . .

104. . . . The fact of the matter is that Canada has expressly created an exception to immunity for criminal proceedings, and has stopped short of doing so for civil suits involving *jus cogens* violations. . . .

109. Given the definition of torture outlined above and the lack of evidence of an exception to state immunity for a *jus cogens* violation, I hold that it is possible for torture to be an official act. . . .

153. Several national courts and international tribunals . . . have consistently confirmed that . . . customary international law does not extend the prohibition of torture so far as to require a civil remedy for torture committed in a foreign state. I agree with these courts and tribunals that the peremptory norm prohibiting torture has not yet created an exception to state immunity from civil liability in cases of torture committed abroad.

157. I must conclude that Canada is not obligated by the *jus cogens* prohibition on torture to open its courts so that its citizens may seek civil redress for torture committed abroad. This is not the meaning and scope of the peremptory norm. Consequently, failing to grant such access would not be a breach of the principles of fundamental justice. However, I agree with the [International Court of Justice] in *Germany v. Italy* that “recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation.” . . .

ABELLA J. (dissenting)— . . .

172. The prohibition on torture is a peremptory norm—*jus cogens*—under international law. That means that the international community has agreed that the prohibition cannot be derogated from by any state. The [CAT] . . . is an international human rights instrument aimed at the prevention of torture and other cruel, inhuman, and degrading treatment or punishment around the world. The [CAT] did not create the prohibition against torture, but was premised on its uncontroversial and universal acceptance.

173. State practice is evolving over whether torture can qualify as official state conduct. The evolution emerges from the following conundrum: how can torture be an official function for the purpose of immunity under international law when international law itself universally prohibits torture. It seems to me that the legal fluidity created by this question and the challenges it imposes for the integrity of international law leave this Court with a choice about whether to extend immunity to foreign officials for such acts.

174. In light of the equivocal state of the customary international law of immunity, the long-standing international acceptance of the principle of reparation manifested in Article 14 of the *Convention Against Torture*, and almost a century of increasing international recognition that human rights violations threaten global peace and stability, I see no reason to include torture in the category of official state conduct attracting individual immunity. Equivocal customary international law should not be interpreted so as to block access to a civil remedy for torture, which, at a *jus cogens* level, is unequivocally prohibited. As a result, and with great respect, I do not agree with the majority that the defendants Saeed Mortazavi and Mohammad Bakhshi are immune from the jurisdiction of Canadian courts. . . .

175. . . . Like the theory of sovereignty itself, the international law of state immunity has evolved significantly over the last century. What was once considered absolute is now recognized to be nuanced and contextual. . . .

179. By its own terms, . . . the theory of state immunity codified by the *State Immunity Act* through s. 3(1) is restricted through several internal statutory limitations. The immunity of a foreign state may be limited, for instance, by waiver (s. 4); in proceedings relating to the commercial activity of the foreign state (s. 5); in proceedings relating to death, personal injury or property damage that occurs in Canada (s. 6); in certain maritime proceedings (s. 7); and in respect of certain property located in Canada (s. 8). . . .

180. In 2012, Parliament amended the *State Immunity Act* to limit the immunity of a foreign state in proceedings against it in connection with its support for terrorism.

181. The doctrine of sovereign immunity is not entirely codified under the *State Immunity Act*. Section 18 specifies that the Act “does not apply to criminal proceedings or proceedings in the nature of criminal proceedings.” Accordingly, the *State Immunity Act* only addresses the circumstances in which Canadian courts are procedurally barred from taking jurisdiction over a foreign state in proceedings outside the criminal context. . . .

184. The only individuals expressly included in the definition of a “foreign state” are “any sovereign or other head of the foreign state . . . while acting as such in a public capacity.” There is no reference to public officials apart from heads of state. . . .

188. Under international law generally, the protection for and treatment of individuals as legal subjects has evolved dramatically. And with that evolving protection has come the recognition of a victim’s right to redress for a violation of fundamental human rights. The claims for civil damages brought by Zahra Kazemi’s estate and her son Stephan Hashemi are founded on Canada’s and Iran’s obligations under international human rights law and the *jus cogens* prohibition against torture. These claims must be situated in the context of the significant development of the principle of reparation under public international law throughout the twentieth century. At its most fundamental, the principle of reparation means that when the legal rights of an individual are violated, the wrongdoer owes redress to the victim for harm suffered. The aim of the principle of reparation is restorative. . . .

199. As all this shows, an individual's right to a remedy against a state for violations of his or her human rights is now a recognized principle of international law.

200. The as yet unsettled question remains, however, whether state immunity denies victims of torture access to a civil remedy. Jurisprudentially, . . . the picture is becoming clearer, but it still lacks focus. . . .

208. . . . [A]t present, state practice is evolving. The evolution, in my view, reveals a palpable, albeit slow trend in the international jurisprudence to recognize that torture, as a violation of a peremptory norm, does not constitute officially sanctioned state conduct for the purposes of immunity *ratione materiae*.

211. . . . [W]hile it can be said that customary international law permits states to recognize immunity for foreign officials, as evidenced in *Jones v. United Kingdom*, it also does not *preclude* a state from denying immunity for acts of torture

212. In my view, this conclusion is reinforced by the steps the international community has taken towards ensuring individual accountability for the commission of torture under the [CAT]. . . .

215. . . . Article 14 [of the CAT] imposes an obligation on state parties to ensure that all victims of torture from their countries can obtain "redress and ha[ve] an enforceable right to fair and adequate compensation." The text provides no indication that the "act of torture" must occur within the territory of the state party for the obligation to be engaged. If a state undertakes to ensure access to a remedy for torture committed abroad, this necessarily implicates the question of the immunity of the perpetrators of that torture. . . .

228. . . . [C]ustomary international law no longer *requires* that foreign state officials who are alleged to have committed acts of torture be granted immunity *ratione materiae* from the jurisdiction of Canadian courts. This interpretation is not only consistent with the text and purposes of Article 14 of the *Convention Against Torture*, it also finds growing expression in the practice of state parties to that treaty.

229. The denial of immunity to individual state officials for acts of torture does not undermine the rationale for the doctrine of immunity *ratione materiae*. In the face of universal acceptance of the prohibition against torture, concerns about any interference with sovereignty which may be created by acting in judgment of an individual state official who violates this prohibition necessarily shrink. The very nature of the prohibition as a peremptory norm means that all

states agree that torture cannot be condoned. Torture cannot, therefore, be an official state act for the purposes of immunity *ratione materiae*. That the [CAT] defines its scope by reference to the fact that torture itself is necessarily carried out by the state and its officials does not detract from this universal understanding, or predetermine whether immunity must be extended to such conduct. . . .

231. As a result, in my view, the *State Immunity Act* does not apply to Mortazavi and Bakhshi, and the proceedings against them are not barred by immunity *ratione materiae*. . . .

As courts consider whether an exception to foreign sovereign immunity should apply, several issues intertwine: (1) *Location* of the act: Should it matter whether a non-commercial “tort” was committed *wholly* within the territory of the state claiming the exception to sovereign immunity? (2) *Nature* of the act: Should it matter whether the tort was a *jus cogens* violation? An act of terrorism? A military act? (3) *How sovereign* is the act? To ask Justice Abella’s question, “how can torture be an official function for the purpose of immunity under international law when international law itself universally prohibits torture”?

Simpson v. Socialist People’s Libyan Arab Jamahiriya
United States Court of Appeals for the District of Columbia Circuit
470 F.3d 356 (D.C. Cir. 2006)

Before: ROGERS and GARLAND, Circuit Judges, and SILBERMAN, Senior Circuit Judge. . . .

ROGERS, Circuit Judge: . . . [W]e affirm the order denying Libya’s motion to dismiss the amended complaint on sovereign immunity grounds. . . .

In February 1987, Sandra Jean Simpson, a United States citizen, and her husband, Dr. Mostafa Karim, a permanent resident of the United States who was born in Egypt, were aboard the *Carin II*, a private yacht, cruising in the Mediterranean Sea on a course from Italy to Greece, when [they claim to have been taken hostage by Libyan authorities.] . . . The Libyans held the *Carin II* party captive and threatened to shoot them if they attempted to leave. Three months into the captivity, Libyan authorities forcibly separated Ms. Simpson and Dr. Karim, permitting Ms. Simpson to fly to Zurich and placing her husband in solitary

confinement, in unsanitary conditions without adequate medical care or proper food, for a period of seven months. Dr. Karim was released from captivity in November 1987, after intense negotiations among Belgium, Egypt, and Libya; he died of cancer in 1993.

Ms. Simpson and her husband's estate sued Libya, alleging torture, hostage-taking, battery, false imprisonment, intentional infliction of emotional distress, and loss of consortium, and seeking compensatory damages. . . . [After initial proceedings in which plaintiffs' claims were partially dismissed,] the plaintiffs filed an amended complaint which alleged three likely motives Libya might have had for abducting Ms. Simpson and Dr. Karim. The amended complaint stated that, in exchange for releasing them, Libya may have wanted: (1) the United States to stop conducting air raids against Libya; (2) revenge for previous U.S. air attacks; and (3) Egypt to return military assets to Libya. It also referenced Libya's pattern of terrorist activity. The amended complaint cited newspaper articles, Libya's history of taking and releasing hostages, and a 1997 Department of Defense intelligence report. . . .

On appeal, Libya challenges the legal and evidentiary basis of the hostage taking claim on the ground that the plaintiffs failed to show the essential "intended purpose." . . . We review the denial of the motion to dismiss for the legal and factual sufficiency of the plaintiffs' claims de novo.

Congress amended the FSIA in the Antiterrorism and Effective Death Penalty Act of 1996, adding the so-called "terrorism exception," which denies sovereign immunity in any case "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of . . . hostage taking["]

The legal question raised by Libya is whether third-party awareness of a hostage-taker's intent is a required element of the hostage-taking exception that must be pled as a jurisdictional fact and supported by evidence. Libya contends that the plaintiffs can show intended purpose only where there is "a minimum showing that the third party is at least aware of the possibility that there is a hostage." Libya's contention, however, is wholly unsupported by our case law and the statutory definition of hostage-taking.

In [its first decision remanding the case], the court looked to the FSIA definition of hostage taking set forth in . . . [an earlier case decided by the court]. There, the court emphasized that "[t]he Convention does not proscribe all detentions, but instead focuses on the intended purpose of the detention." In [that case,] the plaintiffs showed that they were detained to demonstrate the hostage-taker's foreign policy—in that case, Libya's support of Iran's holding of

American hostages. The court held that plaintiffs did not meet the intentionality requirement. The Convention

speaks in terms of conditions of release; the defendant must have detained the victim in order to compel some particular result, specifically to force a third party either to perform an act otherwise unplanned or to abstain from one otherwise contemplated so as to ensure the freedom of the detainee.

Consequently, to show intended purpose, the plaintiff must “suggest[] [a] demand for *quid pro quo* terms between . . . Libya and a third party whereby [the hostages] would have been released.” The plaintiff must “point[] to [a] nexus between what happened to [the hostages] in Libya and any concrete concession that Libya *may* have hoped to extract from the outside world.”

The plain text of the FSIA definition, explanatory commentary on the Convention, and precedent under the Federal Hostage Taking Act (“FHTA”), which defines the behavior proscribed in terms identical to the Convention, all reflect that a plaintiff need not allege that the hostage taker had communicated its intended purpose to the outside world. Consistent with the plain text, the court . . . [had previously] explained that the intentionality requirement focused on the *mens rea* of the hostage taker. The commentary, which Libya dismisses without explanation, similarly explains that “demands” are not required to establish the element of hostage taking: “The words ‘in order to compel’ do not require more than a motivation on the part of the offender.” . . .

It suffices, then, for a plaintiff bringing suit under the FSIA Terrorism Exception to allege a *quid pro quo* as the hostage-taker’s intended result from the detention at issue. Such an allegation is legally sufficient to withstand a motion to dismiss, and the law requires no further showing with respect to third-party awareness of the defendant’s hostage-taking intent. Here, the plaintiffs have alleged the required *quid pro quo*, and thus their jurisdictional facts are legally sufficient to state a claim under the Terrorism Exception. However, a sovereign defendant disputing FSIA jurisdiction may also contest the jurisdictional facts alleged by the plaintiff. In such cases, the court is obliged to review any determinations of factual sufficiency made by the district court. . . .

Accordingly, we affirm the denial of Libya’s motion to dismiss on grounds of sovereign immunity and . . . remand . . . for further proceedings.

SUING FOREIGN GOVERNMENTS AND THEIR OFFICIALS

Who is “The State”?

Current heads of state act for the state and claim immunity for all official acts as state officials. In this section, we first ask whether allegations of horrible acts, such as genocide, can be viewed as acts of state. We then turn to state officials, including officials such as diplomats and consular officials, who claim civil immunities in a variety of ways, including under treaties. The question is whether current and former heads of state should be able to claim immunity for gross violations committed while in office. Do national courts have a right, or even an obligation in some cases, to hold certain foreign state actors accountable for violations of domestic and international law?

**South African Litigation Centre v.
Minister of Justice and Constitutional Development
High Court of South Africa (Gauteng Division, Pretoria)
[2015] ZAGPPHC 402**

[This opinion was signed by Judge D Mlambo, Judge President of the Gauteng Division of the High Court, Pretoria; Judge A. P. Ledwaba, Deputy Judge President of the Gauteng Division of the High Court, Pretoria; and Judge H. J. Fabricius, Judge of the Gauteng Division of the High Court, Pretoria.] . . .

12. During 2009 the ICC issued a warrant for the arrest of President Bashir [of Sudan] for war crimes and crimes against humanity. Thereafter and in 2010 the ICC issued a second warrant for the arrest of President Bashir for the crime of genocide. Both warrants were issued pursuant to the situation in Darfur. In the wake of these warrants and relying on Article 59 of the Rome Statute,^{*} the ICC

^{*} Article 59 of the Rome Statute provides:

- “1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.
2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:
(a) The warrant applies to that person; (b) The person has been arrested in accordance with the proper process; and (c) The person’s rights have been respected. . . .
7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible. . . .”

requested States Parties to the Statute including South Africa to arrest President Bashir in the event that he came into their jurisdictions. . . .

23. . . . Against this background . . . [the applicant’s counsel] argued that where the ICC has made a request for the arrest and surrender of a person within a State party’s jurisdiction, the State party must comply with the request. South Africa, by virtue of its enactment of the Implementation Act, is bound by each of those obligations both under international law and at the domestic level. [Counsel] submitted that in the present context South Africa became liable to arrest and surrender President Bashir as soon as he entered the country. [Counsel] further submitted that the only basis on which the State Respondents could avoid their obligation to arrest and surrender President Bashir would be if he enjoyed some kind of diplomatic immunity from arrest, or from this court’s jurisdiction. . . .

28. . . . The only grounds on which President Bashir could conceivably be alleged to enjoy immunity would be as a head of state or in terms of the host agreement. But in fact, neither basis confers immunity on him. Significantly however the notice promulgated by the 5th Respondent makes no reference to section 4 of the *Immunities Act*. . . .

However, the Rome Statute expressly provides that heads of state do not enjoy immunity under its terms. Similar provisions are expressly included in the *Implementation Act*. It means that the immunity that might otherwise have attached to President Bashir based on customary international law as head of state, is excluded or waived in respect of crimes and obligations under the Rome Statute. . . .

Indeed, the Pre-Trial Chamber of the ICC has expressly confirmed that “the immunities granted to President Bashir under international law and attached to his position as Head of State have been implicitly waived by the Security Council,” and that South Africa is consequently under an obligation to arrest and surrender him. . . .

On its terms, [the host] agreement confers immunity on members and staff of the [African Union (AU)] Commission, and on delegates and representatives of Inter-Governmental Organisations. It does not confer immunity on Member States or their representatives or delegates. . . .

It follows that the host agreement also does not confer immunity on President Bashir, and cannot serve to exclude this Court’s jurisdiction. . . .

The *Immunities Act*, at its highest, confers discretion on the Minister of International Relations to grant immunities and privileges on persons of her choosing. But she must exercise that discretion lawfully, in accordance with South Africa's domestic and international law obligations. She cannot lawfully exercise the discretion where the effect will be to prevent the arrest and surrender of a person subject to an ICC warrant and request for surrender. . . .

Nor can the State Respondents rely on the AU's Convention or decisions to defend the validity of the host agreement. Neither of them can trump South Africa's obligations under the *Implementation Act* and the Rome Statute

By contrast, the . . . Convention has not been domestically enacted. Despite the *Immunities Act* having been passed after the adoption of the . . . Convention, it was not ratified. That represents a clear choice by the Legislature not to confer blanket immunity on AU bodies, meetings and officials that attend them. . . .

Decisions of the AU also cannot trump South Africa's obligations under the Rome Statute. That is because their status in domestic law is persuasive, at best. . . .

37. . . . At this stage, on a common sense approach, there are clear indications that the order of Sunday 14 June 2015 was not complied with. It is for this reason that we are moved to state that:

A democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by stone until it collapses and chaos ensues. . . .

**Draft Articles on Responsibility of States for
Internationally Wrongful Acts**
United Nations International Law Commission (2001)*

. . . Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State. . . .

Article 5. Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance. . . .

Article 8. Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9. Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority. . . .

* Excerpted from the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001.

When Are Actions of Officials “Acts of State”?

Even when an exception to sovereign immunity permits courts to proceed, some courts have held that the official’s challenged act is nonetheless a nonjusticiable (or inadmissible) “act of state.” Are some acts—e.g., military acts—inherently sovereign no matter how heinous they may be? Or is certain conduct—e.g., a war crime committed in the course of armed conflict—so inherently lawless as to divest the act of any sovereign or official character, for purposes of jurisdiction or justiciability?

The Court of Appeal of England and Wales heard *Belhaj v. Straw and Others* and *Mohammed v. Ministry of Defence*, in which the defendants relied upon (a) foreign act of state and (b) state immunity. The Court of Appeal did not strike the claims on either ground, and the defendants have appealed to the Supreme Court of the United Kingdom. Central to the case is the question of what constitutes an act of the state. In a similar case, *Rahmatullah v. Ministry of Defence*, the claimant is suing the United Kingdom government for his brief detention in Iraq by United Kingdom Forces and his much longer detention in Afghanistan by the United States to whom he was transferred by the United Kingdom. Again, the defendants rely on foreign act of state and state immunity defenses. The judge authorized the decision not to strike the claim and granted a certificate enabling the case to leapfrog the Court of Appeal and be heard by the Supreme Court along with *Belhaj*. As of this writing, decisions are expected in the summer of 2016.

Belhaj v. Straw

Court of Appeal of England and Wales (Civil Division)
[2014] EWCA Civ 1394 (October 30, 2014) (appeal pending)

Before: MASTER OF THE ROLLS, LORD JUSTICE LLOYD JONES and LADY JUSTICE SHARP . . . [judgment of the court to which all its members have contributed but which has been drafted principally by Lloyd Jones L.J.] . . .

2. In these proceedings the appellants seek a declaration of illegality and damages arising from what they contend was the participation of the respondents in their unlawful abduction, kidnapping and removal to Libya in March 2004. The claim includes allegations that they were unlawfully detained and/or mistreated in China, Malaysia, Thailand and Libya, and on board a US registered aircraft. It is alleged that their detention and mistreatment was carried out by agents of China, Malaysia, Thailand, Libya and the United States of America. The claim pleads the following causes of action: false imprisonment, trespass to the person, conspiracy

to injure, conspiracy to use unlawful means, negligence and misfeasance in public office.

3. The first appellant, Mr. Belhaj, is a Libyan citizen who is also known as Abu Abdallah Assadaq and Abdullah Sadeq. The second appellant, Mrs. Boudchar, is a Moroccan citizen and is married to Mr. Belhaj. . . .

8. In the 1990s Mr. Belhaj was involved in a Libyan group opposed to Colonel Gaddafi and in 1998 he was forced to flee to Afghanistan. In 2003 he moved to China to evade detection by the Libyan intelligence agencies. . . .

11. Mr. Belhaj alleges that on arrival in Bangkok he was taken by two Thai officials to a van on the airport runway which contained US agents. They pulled him into the van and strapped him onto a stretcher, shackled and hooded him. He was taken in the van to a building and placed in a cell where he was chained to two hooks on the wall. Whilst still hooded he was repeatedly slammed into the wall. He was interrogated and subjected to loud music blasts. He was prevented from sleeping. He was beaten on arrival, when moved from one cell to another and before leaving the building. He was intermittently interrogated by two American men. After about a day he was injected with something which caused him to feel sleepy and confused. He was handcuffed, shackled and hooded and strapped onto a stretcher in a position which was extremely painful. . . .

16. Mr. Belhaj alleges that whilst detained in Tajoura Prison he was interrogated by British Intelligence Officers on at least two occasions. Mr. Belhaj alleges that he gestured to the British agents that he was being beaten and hung by his arms and showed them his scarred wrists. . . .

20. The Particulars of Claim state that the appellants seek declarations of illegality and damages arising out of the respondents' participation in the unlawful abduction, detention and rendition of the appellants to Tripoli, Libya in March 2004 and the respondents' subsequent acts and omissions whilst the appellants were unlawfully detained in Libya. In the Particulars of Claim the appellants define "rendition" as "covert unlawful abduction organised and carried out by State agents, across international borders, for the purpose of unlawful detention, interrogation and/or torture." . . .

22. It is alleged that the respondents knew that the US Government operated a covert rendition programme and a network of "black sites" at which detainees were held incommunicado and tortured. It is further alleged that they knew that if the appellants were abducted as part of the US rendition programme there was a real risk that they would be held incommunicado and tortured. . . .

32. Although the issue of state immunity arises only under the respondents' notice, it is appropriate to address it before considering the wider principle of act of state. . . .

36. . . . Where suit is brought against the servants or agents of a foreign state, that state is entitled to claim immunity for its servants or agents as it could if sued itself. . . .

37. . . . [But counsel for] the respondents seeks to take the argument one step further. He submits that state immunity may also be invoked where, as here, the claim necessarily requires findings of illegality in respect of acts on the part of officials of foreign states for which they could claim immunity if they had been sued directly. He submits that the principle of state immunity prevents the appellants from obtaining via the back door declarations of illegality which they could not obtain if either the states concerned or the officials themselves were directly impleaded in the action. On this basis he submits that the claim indirectly impleads the states concerned because it affects their interests and that, accordingly, state immunity applies to bar the claim.

38. No support for this submission can be found in the structure of the 1978 Act itself. . . . Rather, [the key provision] simply establishes that in circumstances in which a state is immune from the jurisdiction a court must give effect to state immunity, even if the state concerned does not appear in the proceedings. . . .

48. The principles of state immunity and act of state as applied in this jurisdiction are clearly linked and share common rationales. They may both be engaged in a single factual situation. Nevertheless, they operate in different ways, state immunity by reference to considerations of direct or indirect impleader and act of state by reference to the subject matter of the proceedings. Act of state reaches beyond cases in which states are directly or indirectly impleaded, in the sense described above, and operates by reference to the subject matter of the claim rather than the identity of the parties. . . .

114. [Regarding a decision on the act of state issue,] [t]he central . . . determination is whether this court should . . . apply the public policy limitation in a case where the court, if it exercised jurisdiction, would be required to conduct a legal and factual investigation into the validity of the conduct of a foreign state. The *ratio decidendi* of [the prior decision] does not confine the limitation to cases where such an investigation is unnecessary. Furthermore, we consider that there are compelling reasons for concluding that the present case does fall within this limitation on the act of state doctrine. . . .

115. First, a fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. A corresponding shift in international public policy has also taken place. These changes have been reflected in a growing willingness on the part of courts in this jurisdiction to address and investigate the conduct of foreign states and issues of public international law when appropriate.

116. Secondly, the allegations in this case—although they are only allegations—are of particularly grave violations of human rights. The abhorrent nature of torture and its condemnation by the community of nations is apparent from the participation of states in the UN Convention against Torture (to which all of the States concerned with the exception of Malaysia are parties) and the International Covenant on Civil and Political Rights (to which Libya, Thailand, the United States and the United Kingdom are parties) and from the recognition in customary international law of its prohibition as a rule of *jus cogens*, a peremptory norm from which no derogation is permitted. While it is impermissible to draw consequences as to the jurisdictional competence of national courts from the *jus cogens* status of the prohibition on torture . . . , it is appropriate to take account of the strength of this condemnation when considering the application of a rule of public policy. . . .

117. Thirdly, the respondents in these proceedings are either current or former officers or officials of state in the United Kingdom or government departments or agencies. They are not entitled to any immunity before the courts in this jurisdiction, whether *ratione personae* or *ratione materiae*. Furthermore, their conduct, considered in isolation, would not normally be exempt from investigation by the courts. On the contrary there is a compelling public interest in the investigation by the English courts of these very grave allegations. The only ground on which it could be contended that there is any exemption from the exercise of jurisdiction in the present case is because of the alleged involvement of other states and their officials in the conduct alleged. Notwithstanding our view that the present proceedings would entail an investigation of the legality of the conduct of those foreign officials, the fortuitous benefit the act of state doctrine might confer on the respondents is a further factor supporting the application of this public policy limitation.

118. Fourthly, this is not a case in which there is a lack of judicial or manageable standards. On the contrary, the applicable principles of international

law and English law are clearly established. The court would not be in a judicial no man's land.

119. Fifthly, the stark reality is that unless the English courts are able to exercise jurisdiction in this case, these very grave allegations against the executive will never be subjected to judicial investigation. The subject matter of these allegations is such that, these respondents, if sued in the courts of another state, are likely to be entitled to plead state immunity. Furthermore, there is, so far as we are aware, no alternative international forum with jurisdiction over these issues. As a result, these very grave allegations would go uninvestigated and the appellants would be left without any legal recourse or remedy. . . .

121. . . . [T]he present case falls within the established limitation on the act of state doctrine imposed by considerations of public policy on grounds of violations of human rights and international law and that there are compelling reasons requiring the exercise of jurisdiction. . . .

122. So far, this discussion has proceeded entirely by reference to the common law. However, it is also necessary to consider whether Article 6 ECHR has any application to the present issue. . . .

123. The doctrine of act of state, as applied by the courts in this jurisdiction, undoubtedly pursues a legitimate aim, namely the promotion of comity and good relations between states through the respect for another state's sovereignty. Although not required by international law, it is to be found in a number of common law jurisdictions. Furthermore, the doctrine is proportionate to the aim to be achieved. . . . [I]t is not a blanket rule but is subject to a number of important limitations. In particular, it applies only where a determination of the validity or legality of an act of a foreign state is necessary for the determination of the issues before the court. Similarly, in the area of human rights the rule is subject to an important limitation which makes it susceptible of varying application depending on the facts of each case. Furthermore, it is notable that there have been very few cases in this jurisdiction in which the doctrine has been applied with the result of denying access to the court. However, having regard to the particular circumstances of this case, we do not consider that the act of state doctrine is here capable of outweighing the appellants' Article 6 right of access to the court. In coming to this conclusion we have had regard to all the considerations set out above which have led us to the same conclusion on our analysis of the position at common law. . . .

Mohammed v. Ministry of Defence
High Court of Justice of England and Wales
(Queen’s Branch Division)
[2014] WHC 1369 (QB) (May 2, 2014) (appeal pending)

Mr Justice Leggatt: . . .

1. The important question raised by this case is whether the UK government has any right in law to imprison people in Afghanistan; and, if so, what is the scope of that right. The claimant, Serdar Mohammed . . . , was captured by UK armed forces during a military operation in northern Helmand in Afghanistan on 7 April 2010. He was imprisoned on British military bases in Afghanistan until 25 July 2010, when he was transferred into the custody of the Afghan authorities. [Mohammed] claims that his detention by UK armed forces was unlawful (a) under the Human Rights Act 1998 and (b) under the law of Afghanistan. . . .

3. UK armed forces have since 2001 been participating in the International Security Assistance Force (“ISAF”), a multinational force present in Afghanistan with the consent of the Afghan government under a mandate from the United Nations Security Council.” . . .

5. [Mohammed] was captured by UK armed forces in April 2010 as part of a planned ISAF mission. He was suspected of being a Taliban commander and his continued detention after 96 hours for the purposes of interrogation was authorised by UK Ministers. He was interrogated over a further 25 days. At the end of this period the Afghan authorities said that they wished to accept [Mohammed] into their custody but did not have the capacity to do so due to prison overcrowding. [Mohammed] was kept in detention on British military bases for this ‘logistical’ reason for a further 81 days before he was transferred to the Afghan authorities. During the 110 days in total for which [Mohammed] was detained by UK armed forces he was given no opportunity to make any representations or to have the lawfulness of his detention decided by a judge. . . .

[The court concluded that the detention was not legal under domestic or international law.]

385. In his *International Law Opinions* (1956), Lord McNair drew a distinction between two different rules or conceptions of the act of state doctrine. On one conception ‘act of state’ “can be raised as a defence to an act, otherwise tortious or criminal, committed abroad by a servant of the Crown against a subject

of a foreign state or his property, provided that the act was authorised or subsequently ratified by the Crown.” In addition:

The term ‘act of state’ is used, not only narrowly to describe the defence explained above, but also, perhaps somewhat loosely, to denote a rule which is wider and more fundamental, namely, that ‘those acts of the Crown which are done under the prerogative in the sphere of foreign affairs’ . . . for instance, the making of peace and war, the annexation or abandonment of territory, the recognition of a new state or a new government of an old state, etc, cannot form the basis of an action brought against the Crown, or its agents or servants, by any person, British or alien, or by any foreign state, in British municipal tribunals. Such acts are not justiciable in British courts . . .

Lord McNair commented that “[m]uch confusion has resulted from failure to perceive the distinction between the two meanings,” while confessing that “the scope both of the defence ‘act of state’ and of the rule of non-justiciability of certain ‘acts’ or ‘matters of state’ is still obscure.” . . .

392. In the *Al-Jedda* case [(2011)] . . . , Elias LJ referred to [an earlier decision in 1848] . . . where act of state was successfully claimed to bar the claim even though determining the legality of the act was obviously within the court’s competence. He then asked:

Why does the court defer to the executive even in areas where the issue in dispute would be amenable to judicial review? The basis for this appears to be a recognition that where the state through the executive government asserts that its actions are intended to protect interests of state, and the court accepts that this is so, the courts ought not thereafter to undermine that executive action by questioning further its legality. Court and Crown should speak with one voice.

393. The ‘one voice’ principle in the field of foreign relations was most famously stated by Lord Atkin in *Government of the Republic of Spain v SS “Arantzazu Mendi”* [1939], where he said: “Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another.” . . .

394. The force and scope of the one voice principle are necessarily limited. . . . Clearly the principle has no application to acts done within UK territory, which explains why this act of state rule does not apply to such acts

(except in relation to enemy aliens). Within the realm it is a vital function of the courts to protect the rights of liberties of the individual against the state. But in the field of foreign affairs and particularly where UK forces are involved in armed conflict abroad, different considerations apply. . . . I see a material difference between acts done within the jurisdiction of the Crown, where the subject is indeed entitled to expect to be protected by the courts of this country against unlawful executive action, and the position as regards acts abroad, where no such expectation arises.

395. . . . [I]n the context of operations in Afghanistan, the UK government, in common with other nations contributing forces to ISAF, has taken a policy decision that in order to maintain security it is necessary to capture and detain suspected insurgents for up to 96 hours in order to transfer them into the custody of the Afghan authorities. The UK government has also taken a considered decision to authorise the detention of individuals beyond 96 hours in exceptional circumstances, where it is judged that such detention may yield vital intelligence that would help protect UK forces and the local population—potentially saving lives. In addition, the UK has chosen to detain individuals whom the Afghan authorities wish to investigate and potentially to prosecute beyond 96 hours until they can be transferred to the Afghan authorities. This and other aspects of UK detention policy and practice in Afghanistan can be reviewed by the English courts in accordance with established principles of public law. But if and insofar as acts done in Afghanistan by agents of the UK state in carrying out its policy infringe Afghan domestic law, that in my opinion is a matter for which redress must be sought in the courts of Afghanistan. It is not the business of the English courts to enforce against the UK state rights of foreign nationals arising under Afghan law for acts done on the authority of the UK government abroad, where to do so would undercut the policy of the executive arm of the UK state in conducting foreign military operations.

396. . . . In its character, this act of state rule seems to me to be analogous to the conflict of laws rule that English courts will not enforce a right arising under the law of a foreign country if to do so would be contrary to English public policy, and to the rule that English courts will not enforce the penal, revenue or other public law of a foreign state. Thus understood, the Crown act of state doctrine operates, like those other rules, as an exception to the general principle that proceedings may be brought in this country founded on a tort which is actionable under the law of a foreign country where the law of that country is the applicable law. Seen in this way, there is no inconsistency between the [Ministry of Defence's] acceptance that the law applicable to [Mohammed's] claim in tort is the law of Afghanistan and its reliance on the Crown act of state doctrine as a defence to the claim. The act of state rule is not a choice of law rule. It does not

displace Afghan law in favour of English law as the law applicable to the tort claim. Rather, its effect is to preclude the enforcement of that tort claim in the courts of this country.

397. It is important to emphasise how narrow this act of state rule is. As indicated, leaving aside the position of enemy aliens in time of war, it applies only to executive acts done abroad pursuant to deliberate UK foreign policy. It may well be confined to acts involving the use of military force. It is unnecessary for me to decide whether it can be relied on against a British citizen, although . . . I find it difficult to see how the nationality of the claimant can in principle be relevant. Importantly, it applies only to acts which are directly authorised or ratified by the UK government. . . .

Prefecture of Voiotia v. Federal Republic of Germany
Supreme Civil and Criminal Court of Greece (Areios Pagos)
Case No. 11 (2000)*

SUMMARY: The facts:—In June 1944, German occupation forces in Greece massacred more than 300 inhabitants of the village of Distomo and burnt the village to the ground. In 1995, proceedings against Germany were instituted before the Greek courts, by over 250 relatives of the victims of the massacre, claiming compensation for loss of life and property. The Court of Livadia held Germany liable and ordered it to pay compensation to the claimants. Germany appealed to the Court of Cassation, on the ground that it was immune from the jurisdiction of the Greek courts.

Held (by seven votes to four):—The appeal was dismissed. The Greek courts were competent to exercise jurisdiction over the case. . . .

According to Article 11 of [the European Convention on State Immunity], a Contracting Party cannot claim immunity from the jurisdiction of a court of another Contracting Party in relation to its civil liability to provide restitution for damage caused by torts against the person or property (including bodily harm, whether caused intentionally or by negligence, manslaughter, destruction of

* The English translation of this case was provided by the International Crimes Database, hosted and maintained by the T.M.C. Asser Instituut in The Hague and supported by the Dutch Ministry of Security and Justice and the International Centre for Counter-Terrorism.

property, arson, etc.) irrespective of whether the tort was committed by the contracting party acting *jure imperii* or *jure gestionis*.

An additional prerequisite for the establishment of the tortious liability of the foreign State is the existence of a link with the State of the forum. In particular, it must be established cumulatively that (a) the act or omission occurred on the territory of the State of the forum and (b) the author of the act or omission was present on that territory at the time when the facts occurred.

In addition, the European Convention of 1972 has inspired and influenced a significant number of foreign States which have introduced legislation on foreign State immunity, excluding immunity for claims against foreign States relating to tortious liability, provided that the same conditions are satisfied, which constitute an expression of the principle of territoriality (commission of the tort on the territory of the forum State with the author being present on that territory at the time of its commission). Such an exception from immunity is provided for by the legislation of [a variety of states around the world]. . . .

This exception to immunity is also adopted by a large number of prominent writers on international law. In view of these facts, a general practice of the States of the international community accepted as law is thus verified, amounting to the formation of an international custom which, in accordance with Article 28(1) of the Constitution, constitutes an integral part of national law with superior rank.* This rule requires, by way of exception from the principle of immunity, that national courts may exercise international jurisdiction over claims for damages in relation to torts committed against persons and property on the territory of the forum State by organs of a foreign State present on that territory at the time of the commission of these torts even if they resulted from acts of sovereign power (*acta jure imperii*).

[The majority of the Court considers] that State immunity cannot be dispensed with in relation to claims for damages arising [from military action] in situations of armed conflict, which generally involve conflict between States where harm to civilians necessarily results and where resultant claims are normally dealt with through inter-State agreements after the war has ended. But the exception to the immunity rule should apply where the offences for which

* Article 28(1) of the Constitution of Greece provides: "The generally recognised rules of international law, as well as international conventions as of the time they are sanctioned by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity."

compensation is sought (especially crimes against humanity) did not target civilians generally, but specific individuals in a given place who were neither directly nor indirectly connected with the military operations. In particular, in the case of military occupation arising in the course of an armed conflict, Article 43 of the Regulations on the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 confirms that [in law] there is neither transfer of sovereignty nor, in normal circumstances, any abolition of the laws in force in the occupied State, which the occupying forces are required to respect.

Furthermore, extraterritoriality (State immunity) does not cover the criminal acts of the organs of such an occupying force, where they are committed as an abuse of sovereign power, in retaliation for acts of sabotage by resistance groups, against a specific and relatively limited number of completely uninvolved and innocent civilians, something which is anyway contrary to the principle, generally accepted by civilized nations, that no one should be punished for the acts of someone else.

In these proceedings, in the absence of the defendant State, this Court regards the following facts as accepted: The Germans, realizing that the successes of the Allied Forces on the war fronts would result in the steady increase of the resistance of the Greek Liberation Forces, began systematic terrorism with group “clean-up” operations and executions of innocent people, in order to bring down the morale of these fighting forces and to decrease the intensity of their efforts. Therefore, on 10 June 1944, the Germans serving in the Gestapo and the Livadia SS dressed up twenty of their soldiers in Greek dress and headed towards Arachova in two cars with other German cars following. On the way there they were shooting and killing every Greek they met. They arrived at Distomo towards noon and started the destruction. Then they headed to Stiri village. On the way there, however, the disguised Germans were ambushed by Greek resistance men, who killed eighteen of them and one of their Greek drivers.

Subsequently, in order to take revenge, the Germans went back to Distomo where they ordered a curfew. They then encircled the village, put guards on the exits and started a collective massacre, equal to which in atrocity and cruelty humanity has hardly known throughout the centuries. . . .

[The majority of this Court considers that] these crimes (of murder which, at the same time, constituted crimes against humanity) were committed against specific persons of relatively limited number, living in a specific place, who had absolutely no connection to the resistance group which, within the framework of its resistance action, was responsible for the killing of the disguised German soldiers participating in the operation to terrify the local population. These cruel

murders were objectively in any case not necessary for the conservation of the military occupation or to reduce the resistance action and were carried out on the territory of the State of the forum, by organs of the Third Reich, in excess of their sovereign powers. . . .

Consequently, the trial court was entitled to rule that it had international jurisdiction over the relevant claims for damages and pecuniary satisfaction brought by the plaintiffs, albeit on the different ground that the defendant State could not invoke its right of immunity, which it had tacitly waived since the acts for which it was being sued were carried out by its organs in contravention of the rules of *jus cogens* . . . and did not have the character of acts of sovereign power. The trial court therefore correctly concluded, as to the result in relation to the question of the existence of its international jurisdiction, that the plea of lack of international jurisdiction was inadmissible.

Accordingly [the majority of this Court concludes that] the grounds of appeal must be dismissed in so far as they refer to infringements of procedural provisions . . . in relation to the international jurisdiction of the Greek courts. In particular, the argument constituting the first ground of appeal, that the trial court was wrong to recognize an exception to the immunity of foreign States based on customary international law, cannot be upheld and the appeal is dismissed. . . .

[Members of the Court filed several opinions dissenting from specific points.]

Judgment No. 238
Constitutional Court of Italy (2014)

. . . President Giuseppe TESAURO; Judges: Sabino CASSESE, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO, Paolo GROSSI, Giorgio LATTANZI, Aldo CAROSI, Marta CARTABIA, Sergio MATTARELLA, Mario Rosario MORELLI, Giancarlo CORAGGIO, Giuliano AMATO. [Giuseppe TESAURO, President and Drafter. Gabriella Paola MELATTI, Registrar.] . . .

1. By means of three identical orders adopted on 21 January 2014 . . . , the Tribunal of Florence raised the question of constitutionality:

1) of the “norm created in our legal order by the incorporation, by virtue of Article 10 . . . of the Constitution,”* of the international custom, as found by the International Court of Justice (ICJ) in its Judgment of 3 February 2012, insofar as it denies the jurisdiction [of civil courts] in the actions for damages for war crimes committed *jure imperii* by the Third Reich, at least in part in the State of the Court seized;

2) of Article 1 of Law No. 848 of 17 August 1957 (Execution of the United Nations Charter, signed in San Francisco on 16 June 1945), insofar as, through the incorporation of Article 94 of the U.N. Charter, it obliges the national judge to comply with the Judgment of the ICJ, which established the duty of Italian courts to deny their jurisdiction in the examination of actions for damages for crimes against humanity, committed *jure imperii* by the Third Reich, at least in part in Italian territory;

3) of [Article 3] . . . of Law No. 5 of 14 January 2013 (Accession by the Italian Republic to the United Nations Convention on Jurisdictional Immunities of States and their Property, signed in New York on 2 December 2004, as well as provisions for the amendment of the domestic legal order), insofar as it obliges the national judge to comply with the Judgment of the ICJ, even when it established the duty of Italian courts to deny their jurisdiction in the examination of actions for damages for crimes against humanity, committed *jure imperii* by the Third Reich in Italian territory . . .

These norms are questioned in relation to . . . the Constitution. They are said to conflict with the principle of absolute guarantee of judicial protection . . . as they preclude the judicial examination of the case and compensation for damages for the gross violations of human rights suffered by the victims of war crimes and crimes against humanity, committed in the territory of the Italian State (which has the duty to ensure judicial protection) by another State in the exercise of its sovereign powers (*jure imperii*). The principle of absolute guarantee of

* Article 10 of the Constitution of Italy provides: “The Italian legal system conforms to the generally recognised principles of international law. The legal status of foreigners is regulated by law in conformity with international provisions and treaties. A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law. A foreigner may not be extradited for a political offence.”

judicial protection is a supreme principle of the Italian constitutional order and, as such, constitutes a limit to the introduction [in the domestic legal order] of generally recognized norms of international law (under Article 10 . . .), as well as of norms contained in treaties establishing international organizations furthering the ends envisaged by Article 11 of the Constitution, or deriving from such organizations.* . . .

3.2. . . . [T]here is no doubt that the fundamental principles of the constitutional order and inalienable human rights constitute a “limit to the introduction . . . of generally recognized norms of international law, to which the Italian legal order conforms under Article 10 . . . of the Constitution” . . . In a centralized constitutional review system, it is clear that this assessment of compatibility pertains to the Constitutional Court alone, and not to any other judge, even with regard to customary international law. The truth is, indeed, that the competence of this Court is determined by the incompatibility of a norm with constitutional law—this obviously includes a fundamental principle of the State’s constitutional order or a principle that guarantees inviolable human rights. The examination of this contrast is a task of the constitutional judge alone. . . .

3.5. In the present case, the impossibility of effective judicial protection of fundamental rights, acknowledged by the ICJ and confirmed before that Court by the FRG, makes apparent the contrast between international law, as defined by the ICJ, and . . . the Constitution. This contrast, insofar as the international law of immunity of States from the civil jurisdiction of other States includes acts considered *jure imperii* that violated international law and fundamental human rights, obliges this Court to declare that, to the extent that international law extends immunity to actions for damages caused by such serious violations, the referral of Article 10 . . . of the Constitution does not operate. Consequently, insofar as the law of immunity from jurisdiction of States conflicts with the aforementioned fundamental principles [of the Constitution], it has not entered the Italian legal order and, therefore, does not have any effect therein. . . .

4. Different conclusions can be drawn with regard to the question of constitutionality of Article 1 of the Law of Adaptation to the United Nations Charter (Law No. 848 of 17 August 1957). That provision is said to be in breach of Articles 2 and 24 of the Constitution, insofar as it gives execution to the United

* Article 11 of the Constitution of Italy provides: “Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends.”

Nations Charter, and in particular Article 94, which provides that “each Member of the United Nations undertakes to comply with the decision of the ICJ in any case to which it is a party,” and therefore requires that the domestic legal order conform to the Judgment of the ICJ even when it established (as in the present case) the duty of Italian courts to deny their jurisdiction in case of acts of the [foreign] State that constituted serious violations of international humanitarian law and of fundamental rights, as is the case of war crimes and crimes against humanity.

4.1. . . . This binding force produces effects in the domestic legal order through the Special Law of Adaptation (authorization to ratification and execution order). It constitutes one of the cases of limitation of sovereignty the Italian State agreed to in order to favour those international organizations, such as the UN, that aim to ensure peace and justice among the Nations . . . , always within the limits, however, of respect for the fundamental principles and inviolable rights protected by the Constitution. Hence, the obligation to comply with the decisions of the ICJ, imposed by the incorporation of Article 94 of the United Nations Charter, cannot include the Judgment by which the ICJ obliged the Italian State to deny its jurisdiction in the examination of actions for damages for war crimes and crimes against humanity, in breach of fundamental human rights, committed *jure imperii* by the Third Reich in Italian territory. In any case, the conflict between the Law of Adaptation to the United Nations Charter and Articles 2 and 24 of the Constitution arises exclusively and specifically with regard to the Judgment of the ICJ that interpreted the general international law of immunity from the jurisdiction of foreign States as to include cases of acts considered *jure imperii* and classified as war crimes and crimes against humanity, in breach of inviolable human rights. As has been repeatedly recalled, judicial protection of fundamental rights is one of the “supreme principles of the constitutional order.” Accordingly, the questioned provision . . . cannot be opposed to this principle, insofar as it binds the Italian State, and thus Italian courts, to comply with the Judgment of the ICJ of 3 February 2012, which obliges Italian courts to deny their jurisdiction in the examination of actions for damages for crimes against humanity, in blatant breach of the right to judicial protection of fundamental rights. . . .

5. Lastly, . . . the constitutionality of the aforementioned Article [3 of the Law No. 5/2013], to the extent that it obliges the national judge to comply with the Judgment of the ICJ even when, as in the case at issue, it requires the national judge to deny their jurisdiction in the examination of the action for damages for crimes against humanity, committed by the Third Reich in Italian territory. [According to the referring judge], that provision conflicts with the principle of judicial protection of inviolable rights, enshrined in Articles 2 and 24 of the Constitution, insofar as it precludes judicial examination and compensation for

damages for gross violations of human rights suffered by victims of war crimes and crimes against humanity, committed in the territory of the Italian State (which has the duty to ensure judicial protection) by another State, albeit in the exercise of sovereign powers. . . .

FOR THESE REASONS, THE CONSTITUTIONAL COURT . . .

[D]eclares the unconstitutionality of Article 3 of Law No. 5 of 14 January 2013 (Accession of the Italian Republic to the United Nations Convention on Jurisdictional Immunities of States and their Property, signed in New York on 2 December 2004, as well as provisions for the amendment of the domestic legal order); . . .

[D]eclares the unconstitutionality of Article 1 of Law No. 848 of 17 August 1957 (Execution of the United Nations Charter, signed in San Francisco on 26 June 1945), so far as it concerns the execution of Article 94 of the United Nations Charter, exclusively to the extent that it obliges the Italian judge to comply with the Judgment of the ICJ of 3 February 2012, which requires that Italian courts deny their jurisdiction in case of acts of a foreign State constituting war crimes and crimes against humanity, in breach of inviolable human rights; . . .

[D]eclares ill-founded, under the terms set out in the reasoning, the question of constitutionality of the norm “created in our legal order by the incorporation, by virtue of Article 10 . . . of the Constitution,” of the customary international law of immunity of States from the civil jurisdiction of other States, raised in relation to Articles 2 and 24 of the Constitution by the Tribunal through the Orders mentioned above.

WHO DECIDES ON FOREIGN IMMUNITY?: INTERACTIONS OF LEGISLATURES, THE EXECUTIVE BRANCH, AND COURTS

The cases have raised complex questions about the rule of law, access to the courts, judicial competence, the scope of civil liability, respect for human rights, and the relationship between law and foreign policy. A crucial recurring question is which branch of government should decide whether and when foreign sovereign immunity should apply: legislatures, the executive branch, courts, or the international community acting through regional or global conventions? While

most states have statutory exceptions to sovereign immunity, some recognize the importance of foreign ministries and the Executive Branch in determining grants or denials of foreign sovereign immunity.

If in fact these decisions fall within a zone of shared institutional authority, when does it make sense for some key determinations to be made by legislatures and when should they be made by common law interpretation? Illustrative of these issues is the *Samantar* litigation, excerpted below.

Samantar v. Yousuf
Supreme Court of the United States
560 U.S. 305 (2010)

Justice STEVENS delivered the opinion of the Court.

From 1980 to 1986 petitioner Mohamed Ali Samantar was the First Vice President and Minister of Defense of Somalia, and from 1987 to 1990 he served as its Prime Minister. Respondents are natives of Somalia who allege that they, or members of their families, were the victims of torture and extrajudicial killings during those years. They seek damages from petitioner based on his alleged authorization of those acts. The narrow question we must decide is whether the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), provides petitioner with immunity from suit based on actions taken in his official capacity. We hold that the FSIA does not govern the determination of petitioner’s immunity from suit. . . .

Prior to 1952, the State Department followed a general practice of requesting immunity in all actions against friendly sovereigns, but in that year the Department [through the Tate Letter] announced its adoption of the “restrictive” theory of sovereign immunity. Under this theory, “immunity is confined to suits involving the foreign sovereign’s public acts, and does not extend to cases arising out of a foreign state’s strictly commercial acts.” This change threw “immunity determinations into some disarray,” because “political considerations sometimes led the Department to file ‘suggestions of immunity in cases where immunity would not have been available under the restrictive theory.’”

Congress responded to the inconsistent application of sovereign immunity by enacting the FSIA in 1976. Section 1602 describes the Act’s two primary purposes: (1) to endorse and codify the restrictive theory of sovereign immunity, and (2) to transfer primary responsibility for deciding “claims of foreign states to immunity” from the State Department to the courts. After the enactment of the

FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity.

What we must now decide is whether the Act also covers the immunity claims of foreign officials. We begin with the statute’s text and then consider petitioner’s reliance on its history and purpose. . . .

Petitioner argues that the FSIA is best read to cover his claim to immunity because of its history and purpose. As discussed at the outset, one of the primary purposes of the FSIA was to codify the restrictive theory of sovereign immunity, which Congress recognized as consistent with extant international law. We have observed that a related purpose was “codification of international law at the time of the FSIA’s enactment,” and have examined the relevant common law and international practice when interpreting the Act. Because of this relationship between the Act and the common law that it codified, petitioner argues that we should construe the FSIA consistently with the common law regarding individual immunity, which—in petitioner’s view—was coextensive with the law of state immunity and always immunized a foreign official for acts taken on behalf of the foreign state. Even reading the Act in light of Congress’ purpose of codifying state sovereign immunity, however, we do not think that the Act codified the common law with respect to the immunity of individual officials.

The canon of construction that statutes should be interpreted consistently with the common law helps us interpret a statute that clearly covers a field formerly governed by the common law. But the canon does not help us to decide the antecedent question whether, when a statute’s coverage is ambiguous, Congress intended the statute to govern a particular field—in this case, whether Congress intended the FSIA to supersede the common law of official immunity.

Petitioner argues that because state and official immunities are coextensive, Congress must have codified official immunity when it codified state immunity. But the relationship between a state’s immunity and an official’s immunity is more complicated than petitioner suggests, although we need not and do not resolve the dispute among the parties as to the precise scope of an official’s immunity at common law. The very authority to which petitioner points us, and which we have previously found instructive, states that the immunity of individual officials is subject to a caveat not applicable to any of the other entities or persons to which the foreign state’s immunity extends. The Restatement [(Second) of the Foreign Relations Law of the United States] provides that the “immunity of a foreign state . . . extends to . . . any other public minister, official, or agent of the state with respect to acts performed in his official capacity *if the effect of exercising jurisdiction would be to enforce a rule of law against the state.*” And

historically, the Government sometimes suggested immunity under the common law for individual officials even when the foreign state did not qualify. There is therefore little reason to presume that when Congress set out to codify state immunity, it must also have, *sub silentio*, intended to codify official immunity. . . .

Petitioner would have a stronger case if there were any indication that Congress' intent to enact a comprehensive solution for suits against states extended to suits against individual officials. But to the extent Congress contemplated the Act's effect upon officials at all, the evidence points in the opposite direction. As we have already mentioned, the legislative history points toward an intent to leave official immunity outside the scope of the Act. . . .

**Foreign Official Immunity After *Samantar*:
A United States Government Perspective**
Harold Hongju Koh (2011)*

. . . A. Five Tenets of Official Immunity Practice . . .

The first [conclusion], as acknowledged by the Supreme Court in *Samantar* itself, is that when State Department determinations of immunity and non-immunity are made in particular cases, the courts should defer to those State Department determinations. Such deference is due both to State Department determinations with respect to the status of foreign officials and with respect to the character of the acts.

A second conclusion that can be drawn from *Samantar* is that, absent a treaty or statute, general principles regarding immunity articulated by the State Department will govern foreign official immunity as a matter of federal common law. Again, this is nothing new. For more than seventy years, both before and after the Tate Letter and enactment of the FSIA, the federal common law of immunity has given force not just to case-specific immunity determinations but also to principles of immunity articulated by the State Department.

A third tenet is that the immunities of foreign officials belong to the foreign state—not to the officials personally—and thus, it has been historically recognized that those immunities may be waived by the foreign state. States

* Excerpted from Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*, 44 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1141 (2011).

recognize special protections for officials where the balance of public interests requires even deserving claimants to find remedies outside of court systems. But it is also important to remember that official immunity does not extinguish liability; states and their officials may still bear responsibility for the underlying conduct, and the individuals themselves may be subject to suit, including criminal prosecution. Just because an official may not be sued in a foreign court for an official act does not mean that the liability of the individual cannot be established elsewhere. Nor does it mean that the state's own responsibility cannot be addressed through some other mechanism, such as claims settlement or some other form of international remedy. Moreover, as a policy matter, because the U.S. Government is pressing for advancement of the rule of law internationally, this approach should lead in the longer term to reduced need for recourse to U.S. courts for injuries abroad, as more effective domestic remedies become available.

Fourth, in making official immunity determinations, the State Department will distinguish carefully between those immunities that are based on a person's *status* and those immunities that are based on a person's *claimed official acts*. . . . [T]here is a historical distinction between status immunities (immunities *ratione personae*)—i.e., immunities that apply to individual officials because of their current status, which are designed to protect their ability to carry out current functions (diplomatic, head of state, special missions)—and conduct immunities (immunities *ratione materiae*), which derive from the nature of those individuals' conduct and protect centrally against inappropriate judicial oversight of foreign government conduct. Thus, certain foreign officials—such as sitting heads of state, diplomats, and members of qualifying special missions—are entitled to immunities by virtue of their status, during the time they hold that status. Thereafter, as former officials, they are entitled only to those conduct immunities that attach to challenged acts that can be deemed official in nature, which may depend upon the nature of their former office. Obviously, whether an act may be considered “official” for conduct immunity purposes also depends upon the nature of the act alleged. A government official's legitimate authority has not generally been thought to encompass a right to commit “official acts” that violate both international and domestic law.

Fifth, and crucially, not every issue involving a foreign official will raise a *Samantar* issue that goes to the defendant's substantive immunity from suit. Even after *Samantar*, we expect that many cases can be disposed of, instead, based upon what we call “non-*Samantar* issues,” which broadly depend upon the defendant's status immunities or various procedural considerations. . . . As already noted, State Department determinations of status immunity are nothing new—we have been making such recommendations throughout the FSIA era, and they will continue as before. These include, for example, cases involving claims

of head of state immunity, immunity for diplomatic agents, and special missions immunity. Technically speaking, these are not pure “*Samantar*” cases, which require a fuller assessment of a foreign official’s conduct as well as his or her status.

Cases disposed of purely on status grounds fall into four broad categories. First, with respect to *sitting heads of state*, over the past several decades, the Executive Branch has retained its traditional pre-FSIA authority to suggest immunity from suit. A number of courts have held that a suggestion of immunity by the Executive Branch on behalf of a sitting head of state is binding upon the federal courts and must be accepted as conclusive. Those same immunities have not been routinely extended to former heads of state, although some courts have acknowledged that former heads of state enjoy certain immunities based on a combination of their past status and conduct.

Second, in cases brought against sitting *diplomats and consular officials*, the Executive Branch has filed indications of diplomatic and consular immunity where appropriate under the relevant Vienna Conventions.

Third, the U.S. Government has also expressed its view as a host country regarding *residual diplomatic immunity* in several lawsuits brought by domestic servants against their diplomatic employers following the completion of the diplomat’s official service. Under the Vienna Convention on Diplomatic Relations, during the period of a diplomatic agent’s accreditation the agent enjoys near absolute immunity from civil jurisdiction. Because the purpose of such diplomatic immunity is not to benefit individuals, but to ensure the efficient performance of diplomatic missions in representing States, once an individual ceases to be a diplomatic agent in a receiving state, the scope of that individual’s immunity is limited to that set forth in Article 39(2), which provides:

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunity shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period of time in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

A former diplomat thus enjoys residual immunity only for those official acts that were performed in the exercise of his or her functions as a member of the mission.

Fourth, at appropriate times we have acknowledged *special missions immunity*. This is a durationally limited status immunity established in international law that applies to diplomatic missions that are temporary and transient, rather than permanent, in nature. . . . The United States has recognized special missions immunity several times to provide foreign officials with immunity from personal service of process while on the diplomatic mission. This form of immunity does not address the official's underlying immunity from suit based on the nature of his or her conduct, and the State Department's role in ascertaining and asserting it rests upon the President's constitutional authority over foreign affairs, including the enumerated power to receive ambassadors and public ministers. . . .

* * *

After the U.S. Supreme Court remanded *Samantar v. Yousuf*, it was litigated in the district court and eventually appealed to the U.S. Court of Appeals for the Fourth Circuit, where the appellate court considered the question of how much deference should be given to the executive branch.

Yousuf v. Samantar

United States Court of Appeals for the Fourth Circuit
699 F.3d 763 (4th Cir. 2012) (cert. denied, 134 S. Ct. 897 (2014))

Before TRAXLER, Chief Judge, and KING and DUNCAN, Circuit Judges. . . . Chief Judge TRAXLER wrote the opinion, in which Judge KING and Judge DUNCAN joined.

TRAXLER, Chief Judge: . . .

Samantar advances a two-fold argument. First, he contends that the order denying him immunity cannot stand because the district court improperly deferred to the Department of State and abdicated its duty to independently assess his immunity claim. In contrast to the view offered by the United States in its amicus brief that the State Department is owed absolute deference from the courts on any question of foreign sovereign immunity, Samantar claims that deference to the Executive's immunity determination is appropriate only when the State Department recommends that immunity be *granted*. Second, Samantar argues that under the common law, he is entitled to immunity for all actions taken within the scope of his duties and in his capacity as a foreign government official, and that he is immune to any claims alleging wrongdoing while he was the Somali Prime Minister. We address these arguments below. . . .

Before proceeding further, we must decide the appropriate level of deference courts should give the Executive Branch's view on case-specific questions of individual foreign sovereign immunity. The FSIA displaced the common law regime for resolving questions of foreign *state* immunity and shifted the Executive's role as primary decision maker to the courts. After *Samantar*, it is clear that the FSIA did no such thing with respect to the immunity of *individual* foreign officials; the common law, not the FSIA, continues to govern foreign official immunity. And, in light of the continued viability of the common law for such claims, the Court saw "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity" under the common law. The extent of the State Department's role, however, depends in large part on what kind of immunity has been asserted. . . .

The United States, participating as *amicus curiae*, takes the position that federal courts owe absolute deference to the State Department's view of whether a foreign official is entitled to sovereign immunity on either ground. According to the government, under long-established Supreme Court precedent, the State Department's opinion on any foreign immunity issue is binding upon the courts. The State Department's position allows for the federal courts to function as independent decision makers on foreign sovereign immunity questions in only one instance: when the State Department remains silent on a particular case. Thus, the United States contends that the State Department resolved the issues once it presented the district court with its view that *Samantar* was not entitled to immunity.

Samantar, by contrast, advocates the view that deference to the Executive's immunity determination is required *only when the State Department explicitly recommends that immunity be granted*. *Samantar* argues that when the State Department concludes, as it did in this case, that a foreign official is *not* entitled to immunity or remains silent on the issue, courts can and must decide independently whether to grant immunity. And, the plaintiffs offer yet a third view, suggesting that the State Department's position on foreign sovereign immunity does not completely control, but that courts must defer "to the reasonable views of the Executive Branch" regardless of whether the State Department suggests that immunity be granted or denied. In this case, plaintiffs contend the State Department's rationale for urging denial of immunity, as set forth in its [Statement of Interest (SOI)], was reasonable and that the district court properly deferred to it. . . .

The Constitution assigns the power to "receive Ambassadors and other public Ministers" to the Executive Branch, U.S. Const. art. II, § 3, which includes,

by implication, the power to accredit diplomats and recognize foreign heads of state. Courts have generally treated executive “suggestions of immunity” for heads of state as a function of the Executive’s constitutional power and, therefore, as controlling on the judiciary. Like diplomatic immunity, head-of-state immunity involves “a formal act of recognition,” that is “a quintessentially executive function” for which absolute deference is proper.

Accordingly, consistent with the Executive’s constitutionally delegated powers and the historical practice of the courts, we conclude that the State Department’s pronouncement as to head-of-state immunity is entitled to absolute deference. The State Department has never recognized Samantar as the head of state for Somalia; indeed, the State Department does not recognize the Transitional Federal Government or any other entity as the official government of Somalia, from which immunity would derive in the first place. The district court properly deferred to the State Department’s position that Samantar be denied head-of-state immunity.

Unlike head-of-state immunity and other status-based immunities, there is no equivalent constitutional basis suggesting that the views of the Executive Branch control questions of foreign official immunity. Such cases do not involve any act of recognition for which the Executive Branch is constitutionally empowered; rather, they simply involve matters about the scope of defendant’s official duties.

This is not to say, however, that the Executive Branch has no role to play in such suits. These immunity decisions turn upon principles of customary international law and foreign policy, areas in which the courts respect, but do not automatically follow, the views of the Executive Branch. With respect to foreign official immunity, the Executive Branch still informs the court about the diplomatic effect of the court’s exercising jurisdiction over claims against an official of a foreign state, and the Executive Branch may urge the court to grant or deny official-act immunity based on such considerations. “That function, however, concerns the general assessment of a case’s impact on the foreign relations of the United States,” rather than a controlling determination of whether an individual is entitled to conduct-based immunity.

In sum, we give absolute deference to the State Department’s position on status-based immunity doctrines such as head-of-state immunity. The State Department’s determination regarding conduct-based immunity, by contrast, is not controlling, but it carries substantial weight in our analysis of the issue. . . .

[P]laintiffs contend that Samantar cannot raise this immunity as a shield against atrocities such as torture, genocide, indiscriminate executions and prolonged arbitrary imprisonment or any other act that would violate a *jus cogens* norm of international law. A *jus cogens* norm, also known as a “peremptory norm of general international law,” can be defined as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Prohibitions against the acts involved in this case—torture, summary execution and prolonged arbitrary imprisonment—are among these universally agreed-upon norms. . . .

There has been an increasing trend in international law to abrogate foreign official immunity for individuals who commit acts, otherwise attributable to the State, that violate *jus cogens* norms—*i.e.*, they commit international crimes or human rights violations:

Over the last decade . . . a growing number of domestic and international judicial decisions have considered whether a foreign official acts as an arm of the state, and thus is entitled to conduct immunity, when that official allegedly violates a *jus cogens* norm of international law or commits an international crime.

A number of decisions from foreign national courts have reflected a willingness to deny official-act immunity in the criminal context for alleged *jus cogens* violations, most notably the British House of Lords’ *Pinochet* decision denying official-acts immunity to a former Chilean head of state accused of directing widespread torture. “In the decade following Pinochet, courts and prosecutors across Europe and elsewhere . . . commenced criminal proceedings against former officials of other nations for torture and other violations of *jus cogens*.” Some foreign national courts have pierced the veil of official-acts immunity to hear civil claims alleging *jus cogens* violations, but the *jus cogens* exception appears to be less settled in the civil context.

American courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against *jus cogens* claims. We conclude that, under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant’s official capacity.

Moreover, we find Congress’s enactment of the [Torture Victim Protection Act of 1991 (TVPA)], and the policies it reflects, to be both instructive and consistent with our view of the common law regarding these aspects of *jus cogens*. Plaintiffs asserted claims against Samantar under the TVPA which authorizes a civil cause of action against “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture” or “extrajudicial killing.” “The TVPA thus recognizes explicitly what was perhaps implicit in the [Judiciary] Act of 1789—that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) ipso facto a violation of U.S. domestic law.” Thus, in enacting the TVPA, Congress essentially created an express private right of action for individuals victimized by torture and extrajudicial killing that constitute violations of *jus cogens* norms.

Absent universal civil jurisdiction, are there some actions that always affect a state’s interests sufficiently to engage the jurisdiction of their courts? In *Warfaa v. Ali*, the U.S. Court of Appeals for the Fourth Circuit considered the question of when *jus cogens* violations sufficiently “touch and concern” a state to establish jurisdiction.

Warfaa v. Ali

United States Court of Appeals for the Fourth Circuit
811 F.3d 653 (4th Cir. 2016) (cert. pending)

Before GREGORY, AGEE, and DIAZ, Circuit Judges. . . .

Judge AGEE wrote the majority opinion, in which Judge DIAZ joined. Judge GREGORY wrote a separate opinion dissenting in part.

AGEE, Circuit Judge:

Farhan Warfaa alleges that in 1987, a group of soldiers kidnapped him from his home in northern Somalia. Over the next several months, Warfaa claims he was beaten, tortured, shot, and ultimately left for dead at the direction of Yusuf Ali, a colonel in the Somali National Army at the time. Warfaa later sued Ali under the Alien Tort Statute (“ATS”), and the Torture Victim Protection Act of 1991 (“TVPA”), alleging several violations of international law.

After lifting a multi-year stay, the district court dismissed Warfaa’s ATS claims, finding they did not sufficiently “touch and concern” the United States so as to establish jurisdiction in United States courts under *Kiobel v. Royal Dutch Petroleum Co.* [(2013)]. The district court allowed Warfaa’s TVPA claims to proceed after holding that Ali was not entitled to immunity as a foreign official. Both Warfaa and Ali appeal. For the reasons set forth below, we affirm the judgment of the district court. . . .

Warfaa’s amended complaint contains six counts: (1) attempted extrajudicial killing; (2) torture; (3) cruel, inhuman, or degrading treatment or punishment; (4) arbitrary detention; (5) crimes against humanity; and (6) war crimes. All six counts allege torts purportedly committed in violation of international law, with jurisdiction arising under the ATS. In addition, the first two counts—attempted extrajudicial killing and torture—are alleged to violate the TVPA, which provides a jurisdictional basis separate from the ATS. . . .

At the hearing on the [defendant’s] motion to dismiss, the district court stated that it was “going to dismiss the ATS claims from this case” “on the basis of *Kiobel*” because “[t]here is absolutely no connection between the United States and [Ali]’s conduct in Somalia.” It further indicated that it was not inclined to dismiss the TVPA claims.

In a subsequent written opinion, the district court granted Ali’s motion to dismiss as to the ATS claims, but denied the motion as to the TVPA claims. The district court dismissed the ATS claims because “such claims, generally speaking, must be based on violations occurring on American soil.” In this case, however, “all the relevant conduct . . . occurred in Somalia, carried out by a defendant who at the time was not a citizen or resident of the United States.” The district court rejected Ali’s motion to dismiss the TVPA counts, concluding that Ali could not claim “official acts” immunity because his alleged acts violated *jus cogens* norms. . . .

Whether the ATS bars claims related to extraterritorial conduct presents an issue of subject matter jurisdiction, which the Court considers *de novo*. Likewise, the district court’s denial of foreign official immunity presents a question of law that the Court must decide *de novo*. . . .

The ATS “does not expressly provide any causes of action.” Rather, it grants district courts “original jurisdiction” over “any civil action by an alien for a tort . . . committed in violation of the law of nations or a treaty of the United States.”

“Passed as part of the Judiciary Act of 1789, the ATS was invoked twice in the late 18th century, but then only once more over the next 167 years.” After 1980, ATS claims became more common, often relying on the Second Circuit’s decision in *Filártiga v. Peña-Irala* [(1980)]. In that case, the Second Circuit applied the ATS to a claim of torture committed abroad, with all of the acts involving foreign nationals. *Filártiga* opened the door to more ATS claims and “launched modern ATS litigation,” but recent Supreme Court decisions have significantly limited, if not rejected, the applicability of the *Filártiga* rationale.

Alien plaintiffs, like Warfaa, have sought to invoke the ATS as a means to seek relief for alleged international human-rights violations. The Supreme Court has explained, however, the reach of the ATS is narrow and strictly circumscribed.

In *Kiobel*, the Supreme Court considered whether an ATS claim “may reach conduct occurring in the territory of a foreign sovereign.” The answer, for the most part, is “no,” as the Supreme Court has applied a “presumption against extraterritorial application.” The presumption “provides that when a statute gives no clear indication of an extraterritorial application, it has none, and reflects the presumption that United States law governs domestically but does not rule the world.” A court that applies the ATS extraterritorially risks interference in United States foreign policy. Accordingly, in *Kiobel*, the “petitioners’ case seeking relief for violations of the law of nations occurring outside the United States [wa]s barred.” The Supreme Court emphasized that the ATS can create jurisdiction for such claims only where they “touch and concern” United States territory “with sufficient force to displace the presumption against extraterritorial application.”

This Court has applied *Kiobel* only once, in *Al Shimari v. CACI Premier Tech., Inc.* [(2014)]. In that case, four plaintiffs sued an American military contractor and several of its employees who were alleged to be American citizens directly responsible for abusive mistreatment and torture at the Abu Ghraib prison in Iraq. We recognized that “the clear implication of the [Supreme] Court’s ‘touch and concern’ language is that courts should not assume that the presumption categorically bars cases that manifest a close connection to United States territory.” To find that the presumption against extraterritoriality applies, “it is not sufficient merely to say that . . . the actual injuries were inflicted abroad.” Instead, courts should conduct a “fact-based analysis.”

Applying this analytical framework, we found that the *Al Shimari* plaintiffs alleged “extensive ‘relevant conduct’ in United States territory,” which distinguished their case from *Kiobel*. Based on that “extensive relevant conduct,”

the plaintiffs' claims sufficiently "touch[ed] and concern[ed]" the United States to establish jurisdiction under the ATS.

Al Shimari thus is best read to note that the presumption against ATS extraterritorial application is not irrefutable. A plaintiff may rebut the presumption in certain, narrow circumstances: when extensive United States contacts are present and the alleged conduct bears such a strong and direct connection to the United States that it falls within *Kiobel's* limited "touch and concern" language. The usual case will not present the strong and direct "touches" we recognized in *Al Shimari*.

An ATS claim premised on no relevant conduct in the United States will fit within the heartland of cases to which the extraterritoriality presumption applies. Warfaa's cross-appeal asks the Court to apply *Kiobel* and *Al Shimari* to permit a claim against a U.S. resident, Ali, arising out of conduct that occurred solely abroad. We analyze that claim by beginning with *Kiobel's* strong presumption against extraterritorial application of the ATS, recognizing *Al Shimari* is the rare case to rebut the presumption. . . .

The only purported "touch" in this case is the happenstance of Ali's after-acquired residence in the United States long after the alleged events of abuse. Mere happenstance of residency, lacking any connection to the relevant conduct, is not a cognizable consideration in the ATS context. "*Kiobel's* resort to the presumption against extraterritoriality extinguishes . . . ATS cases [with foreign parties and conduct], at least where all of the relevant conduct occurs outside the United States, even when the perpetrator later moves to the United States."

In sum, Warfaa has pled no claim which "touches and concerns" the United States to support ATS jurisdiction. The district court thus did not err in granting Ali's motion to dismiss the ATS counts in the complaint for lack of jurisdiction. . . .

The district court allowed Warfaa's TVPA claims to go forward, finding Ali lacked foreign official immunity for *jus cogens* violations under *Yousuf v. Samantar*. In *Samantar*, we held that foreign official immunity could not be claimed "for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." Ali does not contest that the misdeeds alleged in the complaint violate *jus cogens* norms; he concedes that they do. Rather, his challenge is a simple one: *Samantar* was wrongly decided, and *jus cogens* violations deserve immunity.

Ali would have us overrule *Samantar* entirely, but that course is not open to us. One panel's "decision is binding, not only upon the district court, but also

upon another panel of this court—unless and until it is reconsidered en banc.” True, the Court has the “statutory and constitutional power” to reconsider its own decisions. But we have decided collectively not to exercise that power as a “matter of prudence” outside the en banc context. The district court properly concluded *Samantar* forecloses Ali’s claim to foreign official immunity. . . .

For the reasons described above, the district court correctly held that Warfaa’s ATS claims lacked a sufficient nexus with the United States to establish jurisdiction over those claims. The district court also correctly rejected Ali’s claim of foreign official immunity. . . .

GREGORY, Circuit Judge, concurring in part and dissenting in part: . . .

I would hold that the Supreme Court’s decision in [*Kiobel*] does not foreclose the possibility of relief under the [ATS] here. . . .

This case involves “allegations of serious violations of international law” committed by a natural person who has sought safe haven within our borders and includes claims that are not covered by the Torture Victim Protection Act nor “the reasoning and holding” of *Kiobel*. Thus, the “proper implementation of the presumption against extraterritorial application” in this case requires “further elaboration and explanation.” Blithely relying on the fact that the human rights abuses occurred abroad ignores the myriad ways in which this claim touches and concerns the territory of the United States. . . .

If we consider, as we must, a “broader range of facts than the location where the plaintiff [] actually sustained [his] injuries,” there are three facts that distinguish this case from *Kiobel*. First, Ali’s status as a lawful permanent resident alone distinguishes this case from *Kiobel*, where the corporate defendant was merely “present.” . . .

Second, Ali’s “after-acquired residence” in this country is not mere “happenstance.” Ali was in the United States when he “realiz[ed] that the Barre regime was about to fall.” He initially sought refugee status in Canada. Canada deported Ali back to the United States for gross human rights abuses committed in Somalia. When confronted with deportation proceedings upon entering the United States, he voluntarily departed, only to return two years later on a spousal visa. In 1997, Ali was confronted with deportation proceedings yet again but prevailed at trial to have proceedings terminated. The government did not appeal. He has been living here as a lawful permanent resident, availing himself of the benefits and privileges of U.S. residency since 1996.

Lastly, when the alleged acts of torture took place, Ali was serving as a commander in the Somali National Army. In that same capacity, he received extensive military training, on numerous occasions, in the United States. . . . Whatever the extent of the relationship between Ali and the U.S. military, it cannot be fairly said that “[t]he only purported ‘touch’ in this case is the happenstance of Ali’s after-acquired residence in the United States long after the alleged events of abuse.” . . .

The majority today allows a U.S. resident to avoid the process of civil justice for allegedly “commit[ting] acts abroad that would clearly be crimes if committed at home.” The precedential effect of this holding “could undoubtedly have broad ramifications on our standing in the world, potentially disrupting diplomatic and even commercial relationships.”

It is not the extraterritorial application of the ATS in the instant case that “risks interference in United States foreign policy,” but rather, providing safe haven to an individual who allegedly committed numerous atrocities abroad. This was the case in *Filártiga*, where, as here, “[t]he individual torturer was found residing in the United States.” These are “circumstances that could give rise to the prospect that this country would be perceived as harboring the perpetrator,” thereby “seriously damag[ing] the credibility of our nation’s commitment to the protection of human rights.” Such concerns are precisely what led the United States, writing as amicus in *Kiobel*, to conclude that “allowing suits based on conduct occurring in a foreign country in the circumstances presented in *Filártiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights.”

The ATS has not been completely abrogated by *Kiobel*. It is still a statute, and Congress meant something by it. The fact that the alleged torts occurred outside our borders cannot be the end of the story; what we are dealing with, after all, is the *Alien Tort Statute*.

Ali is alleged to have committed gross human rights abuses, for which he was deported from Canada, and is now a lawful permanent resident. The United States is the sole forum in which he is amenable to suit. The atrocious nature of these allegations, the extensive contacts with the United States, and the context of those contacts renders jurisdiction proper under the ATS. I would reverse the district court’s summary dismissal of the ATS claims and find that Warfaa has pleaded sufficient facts showing that his claim touches and concerns the territory of the United States. . . .

How should the “chicken-and-egg” problem flagged in the *Jurisdictional Immunities Case (Germany v. Italy)* above be addressed? If *jus cogens* violations are in fact actionable, should mere allegation be allowed to trigger jurisdiction? What threshold of plausibility must allegations clear to avoid early jurisdictional dismissal? Is establishing such a threshold the best way to handle such cases going forward?

Recently, the U.S. Court of Appeals for the District of Columbia reviewed in *Helmerich and Payne Int’l Drilling Co. v. Bolivarian Republic of Venezuela* (2015), a complaint against Venezuela regarding the seizure of oil rigs belonging to a Venezuelan subsidiary of an American corporation. In dispute was whether the allegations fell under an exception for expropriations in the U.S. Foreign Sovereign Immunity Act. The court determined that it “must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs’ favor.” This case thus set a threshold that courts should “grant a motion to dismiss on the grounds that the plaintiff has failed to plead a ‘taking in violation of international law’ or has no ‘rights in property . . . in issue’ *only* if the claims are ‘wholly insubstantial or frivolous.’” This plausibility threshold recalls and reflects a more general standard adopted by the Supreme Court of the United States a few years earlier in *Ashcroft v. Iqbal*.

Ashcroft v. Iqbal
Supreme Court of the United States
556 U.S. 662 (2009)

Justice Kennedy delivered the opinion of the Court. . . .

We turn to respondent’s complaint. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” As the Court held in [a previous case], the pleading standard Rule 8 announces does not require “detailed factual allegations,” but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.”

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability

requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

Two working principles underlie our decision in [*Bell Atlantic Corp. v. Twombly* (2007)]. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not “show[n]”—“that the pleader is entitled to relief.”

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. . . .

[Justice Souter, with whom Justice Stevens, Justice Ginsburg, and Justice Breyer joined, filed a dissenting opinion. Justice Breyer also filed a dissenting opinion.]

Cases seeking to hold states and their officials liable raise questions of enforcement, and such cases may defy easy enforcement. To what extent should potential enforcement difficulties weigh into judicial decisions whether to take jurisdiction in the first place?

Maldives Airport Company Ltd. v. GMR Malé International
Supreme Court of Singapore
[2013] SGCA 16

Sundares Menon CJ, Andrew Phang Boon Leong JA and Woo Bih Li J

Sundares Menon CJ (delivering the grounds of decision of the court): . . .

1. This is an appeal from the decision of the High Court judge By her decision, the Judge granted an interim injunction . . . to restrain the appellants, Maldives Airports Company Limited (“MACL”) [wholly owned by the Maldives Government] . . . and the Republic of the Maldives . . . and their respective officers (collectively, “the Appellants”), from interfering with the performance by the respondent, GMR Malé International Airport Private Limited (“the Respondent”), of its obligations under a concession agreement [of 25 years to rehabilitate, expand, modernise, and maintain the Malé International Airport (“the Airport”)] MACL is a company which is wholly owned by the Maldives Government. . . .

8. It is evident that the relationship between the parties has deteriorated severely and rapidly. Faced with the prospect of the Concession Agreement being terminated prematurely and the Airport being taken over by the Appellants imminently, the Respondent . . . [sought] an injunction from the Singapore High Court to restrain the Appellants and their directors, officers, servants or agents from taking any step to:

- (a) interfere either directly or indirectly with the performance by the Respondent of its obligations under the Concession Agreement; and
- (b) take possession and/or control of the Airport or its facilities pending further order by the Singapore court or an arbitral tribunal constituted to resolve the dispute.

9. The Judge granted the Injunction on 3 December 2012, but only in the terms sought in relation to (a) above. No order was made in the terms of (b) above. Thus, the Appellants and their employees were only restrained from interfering with the performance of the Respondent’s obligations under the Concession Agreement (“the Restrained Acts”), although it might well be said that it would not have been possible for the Appellants to do any of the acts under (b) without thereby also doing the acts under (a), contrary to the terms of the Injunction. . . .

11. The main issue in the appeal was whether an interim injunction to restrain the Appellants from interfering with the Respondent's performance of its obligations under the Concession Agreement should be granted until such time as the arbitral tribunal in the 2nd Arbitration was in a position to determine the matter and make a ruling on the orders sought.

12. This presents two questions:

- (a) whether a Singapore court has the power to grant the Injunction, particularly against the government of a foreign sovereign State; and
- (b) if it has such power, whether the Injunction should be granted or upheld in all the circumstances. . . .

68. . . . [T]he Injunction, if upheld, would have presented several practical problems for the Appellants in terms of compliance. The sheer width of the Injunction would have made it difficult for the parties, particularly the Maldives Government, to have any certainty of what was required of them in order to ensure that they were acting in compliance with the terms of the Injunction. Given the broad scope of the Injunction, it would have been inevitable that disputes would arise over a broad spectrum of acts, including many involving other agencies of the Maldives Government. The parties would have had to return repeatedly to the court in Singapore to obtain clarification on whether a particular act did or did not contravene the Injunction. An interim injunction must be certain and should not be granted in terms which leave it to be argued in contempt proceedings what it does and does not require of the party to whom it is directed.

69. Moreover, the Injunction reached beyond the scope of the contractual dispute between the parties into the realm of restricting the operations and duties of domestic regulators whose regulatory functions encompass aspects related to the operation of the Airport. . . .

70. Other Maldivian governmental bodies involved in the regulation of transportation, tourism and even defence might also have been affected had the Injunction remained in place. The uncertainty in the full extent and reach of the Injunction therefore worked against the Respondent. . . . In these circumstances, it was simply inevitable that the actions of the Respondent would spill over into and affect the operations of other governmental entities and agencies in the Maldives. This was the real source of the difficulty.

71. Lastly, . . . interim injunctive relief should not be granted if it requires an unacceptable degree of supervision in a foreign land. That would precisely be the case if the Injunction were maintained. . . .

81. In all the circumstances, we were not convinced that granting or upholding the Injunction carried the lower risk of injustice in the event that it should subsequently transpire that the Appellants were wrong in their legal position. For all these reasons, we allowed the appeal and set aside the Injunction. We also ordered that the costs of the appeal and of the proceedings below be reserved to the arbitral tribunal in the 2nd Arbitration when it is constituted and disposes of the matter.

PRISONS, PUNISHMENTS,
AND RIGHTS

DISCUSSION LEADERS

JUDITH RESNIK, BRENDA HALE,
AND HELEN KELLER

II. PRISONS, PUNISHMENTS, AND RIGHTS

DISCUSSION LEADERS:

JUDITH RESNIK, BRENDA HALE, AND HELEN KELLER

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The boundaries of punishment form the subject matter of this chapter, largely focused on the treatment of prisoners. In the wake of World War II, prisoners gained the status of rights-holders and, during the last half century, constitutional courts around the world have shaped a law of prisoners' rights, drawing on provisions at the national and transnational level protecting individuals from torture and other cruel and degrading forms of treatment.

Several puzzles reside in this relatively new body of law, not the least of which is its parameters. The law of sentencing has a longer pedigree and is often assumed to be discrete from the law of prisons. Further, in many jurisdictions, decisions on punishment (the length of a sentence, the imposition of fines, and whether confinement to prisons is ordered) are made by judges. Questions related to the execution of sentences (such as assignments to prisons, transfers, placement in solitary confinement, access to visitors) are often seen as belonging to the executive. Of course, such a binary is made complex by legislative enactments, which sometimes direct judges by setting ranges of sentences and fines or by requiring mandatory minimums. Moreover, legislation can structure the implications of imprisonment, such as precluding prisoners from voting, getting housing benefits, or directing prison officials on how to classify prisoners. And in some jurisdictions, judges and not the executive control prisoner classification decisions.

Thus, as the materials in this chapter make plain, the lines blur. As the Israel Supreme Court concluded in its 2009 ruling holding unlawful the legislative judgment to permit private prisons, decisions about where to confine prisoners, whether to strip search them, and whether to discipline them can be viewed as a sequence of mini-sentencing decisions, punishing anew or varying the forms of punishment. Analyses of whether constitutions and international law limit the forms of punishment and the nature of conditions within a prison are continuous with inquiries into whether

constitutions impose constraints on the forms, duration, nature, and implications of sentences. Included, therefore, in this chapter are excerpts of cases holding “whole life” and “life without parole” sentences impermissible; given that the United States is the rare jurisdiction that continues to have capital sentences, materials on the death penalty are not.

The continuity between sentencing-as-punishment and prison-as-punishment raises questions about whether courts’ relationship to prison administration is distinctive from judicial interaction with other executive agencies. Does the fact that judges are the conduit *to* prison put them in a special relationship that authorizes more judicial oversight than over other executive branch actors? Or do concerns about safety and security counsel more deference? Such debates are, in turn, informed by background assumptions about whether persons incarcerated after convictions ought to be understood as citizens, remaining part of the body politic and retaining all rights possible, or whether incarceration licenses many incursions into a panoply of rights. At its core, these debates reflect views on the extent to which “the privileges of society” and of sociability may be suspended, and what aspects of life are understood not as privileges but as rights, with the burden of justification on limitations residing with the state. Thus, several cases excerpted consider whether practices in prisons impose more punishment than is constitutionally permissible.

Throughout, the questions for the chapter are why and when courts have a role to play in deciding the parameters and the forms that punishment takes. The examples run from whipping, profound isolation, transfers to higher security settings, visitor bans, and whole-life sentences to disenfranchisement. Some of the cases seek to overturn administrative judgments, while others challenge legislative directives, such as prisoner disenfranchisement.

Repeatedly at issue are the underlying presumptions about what burdens of justification belong to the states and about the scope and function of judicial review. The remedial debate is likewise intense, with sharp disagreements about structural orders mandating improved health care, better sanitation, caps on prison populations, constraints on life-long confinement and blanket voting bans, as well as about individualized orders reducing the length of sentences, ordering damages, or imposing legal fees and costs on the state.

LICENSING PUNISHMENT

An Essay on Crimes and Punishments

Cesare Beccaria (1764)*

. . . That a punishment may produce the effect required it is sufficient that the *evil* it occasions should exceed the *good* expected from the crime, including in the calculation the certainty of the punishment, and the privation of the expected advantage. All severity beyond this is superfluous, and therefore tyrannical. . . .

An Introduction to the Principles of Morals and Legislation

Jeremy Bentham (1780)**

. . . § 1. *General view of cases unmeet for punishment.*

I. The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and . . . to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief.

II. But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted . . . as far as it promises to exclude some greater evil.

III. . . . [I]n the following cases punishment ought not to be inflicted.

1. Where it is *groundless*: where there is no mischief for it to prevent
2. Where it must be *inefficacious*: where it cannot act so as to prevent the mischief.
3. Where it is *unprofitable*, or too *expensive*: where the mischief it would produce would be greater than what it prevented.
4. Where it is needless: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate. . . .

* Excerpted from CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 81 (1764) (XXVII, “Of The Mildness of Punishments”) (W. Gordon & W. Creech editors, 1778).

** Excerpted from JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Ch. XIII, “Cases Unmeet for Punishment”) (reprint 1907) (1823 edition, 1780), available at <http://www.econlib.org/library/Bentham/bnthPML.html>.

Panopticon

Jeremy Bentham (1787)*

. . . The essence of [the Panopticon Plan] consists . . . in the *centrality* of the inspector's situation, combined with the well-known and most effectual contrivances for *seeing without being seen*. . . . What is also of importance is, that for the greatest proportion of time possible, each man should actually *be* under inspection . . . [so] that the inspector may have the satisfaction of knowing, that the discipline actually has the effect which it is designed to have

I take for granted . . . that under the necessary regulations for preventing interruption and disturbance, . . . the doors of all public establishments ought to be, thrown wide open to the body of the curious at large – the great *open committee* of the tribunal of the world. And who ever objects to such publicity, where it is practicable, but those whose motives for objection afford the strongest reasons for it? . . .

[W]hat every prison might, and in some degree at least ought to be, designed at once as a place of *safe custody*, and a place of *labour*. . . . [T]he effect . . . would . . . render[] . . . unnecessary that inexhaustible fund of disproportionate, too often needless, and always unpopular severity, not to say torture – the use of *irons*. Confined in one of these cells, every motion of the limbs, and every muscle of the face exposed to view, what pretence could there be for exposing to this hardship the most boisterous malefactor? Indulged with perfect liberty within the space allotted to him, in what worse way could he vent his rage, than by beating his head against the walls? . . .

Discipline and Punish: The Birth of the Prison

Michel Foucault (1975)**

. . . By the end of the eighteenth and the beginning of the nineteenth century, the gloomy festival of punishment was dying out, . . . [with] the disappearance of punishment [through public executions and the “use of prisoners in public works, cleaning city streets or repairing the highways”] as a spectacle. . . .

Punishment, then, will tend to become the most hidden part of the penal process. This has several consequences: it leaves the domain of more or less everyday

* Excerpted from JEREMY BENTHAM, THE PANOPTICON WRITINGS (LETTERS V, VI & VII) (1787) (Miran Božovič editor, Verso 1995).

** Excerpted from MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan translator, Vintage Books 2d edition 1995) (1975).

perception and enters that of abstract consciousness; its effectiveness is seen as resulting from its inevitability, not from its visible intensity; it is the certainty of being punished and not the horrifying spectacle of public punishment that must discourage crime; the exemplary mechanics of punishment changes its mechanisms. As a result, justice no longer takes public responsibility for the violence that is bound up with its practice. . . .

The apportioning of blame is redistributed: in punishment-as-spectacle a confused horror spread from the scaffold; it enveloped both executioner and condemned; and, although it was always ready to invert the shame inflicted on the victim into pity or glory, it often turned the legal violence of the executioner into shame. Now the scandal and the light are to be distributed differently; it is the conviction itself that marks the offender with the unequivocally negative sign: the publicity has shifted to the trial, and to the sentence; the execution itself is like an additional shame that justice is ashamed to impose on the condemned man; so it keeps its distance from the act, tending always to entrust it to others, under the seal of secrecy. It is ugly to be punishable, but there is no glory in punishing. Hence that double system of protection that justice has set up between itself and the punishment it imposes. Those who carry out the penalty tend to become an autonomous sector; justice is relieved of responsibility for it by a bureaucratic concealment of the penalty itself. . . .

The reduction in penal severity in the last 200 years is a phenomenon with which legal historians are well acquainted. But, for a long time, it has been regarded in an overall way as a quantitative phenomenon: less cruelty, less pain, more kindness, more respect, more ‘humanity’. In fact, these changes are accompanied by a displacement in the very object of the punitive operation. Is there a diminution of intensity? Perhaps. There is certainly a change of objective.

If the penalty in its most severe forms no longer addresses itself to the body, on what does it lay hold? The answer of the theoreticians . . . seems to be contained in the question itself: since it is no longer the body, it must be the soul. . . .

The practice of placing individuals under ‘observation’ is a natural extension of a justice imbued with disciplinary methods and examination procedures. Is it surprising that the cellular prison, with its regular chronologies, forced labour, its authorities of surveillance and registration, its experts in normality, who continue and multiply the functions of the judge, should have become the modern instrument of penalty? Is it surprising that prisons resemble factories, schools, barracks, hospitals, which all resemble prisons? . . .

Academic Center of Law and Business v. Minister of Finance
Supreme Court of Israel
Case No. HJC 2605/05 [19 November 2009]

[Petition granted by majority opinion (President Beinisch, Vice-President Rivlin, and Justices Procaccia, Grunis, Naor, Arbel, Joubran and Hayut), Justice Levy dissenting.]

President D. BEINISCH . . .

The arrangement provided in amendment 28* leads to a transfer of basic powers of the state in the field of law enforcement — imprisonment powers — the exercise of which involves a continuous violation of human rights, to a private profit-making corporation. . . . [T]his transfer . . . violates the constitutional rights . . . enshrined in the Basic Law: Human Dignity and Liberty. . . .**

12. . . . [A]lthough the governor of the privately managed prison was not given important powers . . . given to the governor of an Israel Prison Service prison (including the power to extend the period for holding an inmate in administrative isolation for more than 48 hours and jurisdiction regarding prison offences), the law still gives him powers that, when exercised, involve a serious violation of the rights to personal liberty and human dignity. These powers include, inter alia, the power to

* Amendment 28, the Prisons Ordinance Amendment Law, enacted in 2004, provided, for the first time, that a private corporation could run a prison; the amendment delegated responsibility for “maintaining order, discipline and public security,” “preventing the escape of inmates . . . in custody,” and “ensuring the welfare and health of the inmates,” including providing rehabilitation programs in job training and education to the managing corporation and its employees.

** The Basic Law: Human Dignity and Liberty (1992) of Germany provides:

- “1. The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.
2. There shall be no violation of the life, body or dignity of any person as such. . . .
5. There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.
8. There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.
9. There shall be no restriction of rights under this Basic Law held by persons serving in the Israel Defense Forces, the Israel Police, the Prisons Service and other security organizations of the State, nor shall such rights be subject to conditions, except by virtue of a law, or by regulation enacted by virtue of a law, and to an extent no greater than is required by the nature and character of the service.”

order an inmate to be held in administrative isolation for a maximum period of 48 hours; . . . the conducting of an external examination of the naked body of an inmate; . . . the taking of a urine sample from an inmate; . . . [approval of] the use of reasonable force in order to carry out a search on the body of an inmate; . . . to order an inmate not to be allowed to meet with a particular lawyer [as well as the authority] to use a weapon . . . to prevent . . . escape . . . [and the power] to arrest and detain a person without a warrant . . . and . . . to carry out a search . . . of an inmate when . . . admitted . . . and during his stay in the prison. . . . [An] employee of the concessionaire . . . is also entitled . . . to use reasonable force and to take steps to restrain an inmate

14. [A] law passed by the Knesset . . . enjoys the presumption of constitutionality [T]he court should . . . strik[e] a delicate balance between the principles of majority rule and the separation of powers, on the one hand, and the protection of human rights and the basic values underlying the system of government in Israel, on the other. . . .

17. . . . Our deliberations . . . are based on the premise that imprisoning a person and holding him in custody . . . violates his right to liberty and freedom of movement. . . . even when the imprisonment is lawful. . . . [T]he loss of personal liberty and freedom of movement of an inmate . . . inherent in the actual imprisonment does not justify an additional violation of the other human rights . . . [that are] not required by the imprisonment itself or in order to realize an essential public interest recognized by law. . . .

25. . . . [F]rom a normative viewpoint, the decision of the competent courts . . . to sentence a particular person . . . is the source of the power to violate the constitutional right of . . . personal liberty. But the actual violation of the right . . . takes place on a daily basis as long as he remains an inmate of the prison. . . .

28. . . . [A] prison, even when it operates within the law, is the institution in which the most serious violations of human rights that a modern democratic state may impose on its subjects may and do occur. . . .

[T]he power of imprisonment and the other invasive powers . . . are therefore some of the state's most distinctive powers as the embodiment of government, and they reflect the constitutional principle that the state has a monopoly upon exercising organized force in order to advance the general public interest. . . .

55. [W]hen we balance the violation of the human rights of prison inmates as a result of their being imprisoned in a privately managed prison . . . against the . . . purpose of improving prison conditions while achieving greater economic and administrative efficiency, the constitutional rights to personal liberty and human dignity are of greater weight. . . . Indeed, in so far as the state is required to improve the prison conditions of inmates—a proper and important purpose—it should be

prepared to pay the economic price . . . , and it should accept that ‘efficiency’ . . . is not a supreme value

65. . . . [O]ur conclusions . . . do not express any opinion on the legality of the privatization of government services in other fields (such as health, education and various social services) . . . different from the powers involved in holding prison inmates under lock and key. . . .

69. . . . [S]ince the privately managed prison whose establishment is regulated by amendment 28 has not yet begun to operate, we see no reason to suspend the declaration that amendment 28 is void. . . .

CONSTRAINING PUNISHMENT: THE RISE OF RIGHTS

The excerpts below date from the 1930s to 2015 and provide a sampling of transnational and national provisions that track the movement of prisoners from being an object of concern to rights-holders, as certain procedures (“a dark cell”) become prohibited and as mental health and disabilities come into view. A 2013 synthesis of the legal import of such materials can be found in Dirk van Zyl Smit, *Legitimacy and the Development of International Standards for Punishment*.*

Improvements in Penal Administration: Standard Minimum Rules for the Treatment of Prisoners, Drawn up by the International Penal and Prison Commission League of Nations (1934)**

The rules . . . show the general direction . . . to indicate the minimum conditions that should be observed in the treatment of prisoners from the humanitarian and social point of view. . . .

* *In* LEGITIMACY AND CRIMINAL JUSTICE: AN INTERNATIONAL EXPLORATION (JUSTICE TANKEBE & ALISON LIEBLING editors, Oxford University Press 2014).

** In 1929, the International Penal and Penitentiary Commission (IPPC) drafted rules, revised in 1933 and adopted in 1934, of which the League of Nations took note on September 26, 1934. *See* 123 League of Nations O.J. Spec. Supp. 14, 17 (VI.4) (1934). The League recommended that governments take the Rules “into consideration,” requested them to “consider the possibility of adapting their penitentiary system to the Standard Minimum Rules if that system is below the minimum laid down in the said rules,” and requested them to submit regular reports regarding their application and on prison reforms achieved in their respective countries. *See* ROGER S. CLARK, THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM 11-12, note 26 (1994).

4. The principal aim of the treatment of prisoners should be to accustom them to order and work, and to strengthen their moral character. . . .

8. The administration should supply prisoners with food sufficient both in quality and quantity to maintain their ordinary health and strength. . . .

33. Disciplinary punishment should never . . . depart from the descriptions of the law or the decrees of competent administrative authorities. . . .

35. Before punishment is inflicted, it should be preceded by a thorough examination, and the prisoner should have the opportunity of expressing whatever he wishes to say for his defence. . . .

36. If, in certain countries, for exceptional cases, corporal punishment is permitted, the method of its execution should be determined by the law. If it is allowed, corporal punishment should never be carried out unless the Medical Officer certifies that the prisoner can bear it. . . .

37. If, in certain countries, for exceptional cases, placing in a dark cell is permitted, the restrictions which govern it should be regulated by the law. . . .

Standard Minimum Rules for the Treatment of Prisoners

United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1955)*

1. The following rules . . . seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions. . . .

7. (1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received

8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. . . .

* Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and resolution 2076 (LXII) of 13 May 1977.

28. (1) No prisoner shall be employed, in the service of the institution, in any disciplinary capacity. . . .

31. Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.

32. (1) Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it. . . .

33. Instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. . . .

36. . . . (3) Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels. . . .

37. Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits. . . .

55. There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. . . .

61. The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. . . .

63. (1) The fulfilment of these principles requires individualization of treatment . . .

International Covenant on Civil and Political Rights
United Nations (1966)*

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . . .

* International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. . . .

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

A Sampling of National Constitutional Protections of Prisoners

Spain (1978)*

Section 25 . . .

2. Punishments entailing imprisonment and security measures shall be aimed at reeducation and social rehabilitation and may not involve forced labour. The person sentenced to prison shall enjoy, during the imprisonment . . . fundamental rights . . . except those expressly restricted by the content of the sentence, the purpose of the punishment and the penitentiary law. In any case, he or she shall be entitled to paid work and to the appropriate Social Security benefits, as well as to access to cultural opportunities and the overall development of his or her personality. . . .

Guatemala (1993)**

Article 19. Penitentiary System.

The penitentiary system must tend to the social rehabilitation and reeducation of the prisoners [reclusos] and to comply[,] in their treatment, with [observance to] the following minimum norms:

- a. They must be treated as human beings; they must not be discriminated against for any reason whatsoever, or be infringed with cruel treatment, physical, moral, [or] psychic tortures, duress or harassments, labor incompatible with their physical state, actions that denigrate their dignity, or make them victims of exactions, or be submitted to scientific experiment. . . .

* Spain's Constitution of 1978 as amended through 2011. Translation provided by the Constitute Project, *available at* <https://www.constituteproject.org>.

** Guatemala's Constitution of 1985 as amended through 1993. Translation provided by the Constitute Project, *available at* <https://www.constituteproject.org>.

Argentina (1994)*

Article 18 . . .

The prisons of the Nation shall be healthful and clean, for the custody and not for the punishment of prisoners confined therein; and any measure that under the pretext of precaution leads to mortifying them beyond what their custody demands, shall render liable the judge who authorizes it.

South Africa (1996)**

Sec. 35(2)

Everyone who is detained, including every sentenced prisoner, has the right . . .

e. to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment

The most recent international provisions, adopted in 2015, reflect the degree to which prisoners have come to be seen as entitled to rights and to be in relationship to courts and lawyers, as contrasted to the 1930s admonitions for protection as a matter of discretion.

**Standard Minimum Rules for the Treatment of Prisoners
 (“Nelson Mandela Rules”)
 United Nations (2015)*****

The following rules . . . seek only, on the basis of the general consensus of contemporary thought . . . , to set out what is generally accepted as being good principles and practice

* Argentina’s Constitution of 1853, reinstated in 1983, as amended through 1994. Translation provided by the Constitute Project, *available at* <https://www.constituteproject.org>.

** South Africa’s Constitution of 1996 as amended through 2012. Provided by the Constitute Project, *available at* <https://www.constituteproject.org>.

*** Excerpted from United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Resolution adopted by the United Nations General Assembly (Dec. 17, 2015), A/RES/70/175.

Rule 1

All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. . . .

Rule 5

1. The prison regime should seek to minimize any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings. . . .

Rule 39 . . .

3. . . . Prison administrations shall not sanction any conduct of a prisoner that is considered to be the direct result of his or her mental illness or intellectual disability. . . .

Rule 43

1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:

- (a) Indefinite solitary confinement;
- (b) Prolonged solitary confinement;
- (c) Placement of a prisoner in a dark or constantly lit cell;
- (d) Corporal punishment or the reduction of a prisoner's diet or drinking water;
- (e) Collective punishment.

2. Instruments of restraint shall never be applied as a sanction for disciplinary offences.

3. Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order.

Rule 44

For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

Rule 45

1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to

the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.

2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. . . .

Rule 61

1. Prisoners shall be provided with adequate opportunity, time and facilities to be visited by and to communicate and consult with a legal adviser of their own choice or a legal aid provider, without delay, interception or censorship and in full confidentiality

3. Prisoners should have access to effective legal aid. . . .

PUNISHMENT IN PRISONS

Whipping

Jackson v. Bishop

United States District Court for the Eastern District of Arkansas
268 F.Supp. 804 (E.D. Ark. 1967)

OREN HARRIS and GORDON E. YOUNG, District Judges. . . .

[The plaintiffs, prisoners, contend]: First, . . . that the infliction of corporal punishment in any form constitutes cruel and unusual punishment contrary to the prohibitions of the Eighth Amendment to the United States Constitution as made applicable by the Fourteenth Amendment to the States. Secondly and alternatively, . . . that the use of the strap or "hide" as a means of punishing inmates in the Penitentiary under any circumstances is cruel and unusual so as to be unconstitutional. . . .

It is well settled that . . . federal courts have an extremely limited area in which they may act pertaining to the treatment of prisoners confined to state penal institutions. State officials must of necessity have wide discretion and control over disciplinary measures in order to properly maintain the prison system as well as to protect the public. . . . [T]his court cannot and will not become appellate in nature and review each prison administration decision to punish a prisoner.

However, it is equally well settled that there are exceptions to these rules when special circumstances exist and constitutional rights are involved. . . . On January 10, 1966, the Penitentiary Board . . . promulgated a set of rules and regulations for the Penitentiary [on] . . . corporal punishment.* . . . The strap . . . is made of leather and is between four and five feet long and four inches wide. . . . On July 29, 1966, [Plaintiff] Jackson and seven other inmates received eight lashes with the strap for leaving okra in the field. . . .

The Eighth Amendment to the Constitution of the United States provides “. . . excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” . . . [Corporal] punishment has not been viewed historically as a constitutionally forbidden cruel and unusual punishment. . . . Neither are we willing to say that the use of the strap in and of itself is contrary to the Eighth Amendment’s prohibitions. . . .

A punishment, like a law, may be constitutional in its bare form and yet be unconstitutionally administered. . . . There can be no doubt that the brutal and sadistic atrocities which were uncovered by the investigation of the State Police in August and September of 1966 cannot be tolerated [such as] . . . the use of a telephone shocking apparatus, the teeter board, strapping on the bare buttocks, and other torturous acts of this nature. . . .

It is neither this court’s duty nor its inclination to tell the defendant or the Penitentiary Board what rules should be promulgated in order to comply with the Constitution. However, the court will make these general observations. First, more than one person’s judgment should be required for a decision to administer corporal punishment. . . . Secondly, that circumvention of the rules and regulations by an official in time of anger is intolerable. . . . Third, that summary acceptance of one inmate’s report on another without further investigation in determining whether punishment should be administered voids the effectiveness of any rules And, finally, it is suggested that the Superintendent or an Assistant Superintendent of the Prison participate in or review any decision to inflict corporal punishment. . . .

* The regulations provided: “These major offenses will warrant corporal punishment:

- (1) Homosexuality.
- (2) Agitation (defined as one who creates turmoil and disturbances).
- (3) Insubordination (resisting authority or refusing to obey orders).
- (4) Making or concealing of weapons.
- (5) Refusal to work when medically certified able to work.
- (6) Participating in or inciting a riot.
- (7) No inmate shall ever be authorized to inflict any corporal punishment under color of prison authority on another inmate.

Punishment shall not, in any case, exceed Ten lashes with the strap”

[T]he defendant, O. E. Bishop, Superintendent of the Arkansas State Penitentiary, and any personnel of the Prison System are permanently restrained from:

The use of any such devices as the crank telephone or teeter board;
or [t]he application of any whipping to the bare skin of prisoners.

Such officials are further restrained from the “use of the strap” on any prisoner until additional rules and regulations are promulgated with appropriate safeguards in accordance with said opinion

Jackson v. Bishop

United States Court of Appeals for the Eighth Circuit
404 F.2d 571 (8th Cir. 1968)

[Before MARTIN DONALD VAN OOSTERHOUT, Chief Judge, HARRY BLACKMUN, Circuit Judge, and ROBERT VAN PELT, District Judge.]

BLACKMUN, Circuit Judge.

The three plaintiffs-appellants, inmates of the Arkansas penitentiary . . . claim . . . that the district court erred in refusing to hold that corporal punishment of prisoners is cruel and unusual punishment . . . and in holding that the whipping of prisoners was not unconstitutional per se. . . . We conclude that the plaintiffs are correct . . . and that Arkansas’ use of the strap, irrespective of safeguards, is to be enjoined. . . .

. . . [W]e have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap’s use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess

(1) We are not convinced that any rule or regulation as to the use of the strap, however seriously or sincerely conceived and drawn, will successfully prevent abuse. . . . (2) Rules in this area seem often to go unobserved. . . . (3) Regulations are easily circumvented. . . . (4) Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous. (5) Where power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power. (6) There can be no argument that excessive whipping or an inappropriate manner of whipping or too great frequency of whipping or the use of studded or overlong straps all constitute cruel and unusual

punishment. But if whipping were to be authorized, how does one, or any court, ascertain the point which would distinguish the permissible from that which is cruel and unusual? (7) Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike. It frustrates correctional and rehabilitative goals. . . . (8) Whipping creates other penological problems and makes adjustment to society more difficult. (9) Public opinion is obviously adverse. Counsel concede that only two states still permit the use of the strap. Thus almost uniformly has it been abolished. It has been expressly outlawed by statute in a number of states. . . .

Solitary Confinement and Transfers

Solitary confinement is often explained on the bases of three rationales – to protect individuals, to discipline them, or to prevent future harms. The excerpts below address substantive limitations on the degrees of isolation permissible, as well as procedural questions on how decisions about placement are made. Again, the questions are whether these forms of punishment ought to be within the discretion of prison administrators, as whipping once was in the United States, or whether constitutional limits on punishment apply.

Ramirez-Sanchez v. France European Court of Human Rights (Grand Chamber) [2006] ECHR 685

. . . The European Court of Human Rights, sitting as a Grand Chamber composed of: Luzius Wildhaber, *President*, Christos Rozakis, Jean-Paul Costa, Nicolas Bratza, Boštjan M. Zupančič, Volodymyr Butkevych, Josep Casadevall, John Hedigan, Margarita Tsatsa-Nikolovska, Kristaq Traja, Lech Garlicki, Javier Borrego Borrego, Elisabet Fura-Sandström, Alvina Gyulumyan, Renate Jaeger, Danutė Jočienė, Dragoljub Popović, *judges*, and Lawrence Early, *Section Registrar*

10. The applicant, who claims to be a revolutionary by profession, was . . . placed under judicial investigation in connection with a series of terrorist attacks in France and was given a life sentence on 25 December 1997 for the murder of two police officers and an acquaintance on 27 June 1975.

11. He was held in solitary confinement from the moment he was first taken into custody in mid-August 1994 until 17 October 2002

12. . . . [T]his entailed his being held in a 6.84 square metre cell that was run-down and poorly insulated, with an open toilet area. The applicant was prohibited all contact with other prisoners His sole permitted activity outside his cell was a two-hour daily walk in a triangular area that was 15 metres long and 7.5 metres wide at the base, receding to 1 metre at the vertex . . . [,] walled in and covered with wire mesh. . . .

78. In a judgment of 25 November 1998 . . . the Paris Administrative Court rejected the application [that was filed in 1996, and held] . . . that the impugned decision was an internal administrative measure which the administrative courts had no power to set aside.

86. The applicant complained . . . that his prolonged solitary confinement . . . constituted inhuman and degrading treatment and . . . violated Article 3 of the Convention. . . . Article 3 provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

115. . . . Even in the most difficult of circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.

116. . . . The nature of the offence allegedly committed by the applicant is . . . irrelevant for the purposes of Article 3

117. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim In assessing the evidence on which to base the decision whether there has been a violation of Article 3, the Court adopts the standard of proof “beyond reasonable doubt.”

119. In order for a punishment or treatment associated with it to be “inhuman” or “degrading,” the suffering or humiliation involved must . . . go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment [W]hen assessing conditions of detention, account has to be taken of the cumulative effects . . . , as well as the specific allegations made by the applicant

127. . . . [T]he cell which the applicant occupied . . . was large enough to accommodate a prisoner, was furnished with a bed, table and chair, and had sanitary facilities and a window giving natural light.

128. In addition, the applicant had books, newspapers, a reading light and a television set at his disposal, . . . access to the exercise yard two hours a day and to a cardio-training room one hour a day. . . .

130. . . . [T]he Court finds that the physical conditions . . . were proper and complied with the [Recommendation Rec(2006)2 of the Committee of Minister on the] European Prison Rules adopted . . . on 11 January 2006. These conditions were also considered to be “globally acceptable” by the [European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment]. . . . Accordingly, no violation of Article 3 can be found

DISSENTING OPINION OF JUDGE CASADEVALL JOINED BY JUDGES ROZAKIS, TSATSA-NIKOLOVSKA, FURA-SANDSTRÖM AND POPOVIĆ

. . . 4. . . . [T]he Court described the applicant’s isolation as “partial and relative,” as if a scale of the seriousness of such a prison regime had been established. However, no such scale exists. . . . [A]t the heart of the problem, over and above the question of physical conditions, is the issue of the length of the applicant’s solitary confinement. Even if his isolation was only *partial* or *relative*, the situation became increasingly serious with the passage of time. . . .

5. . . . A period of more than eight years cannot stand up to any objective examination. Whatever the physical conditions, such a lengthy period is bound to aggravate the prisoner’s distress and suffering and the risks to his or her physical and mental health . . . inherent in any deprivation of liberty. . . .

6. . . . Neither [the applicant’s] physical robustness nor his mental stamina can make a period of solitary confinement in excess of eight years acceptable.

Öcalan v. Turkey (No. 2)

European Court of Human Rights (Second Section)

[2014] ECHR 286

. . . The European Court of Human Rights (Second Section), sitting as a Chamber composed of: Guido Raimondi, *President*, Işıl Karakaş, Peer Lorenzen, Dragoljub Popović, András Sajó, Paulo Pinto de Albuquerque, Helen Keller, *judges*, and Stanley Naismith, *Section Registrar*

9. [In 1999], the Ankara National Security Court found the applicant guilty of carrying out acts designed to bring about the secession of part of Turkey’s territory and of training and leading a gang of armed terrorists . . . [and] sentenced him to death

. . . . It found that the applicant was the founder and principal leader of an illegal organisation, namely the PKK (the Workers' Party of Kurdistan – hereafter “the PKK”). . . . [O]n his orders and instructions, the PKK had carried out several armed attacks, bomb attacks, acts of sabotage and armed robberies, and that in the course of those acts of violence thousands of civilians, soldiers, police officers, village guards and public servants [estimated to number almost 30,000] had been killed. . . .

11. In October 2001 Article 38 of the Constitution was amended so that the death penalty could no longer be ordered or implemented other than in time of war or of imminent threat of war, or for acts of terrorism. . . . [In] 2002, the Turkish Grand National Assembly resolved . . . to abolish the death penalty in peacetime As a result . . . , a prisoner whose death sentence for an act of terrorism has been commuted to life imprisonment must spend the rest of his life in prison. . . .

15. The applicant suffered over ten years of extremely strict solitary confinement, from February 1999 to November 2009. . . .

23. The applicant remained in the same cell . . . for almost ten years nine months. . . .

95. The Court . . . considered the conformity with Article 3 of the applicant's conditions of detention from the outset until 12 May 2005 in its judgment of the same date, when it reached the following conclusion: . . .

the Grand Chamber agrees with the Chamber that the general conditions in which he is being detained . . . have not thus far reached the minimum level of severity required to constitute inhuman or degrading treatment within the meaning of Article 3 of the Convention. . . .

104. . . . [A] prisoner's segregation from the prison community does not in itself amount to inhuman treatment. . . .

105. However, in order to avoid any risk of arbitrariness, substantive reasons must be given when a protracted period of solitary confinement is further extended. . . . The statement of reasons will need to be increasingly detailed and compelling as time passes. . . .

139. For the period preceding 17 November 2009, the restrictions placed on the applicant were comparable to those imposed on Mr. Ramirez Sanchez, whose application was the subject of a Grand Chamber judgment finding no violation of Article 3 of the Convention. . . .

146. . . . [T]he applicant's social isolation continued until 17 November 2009 under more or less the same conditions as those observed in its 12 May 2005 judgment. . . .

[During] the period during which the applicant was the prison's only inmate, [the Court found] . . . excessive restrictions on access to news information, the persistent major problems with access by visitors to the prison (for family members and lawyers) and the insufficiency of the means of marine transport in coping with weather conditions, the restriction of staff communication with the applicant to the bare minimum required for their work, the lack of any constructive doctor/patient relationship with the applicant, the deterioration in the applicant's mental state in 2007 resulting from a state of chronic stress and social and affective isolation combined with a feeling of abandonment and disillusionment, and the fact that no alternatives were sought to the applicant's solitary confinement until June 2008 The Court concludes that the conditions of detention imposed on the applicant during that period attained the severity threshold to constitute inhuman treatment within the meaning of Article 3 of the Convention.

147. There has accordingly been a violation of Article 3 of the Convention in relation to the applicant's conditions of detention up to 17 November 2009. . . .

JOINT PARTLY DISSENTING OPINION OF JUDGES RAIMONDI,
KARAKAŞ AND LORENZEN

We voted with the majority on all the salient points, but we cannot concur with the conclusion that the applicant's conditions of detention up to 17 November 2009 were in breach of Article 3 of the Convention.

In its judgment of 12 May 2005 the Grand Chamber of the Court concluded – unanimously—that the general conditions under which the applicant had been incarcerated had not attained the severity threshold to constitute inhuman or degrading treatment within the meaning of Article 3

We consider . . . that in the specific circumstances of the present case, the fact that the detention continued under the same conditions for some four-and-a-half years cannot justify an assessment different from that of the Grand Chamber in the previous case. . . .

Breivik v. Ministry of Justice

Oslo District Court, Norway

15-107496TVI-OTIR/02 (Apr. 20, 2016) (appeal pending)

[Helen Andenæs Sekulic, District Court Judge.]* . . .

Anders Behring Breivik, was arrested by the police on 22 July 2011 after having committed acts of terrorism He killed 8 people and wounded a number of others . . . when he detonated a bomb in the Government Building Complex in Oslo. . . . On that same day, he killed 69 people on Utøya island, where most of the victims were attending the summer camp [of the Workers' Youth League] [O]n 24 August 2012, Breivik was convicted . . . and sentenced to preventive custody . . . for a period of 21 years, with a minimum period of 10 years. . . .

[As of February 2016] Breivik had access to three cells: a cell to live in, a cell to work in and a cell for exercise. Each of the cells was 8 square metres in size. . . . Breivik could move freely between these cells during daytime. He also had access to a shower and exercise yard on a daily basis, if he wished. . . . All of the cells have windows which allow daylight The living area cell contains a toilet, sink and shower, desk with chair, TV with built-in DVD player and X-box, cork board, cupboard with integrated refrigerator, and a bed. . . .

With the exception of his mother, and one visit by a researcher . . . , Breivik has not had any private visits. The Plaintiff has not had any form of companionship with other inmates. . . .

The concept of isolation is not an absolute. The reality is that the Plaintiff spends 22–23 hours per day alone in a cell. This is an entirely closed world, with very little human contact. The external facilities surrounding the Plaintiff are of little significance; being cut off from other human beings is the important issue here. . . . Moreover, Breivik has not had an independent appeal body that could evaluate his prison conditions overall. . . . His prison regime deviates in such a manifest way from the treatment given to all other prisoners in Norwegian prisons, regardless of what heinous acts they have been convicted of, that this must be deemed to be an additional punishment. . . .

[I]t is argued that the frequent strip-searches and being woken up in the night which the Plaintiff was subjected . . . , constitutes a distinct violation in the form of “degrading treatment” according to ECHR, Article 3. Breivik himself has noted the number of strip-searches during the period . . . at 880, a figure the Court will

* This translation was provided by the Judiciary of Norway, *available at* <https://www.domstol.no/contentassets/cd518ea4a48d4f8fa2173db1b7a4bd20/dom-i-saken-om-soningsforhold---15-107496tvi-otir---abb---staten-eng.pdf>.

accept. . . . Female guards were present during the searches on several occasions, and Breivik found that to be an extra burden. For a long period of time, he was also woken up every half hour during the night to prove that he was still alive. It is the opinion of the Court that the extra burden entailed by the strip-searches must be regarded as a degrading treatment in the sense of the Convention.

As regards ECHR Article 8,^{*} the letter screening has been carried out so stringently that the Plaintiff has, in practice, been cut off from communicating and forming relationships with others by means of letters. . . .

Viewed in context with his strict prison conditions in general, these are disproportionate interferences, and not “necessary in a democratic society”, as Article 8, No. 2 of ECHR stipulates as a criterion. . . . The Human Rights Act makes ECHR Norwegian law . . . [and] the provisions of the Convention . . . “in the event of conflict, take precedence ahead of provisions in other legislation.” Established Supreme Court case law dictates that Norwegian courts shall interpret ECHR in the same way as the European Court of Human Rights. . . .

The European Court of Human Rights distinguishes between “complete sensory isolation,” “total social isolation” and “relative social isolation” The Court believes that Breivik is subject to the latter prison regime, in which he is isolated from other prisoners. . . .

The Court cannot see that the circumstances that warrant Breivik’s placement . . . also constitute sufficient grounds for him not having the company of potential other inmates in the same wing. The wing is subject to very strict security measures and routines, and is staffed by highly qualified employees. . . .

The Court believes that communication via microphone through a glass wall results in a sense of detachment. . . . [T]he importance of being able to carry out conversations with another human being in a normal manner (without a glass wall), must not be under-estimated. . . .

^{*} Article 8 of the Convention provides:

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Breivik is a dangerous person, who will most likely spend the rest of his life in prison. There are good reasons for preventing him from establishing contact with like-minded individuals so as to prevent him from inspiring others However, . . . there is no correspondence between the risk assessments performed of him, his good behaviour in prison since he was arrested, and the strict regime he is still subjected to. . . . [T]hat . . . prison regime entails an inhuman treatment of Breivik. . . .

[As to his claims under Article 8,] the State has not disputed that the letter screening constitutes an interference in the sense of Article 8. The question is whether the interference is permitted under Article 8, No. 2. . . . Breivik is convicted of politically-motivated terrorism It must further be assumed that Breivik has a kind of hero-status in certain extreme right-wing circles. . . . Therefore . . . communication between Breivik and like-minded individuals “could disturb peace, order and security.” The interference is thus in accordance with the law. . . .

The question is then whether the interference is “necessary in a democratic society”. . . . [W]hen the purpose of the interference is to combat or prevent terrorism, the State must be afforded a wide margin of discretion, even in relation to interference in the inmate’s close or specially protected relationships. . . . Breivik’s interests in establishing a contact network must give way to the State’s interest in preventing possible right-wing extremist radicalisation. Therefore, the Court cannot ascertain any breach of ECHR Article 8. . . .

The case has substantial importance for his well-being, and the relative strengths of the parties indicate that the State should bear his legal costs. . . . The State is hereby ordered to reimburse Breivik’s legal costs in the amount of NOK 330,937.50.

Wilkinson v. Austin
Supreme Court of the United States
545 U.S. 209 (2005)

Justice KENNEDY delivered the opinion of the Court.

This case involves the process by which Ohio classifies prisoners for placement at its highest security prison, known as a “Supermax” facility . . . designed to segregate the most dangerous prisoners from the general prison population. . . .

About 30 States now operate Supermax prisons, in addition to . . . two . . . facilities operated by the Federal Government. In 1998, Ohio opened its only Supermax facility, the Ohio State Penitentiary (OSP), after a riot in one of its maximum-security prisons. OSP has the capacity to house up to 504 inmates in single-

inmate cells and is designed to “separate the most predatory and dangerous prisoners from the rest of the . . . general [prison] population.” . . .

In OSP almost every aspect of an inmate’s life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

Incarceration at OSP is synonymous with extreme isolation. In contrast to any other Ohio prison, including any segregation unit, OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate’s cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.

Aside from the severity of the conditions, placement at OSP is for an indefinite period of time, limited only by an inmate’s sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated at OSP once assigned there. . . .

Upon entering the prison system, all Ohio inmates are assigned a numerical security classification from level 1 through level 5, with 1 the lowest security risk and 5 the highest. The initial security classification is based on numerous factors (*e.g.*, the nature of the underlying offense, criminal history, or gang affiliation) but is subject to modification at any time during the inmate’s prison term if, for instance, he engages in misconduct or is deemed a security risk. Level 5 inmates are placed in OSP

The Fourteenth Amendment’s Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake. A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word “liberty,” or it may arise from an expectation or interest created by state laws or policies. . . .

We have held that the Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement. We have also held, however, that a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations

[I]t is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is . . . the nature of those conditions themselves “in relation to the ordinary incidents of prison life.” . . . [The Court has] found no liberty interest protecting against a 30-day

assignment to segregated confinement because it did not “present a dramatic departure from the basic conditions of [the inmate’s] sentence.” . . .

The . . . standard requires us to determine if assignment to OSP “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” . . . [A]ssignment to OSP imposes an atypical and significant hardship under any plausible baseline.

For an inmate placed in OSP, almost all human contact is prohibited Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First, . . . [u]nlike the 30-day placement in [the earlier case], placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second [the] placement disqualifies an otherwise eligible inmate for parole consideration. . . . [T]aken together they impose an atypical and significant hardship within the correctional context. It follows that respondents have a liberty interest in avoiding assignment to OSP. . . .

OSP’s harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance. . . .

[W]e find Ohio’s New Policy provides a sufficient level of process. We first consider the significance of the inmate’s interest in avoiding erroneous placement at OSP. Prisoners held in lawful confinement have their liberty curtailed by definition, so the procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all. . . .

The second factor addresses the risk of an erroneous placement under the procedures in place, and the probable value, if any, of additional or alternative procedural safeguards. . . . Requiring officials to provide a brief summary of the factual basis for the classification review and allowing the inmate a rebuttal opportunity safeguards against the inmate’s being mistaken for another or singled out for insufficient reason. . . . Ohio also invites the inmate to submit objections prior to the final level of review. This second opportunity further reduces the possibility of an erroneous deprivation. . . . In addition to these safeguards, Ohio further reduces the risk of erroneous placement by providing for a placement review within 30 days of an inmate’s initial assignment to OSP.

The third . . . factor addresses the State’s interest. In the context of prison management, and in the specific circumstances of this case, this interest is a dominant consideration. Ohio has responsibility for imprisoning nearly 44,000 inmates. The State’s first obligation must be to ensure the safety of guards and prison personnel, the public, and the prisoners themselves.

Prison security, imperiled by the brutal reality of prison gangs, provides the backdrop of the State's interest. Clandestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals, gangs seek nothing less than to control prison life and to extend their power outside prison walls. . . .

The problem of scarce resources is another component of the State's interest. The cost of keeping a single prisoner in one of Ohio's ordinary maximum-security prisons is \$34,167 per year, and the cost to maintain each inmate at OSP is \$49,007 per year. We can assume that Ohio, or any other penal system, faced with costs like these will find it difficult to fund more effective education and vocational assistance programs to improve the lives of the prisoners. It follows that courts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior. . . .

May v. Ferndale Institution
Supreme Court of Canada
[2005] 3 S.C.R. 809

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ. was delivered by

LEBEL AND FISH JJ. — . . .

4. Each of the appellants are prisoners serving life sentences for murder and/or manslaughter. . . . After varying periods of incarceration, the appellants became residents of Ferndale Institution, a minimum security federal penitentiary located in British Columbia.

5. Between November 2000 and February 2001, all five appellants were involuntarily transferred from Ferndale Institution to medium-security institutions. . . .

6. The transfers were the result of a direction from the Correctional Service of Canada ("CSC") to review the security classifications of all inmates serving life sentences in minimum-security institutions who had not completed their violent offender programming. . . . CSC used computer applications to assist the classification review process. . . .

15. . . . [The Court held that the lower court should have heard the habeas petitions.] . . .

76. The decision to transfer an inmate to a more restrictive institutional setting constitutes a deprivation of his or her residual liberty . . . [T]he appellants have discharged their burden of making out a deprivation of liberty. . . .

78. The appellants . . . argue that the transfer decisions were arbitrary because they were solely based on a change in policy, in the absence of any “fresh” misconduct on their part. . . . [and] submit that the respondents did not comply with their duty of disclosure by withholding a relevant scoring matrix. . . .

81. The respondents, however, stress that while the change in policy may have prompted the review of the appellants’ security classifications, an individualized assessment was conducted of each inmate . . . [considering] each inmate’s personal circumstances and characteristics.

82 We agree with the respondents. . . . [C]orrectional authorities may change how a sentence is served, including transferring an inmate to a higher security institution, without necessarily violating the principles of fundamental justice [because] [a] change in the form in which a sentence is served, whether it be favourable or unfavourable to the prisoner, is not, in itself, contrary to any principle of fundamental justice. . . .

83. . . . A transfer decision initiated by a mere change in policy is not, in and of itself, arbitrary. . . . A fair balance must be reached between the interest of inmates deprived of their residual liberty and the interest of the state in the protection of the public. . . .

85. . . . In every case, there was a concern that the inmate had failed to complete a violent offender program and this led to the conclusion that the risk presented by the inmate could not be managed at Ferndale Institution. Thus, the prisoner’s liberty interest was limited pursuant to the policy only to the extent that it was shown to be necessary for the protection of the public. . . .

86. For the foregoing reasons, habeas corpus should not be granted on the basis of arbitrariness. . . .

87. The appellants submit that CSC did not make full disclosure of the information relied upon in their reclassification. A computerized tool was used in the reclassification process. CSC did not disclose the so-called “scoring matrix” for this computerized tool. . . . The appellants’ claim raises the issue of procedural fairness. . . .

118. How can there be a meaningful response to a reclassification decision without information explaining how the security rating is determined? As a matter of logic and common sense, the scoring tabulation and methodology . . . should have been made available . . . [because] inmates may want to rebut the evidence relied upon for the calculation of the . . . score and security classification. . . .

120. . . . The respondents concealed crucial information . . . [and] violated their statutory duty [to disclose]. The transfer decisions were made improperly and . . . the appellants were unlawfully deprived of their liberty. . . .

121. . . . The applications for habeas corpus and the motion to adduce new evidence are granted. The transfer decisions are declared null and void for want of jurisdiction. The appellant still incarcerated in a medium-security institution pursuant to the impugned decision is thus to be returned to minimum-security institutions.

[Justice Charron’s dissent argued that inmates were not unlawfully deprived of their liberty, as the transfer decisions were not arbitrary. Although the officials’ had wrongly withheld the computerized security classification rating tool, each prisoner was provided with a “summary of the information” to know the case he had to meet, and the prison officials transferred the prisoners on the basis of sufficient information and individual assessments.]

Shahid v. Scottish Ministers
Supreme Court of the United Kingdom
[2015] UKSC 58

LORD REED: (with whom Lord Neuberger, Lady Hale, Lord Sumption and Lord Hodge agree)

1. On 8 November 2006 the appellant and his two co-accused were convicted of the racially-aggravated abduction and murder of a 15 year old boy, . . . selected at random and abducted from a public street, repeatedly stabbed, and set alight with petrol.

2. . . . On 7 October 2005 [Shahid was] . . . placed in solitary confinement, otherwise described as segregation. . . . Altogether, he spent 56 months in segregation. . . .

4. . . . [T]he appellant seeks orders declaring that certain periods of his segregation were contrary to the relevant Prison Rules, and that there were violations of his Convention rights under articles 3 and 8 of the European Convention on Human Rights (“ECHR”), as given effect by the Human Rights Act 1998. He also seeks an award of damages

32. . . . [T]he conditions of the appellant’s segregation were not such as in themselves to breach article 3. The space and layout of the cells were satisfactory, and there was integral sanitation, although it was not screened. . . .

33. . . . Although the regime prevented contact with the general prison population, it did not involve the appellant's total isolation from other prisoners or from other human contacts. He was confined to his cell for between 20 and 22 hours per day. He was permitted to associate with other prisoners at times when he was released from his cell. . . .

37. Considering the facts of this case against the criteria applied in the case law of the European Court, the treatment of the appellant did not attain the minimum level of severity required for a violation of article 3. . . .

39. It is accepted . . . that segregation is an interference with the right to respect for private life guaranteed by article 8(1), and therefore requires to be justified under article 8(2). . . .

40. There is no doubt that the segregation pursued a legitimate aim . . .

41. Whether the segregation was "in accordance with the law" is a more difficult question. . . .

74. . . . In view of the length of the appellant's segregation, a rigorous examination is called for by the court to determine whether the measures taken were necessary and proportionate compared with practicable alternative courses of action. . . .

86. . . . It is . . . the Ministers['] burden] to establish that the appellant's segregation for 56 months was proportionate. . . . [I]n the absence of any evidence that serious steps were taken by the . . . management to address the issues arising from his segregation until four and a half years after it had begun, they have failed to do so.

87. Where the court finds that an act of a public authority is unlawful . . . section 8(1) of the [Human Rights] Act enables the court to grant such relief or remedy, or make such order, as it considers just and appropriate. . . . [N]o award of damages is to be made unless, taking account of all the circumstances of the case, including any other relief or remedy granted, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made. . . .

89. . . . Whether the failure to develop a management plan for his integration into the mainstream, or to consider possible transfers, resulted in a prolongation of his segregation is possible but uncertain. Three matters are however clear. [He has not] suffered any severe or permanent injury to his health as a consequence of the prolongation of his segregation. . . . [T]he degree of interference with his private life which resulted from his removal from association with other prisoners was relatively limited . . . [and] he was not isolated from all contact with other prisoners, and remained entitled to receive visits and to make telephone calls.

90. In these circumstances, just satisfaction can be afforded by making a declaratory order, establishing that the appellant's Convention rights were violated, and by making an appropriate award of costs. . . .

Davis v. Ayala
Supreme Court of the United States
135 S. Ct. 2187 (2015)

[Justice Kennedy returned to the topic of solitary confinement in a 2015 concurrence in *Davis v. Ayala*, in which he joined with four other members of the Court to reject a habeas petitioner's claim that the exclusion of his lawyer from a hearing about racially prejudiced jury selection violated Hector Ayala's constitutional rights. Dissenting on the merits were Justices Sotomayor, Justices Ginsburg, Breyer, and Kagan.]

Justice KENNEDY, concurring. . . .

[I]f his solitary confinement follows the usual pattern, it is likely [that Hector Ayala] has been held for all or most of the past 20 years or more in a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone. It is estimated that 25,000 inmates in the United States are currently serving their sentence in whole or substantial part in solitary confinement, many regardless of their conduct in prison. . . .*

The human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators. . . . Yet . . . the condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest. . . . [While s]entencing judges . . . devote considerable time and thought to their task . . . [, t]here is no accepted mechanism . . . for them to take into account, when sentencing a defendant, whether the time in prison will or should be served in solitary. So in many cases, it is as if a judge had no choice but to say: "In imposing this capital sentence, the court is well aware that during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself." Even if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of society's simple unawareness or indifference. . . .

* More recent estimates from *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* (2015) are that 80,000-100,000 people were so confined in the fall of 2014.

Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price. In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them. . . .

Justice THOMAS, concurring.

. . . I write separately only to point out, in response to the separate opinion of JUSTICE KENNEDY, that the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims, Ernesto Dominguez Mendez, Marcos Antonio Zamora, and Jose Luis Rositas, now rest. And, given that his victims were all 31 years of age or under, Ayala will soon have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth.

Visitor Bans

Excerpted below are cases addressing visiting bans on prisoners in isolation and bans imposed more generally. These limits raise the question of prison officials authority to curtail forms of interpersonal contact with people outside the walls of prison and what sources constitutional courts invoke when constraining the authority to cut-off contact.

Öcalan v. Turkey (No. 2) European Court of Human Rights (Second Section) [2014] ECHR 286

. . . The European Court of Human Rights (Second Section), sitting as a Chamber composed of: Guido Raimondi, *President*, Işıl Karakaş, Peer Lorenzen, Dragoljub Popović, András Sajó, Paulo Pinto de Albuquerque, Helen Keller, *judges*, and Stanley Naismith, *Section Registrar*

150. The applicant complained of a violation of his right to respect for his family life [under Article 8 of the Convention] . . . , that is to say the restrictions imposed on his contact with members of his family, telephone calls, correspondence and visits.

155. . . . [T]he applicant . . . is subject to a special detention regime which involved restricting the number of family visits (once a week, on request) and, up until 2010, imposed measures to monitor the visits (the prisoner was separated from his visitors by a glass panel). . . .

163. As regards striking a balance between the applicant's individual interest in communicating with his family and the general interest of limiting his contact with the outside, . . . the prison authorities attempted to help the applicant . . . to remain in contact with his immediate family, authorising visits once a week without any limit on the number of visitors. Furthermore, from 2010 onwards the prison authorities . . . allowed the applicant to receive his visitors seated at a table

164. . . . [T]he restrictions on the applicant's right to respect for his family life did not exceed those which are necessary in a democratic society for the protection of public safety and the prevention of disorder and crime, within the meaning of Article 8 § 2 of the Convention. . . .

**Permission for Extension of Detention Period and Restriction of
Frequency of Visits to the Detainees**
Constitutional Court of South Korea
(15-2(B) KCCR 311, 2002Hun-Ma193, November 27, 2003)

Held, . . . the relevant provision of the Enforcement Decree of the Military Criminal Administration Act limiting visits to . . . detainees to two times per week are unconstitutional. . . .

[W]hereas the Enforcement Decree of the Criminal Administration Act allows one visit per day to the detainee, the Enforcement Decree of the Military Criminal Administration Act . . . limits the frequency of visits to the detainee to twice per week (hereinafter referred to as the 'provision of the Enforcement Decree at issue in this case').

One out of the two complainants in this case, who served as a Republic of Korea Air Force colonel, was arrested for allegedly divulging military secrets and receipt of bribery concerning official duties. . . . The other complainant . . . [his spouse] was placed under restriction upon the frequency of visits to the first complainant, pursuant to the provision of the Enforcement Decree at issue in this case. . . .

[T]here is no express provision within the Constitution with respect to the right of the suspect or the defendant in custody to meet with a 'third party' who is not an

attorney as in this case. . . . The question here is whether this is a right merely guaranteed by the Criminal Procedure Act, or a constitutionally guaranteed basic right.

[This] right . . . to meet and interact with others who are not attorneys is one of the basic rights as a human being that must be guaranteed in order to prevent complete severance and destruction of basic life relations as a human being to interact with family and others due to detention and also to prepare for the defense of such suspects and defendants. Therefore, it should be deemed to be a constitutionally guaranteed basic right by its nature.

The right . . . is derived from the general freedom to act that the Constitutional Court has recognized as one of the basic rights included in the right to pursue happiness of Article 10 of the Constitution. Also, Article 27(4) of the Constitution* providing for the principle of presumption of innocence is yet another provision from which such right is derived. . . .

Pursuant to Article 37(2) of the Constitution, basic rights may in principle be restricted solely by statute. . . . The provision of the Enforcement Decree at issue in this case nevertheless limits the frequency of visits to the detainee by a provision not in a statute but in a presidential decree.

The principle of statutory reservation with respect to the restriction of basic rights under Article 37(2) of the Constitution . . . requires [a] statutory basis for restrictions upon basic rights and does not necessarily mean that the form of the restriction should be in the form of a statute. . . . Article 75 of the Constitution provides that the “President may issue presidential decrees concerning matters delegated to him or her by statutes . . . ,” thereby establishing a basis for statutory delegation.

The relevant provisions of the Military Criminal Administration Act state that visits to the detainee should be permitted unless there are special grounds to determine

* The Constitution of South Korea provides:

Article 10: “All citizens are assured of human worth and dignity and have the right to pursue happiness. It is the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.”

Article 27(4): “The accused are presumed innocent until a judgment of guilt has been pronounced.”

Article 37(2): “The freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order, or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.”

that such visits are inappropriate for purposes relating to guidance and treatment. The Military Criminal Administration Act is . . . silent of delegation with respect to the frequency of visits to the detainee. Therefore, limiting the frequency of visits to the detainee to twice per week by the provision of the Enforcement Decree at issue in this case is in violation of Article 37(2) and Article 75 of the Constitution as a restriction upon the right to visit and interaction without statutory delegation. . . .

There are other effective means available for the detention facilities to achieve the legislative purpose of ‘prevention of flight or destruction of evidence and maintenance of order within detention facilities’ while restricting less of the basic rights of the complainants, . . . for example, stricter supervision of visits by participation of a prison officer therein or temporary prohibition of visits when necessary. Therefore, the provision of the Enforcement Decree at issue in this case fails to meet the requirement of the least restrictive means necessary for the constitutional justification of restrictions upon basic rights . . . [and] is therefore unconstitutional as it excessively restricts the right to visit and interact of the complainants. . . .

Overton v. Bazzetta
Supreme Court of the United States
539 U.S. 126 (2003)

Justice KENNEDY delivered the opinion of the Court.

The State of Michigan, by regulation, places certain restrictions on visits with prison inmates. The question before the Court is whether the regulations violate the substantive due process mandate of the Fourteenth Amendment, or the First and Eighth Amendments as applicable to the States through the Fourteenth Amendment.*

* The U.S. Constitution provides:

First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Fourteenth Amendment, Section 1: “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The population of Michigan's prisons increased in the early 1990's. More inmates brought more visitors, straining the resources available for prison supervision and control. [P]rison officials found it more difficult to maintain order during visitation and to prevent smuggling or trafficking in drugs. . . .

In response . . . , the Michigan Department of Corrections (MDOC or Department) . . . promulgat[ed] the regulations here at issue . . . to limit the visitors a prisoner is eligible to receive, in order to decrease the total number of visitors.

[A]n inmate may receive visits only from individuals placed on an approved visitor list, except . . . qualified members of the clergy and attorneys. . . . The list may include an unlimited number of . . . the prisoner's immediate family and 10 other individuals the prisoner designates, subject to some restrictions. Minors under the age of 18 may not be placed on the list unless they are the children, stepchildren, grandchildren, or siblings of the inmate. . . .

Prisoners who commit multiple substance-abuse violations are not permitted to receive any visitors except attorneys and members of the clergy. An inmate subject to this restriction may apply for reinstatement of visitation privileges after two years. . . .

The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration. [F]reedom of association is among the rights least compatible with incarceration. . . .

We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners. We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to legitimate penological interests. . . . We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them. . . . The burden, moreover, is not on the State to prove the validity of prison regulations but on the prisoner to disprove it. . . . Respondents have failed to do so here. . . .

[F]our factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: whether the regulation has a "valid, rational connection" to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the regulation. . . .

[T]he restriction on visitation for inmates with two substance-abuse violations, a bar which may be removed after two years, serves the legitimate goal of deterring the use of drugs and alcohol within the prisons. . . .

Having determined that each of the challenged regulations bears a rational relationship to a legitimate penological interest, we consider whether inmates have alternative means of exercising the constitutional right they seek to assert. Were it shown that no alternative means of communication existed, . . . it would be some evidence that the regulations were unreasonable. . . . Respondents here do have alternative means of associating with those prohibited from visiting. . . . [I]nmates can communicate with those who may not visit by sending messages through those who are allowed to visit. Although this option is not available to inmates barred all visitation after two violations, they and other inmates may communicate with persons outside the prison by letter and telephone. Respondents protest that letter writing is inadequate for illiterate inmates and for communications with young children. They say, too, that phone calls are brief and expensive, so that these alternatives are not sufficient. Alternatives to visitation need not be ideal, however; they need only be available. . . .

Another relevant consideration is the impact that accommodation of the asserted associational right would have on guards, other inmates, the allocation of prison resources, and the safety of visitors. Accommodating respondents' demands would cause a significant reallocation of the prison system's financial resources and would impair the ability of corrections officers to protect all who are inside a prison's walls. . . .

[Our case law] does not impose a least-restrictive-alternative test, but asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a de minimis cost to the valid penological goal. . . . [W]e defer to MDOC's judgment that a longer restriction better serves its interest in preventing the criminal activity that can result from these interactions. . . .

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, concurring. . . .

It was in the groundbreaking decision in *Morrissey v. Brewer* (1972), in which we held that parole revocation is a deprivation of liberty within the meaning of the Due Process Clause of the Fourteenth Amendment, that the Court rejected the view once held by some state courts that a prison inmate is a mere slave. Under that rejected view, the Eighth Amendment's proscription of cruel and unusual punishment would have marked the outer limit of the prisoner's constitutional rights. It is important to emphasize that nothing in the Court's opinion today signals a resurrection of any such approach in cases of this kind. To the contrary, it remains true that the "restraints and

the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.”

Justice THOMAS, with whom Justice SCALIA joins, concurring in the judgment. . . .

I would sustain the challenged regulations on different grounds. . . . The Court’s precedents on the rights of prisoners rest on the implicit (and erroneous) presumption that the Constitution contains an implicit definition of incarceration. This is manifestly not the case, and, in my view, States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—*provided only that those deprivations are consistent with the Eighth Amendment*. Under this view, the Court’s precedents on prisoner “rights” bear some reexamination. . . .

The proper inquiry, therefore, is whether a sentence validly deprives the prisoner of a constitutional right enjoyed by ordinary, law-abiding persons. Whether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State’s prerogative to determine how it will punish violations of its law, and this Court awards great deference to such determinations. . . .

It is highly doubtful that, while sentencing each respondent to imprisonment, the State of Michigan intended to permit him to have any right of access to visitors. Such access seems entirely inconsistent with Michigan’s goal of segregating a criminal from society Moreover, the history of incarceration as punishment supports the view that the sentences imposed on respondents terminated any rights of intimate association. . . .

Although any State is free to alter its definition of incarceration to include the retention of constitutional rights previously enjoyed, it appears that Michigan sentenced respondents against the backdrop of this conception of imprisonment. . . . In my view, . . . regulations pertaining to visitations are not punishment within the meaning of the Eighth Amendment. . . .

Disabling Conditions

This section excerpts a few cases addressing the totality of conditions for general-population prisoners. Rather than singling out specific prisoners or sets of individuals for different and more isolating punishment, these cases consider the totality of prison life for “regular” prisoners. Remedies are at the center of these

decisions, as judges debate when aggregate remedies are appropriate and whether structural interventions (such as system-wide injunctions and pilot judgments) should be ordered.

Torreggiani v. Italy
European Court of Human Rights (Second Section)
[2013] ECHR 293*

. . . The European Court of Human Rights (Second Section), sitting as a Chamber composed of: Danutė Jočienė, *President*, Guido Raimondi, Peer Lorenzen, Dragoljub Popović, Işıl Karakaş, Paulo Pinto de Albuquerque, Helen Keller, *judges*, and Stanley Naismith, *Registrar*.

“ . . . [The] applicants—Mr Torreggiani, Mr Bamba, Mr Biondi, Mr Sela, Mr El Haili, Mr Hajjoubi and Mr Ghisoni—were serving sentences in Busto Arsizio and Piacenza prisons. Each . . . alleged that he had shared a 9 sq. m cell with two other prisoners, giving them 3 sq. m of personal space each. They complained of a lack of hot water and, in some cases, of inadequate lighting in the cells. . . .

Mr Ghisoni and two other inmates in Piacenza prison applied [in April of 2010] to the judge responsible for the execution of sentences, complaining that their conditions of detention were poor because of overcrowding in the prison, and alleged a breach of the principle of equal treatment between prisoners. In August 2010 . . . the judge . . . held that the complainants had been subjected to inhuman and degrading treatment as a result of having to share a cramped cell with two other persons, and that they had been discriminated against compared with prisoners being kept in more favourable conditions. . . .

The [ECtHR] found that the applicants’ living space had not conformed to the standards deemed to be acceptable under its case-law . . . [and] pointed out that the standard recommended by the Committee for the Prevention of Torture in terms of living space in cells was 4 sq. m per person. The shortage of space . . . had been exacerbated by . . . the lack of hot water over long periods, and inadequate lighting and ventilation . . . [that] although not in themselves inhuman and degrading, amounted to additional suffering.

* Excerpted is the Court’s English Press Release; the judgment was published in French. *See* Press Release: The Court calls on Italy to resolve the structural problem of overcrowding in prisons, which is incompatible with the Convention, Registrar of the Court, European Court of Human Rights (January 8, 2013), *available* at <http://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-4212710-5000451&filename=Chamber%20judgment%20Torreggiani%20and%20Others%20v.%20Italy%2008.01.2013.pdf>.

While there was no indication of any intention to humiliate or debase the applicants, the Court considered that their conditions of detention had subjected them—in view of the length of their imprisonment—to hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. There had therefore been a violation of Article 3 of the Convention.

The Court reiterated that Article 46, as interpreted in the light of Article 1 (obligation to respect human rights), imposed on the respondent State a legal obligation to implement appropriate measures to secure the right of the applicant which the Court found to have been violated. Such measures also had to be taken in respect of other persons in the applicant[s'] position, notably by solving the problems that had led to the Court's findings. Hence, in order to facilitate implementation of its judgments, the Court might adopt a pilot-judgment procedure allowing it to clearly identify the existence of structural problems underlying the violations and to indicate specific measures or actions to be taken by the respondent State to remedy them.

A further aim of the pilot-judgment procedure was to induce the respondent State to resolve large numbers of individual cases arising from the same structural problem at the domestic level, thus implementing the principle of subsidiarity which underpinned the Convention system. The pilot-judgment procedure was aimed primarily at ensuring the speedy and effective resolution of a systemic dysfunction and the introduction of effective domestic remedies in respect of the violations in question. . . . The structural nature of the problem was confirmed by the fact that several hundred applications were currently pending

It was not for the Court to dictate to States their choice of penal policy or how to organise their prison systems; these raised complex legal and practical issues which, in principle, went beyond the Court's judicial remit. Nevertheless, the Court wished to stress in this context the Recommendations of the Committee of Ministers of the Council of Europe inviting States to encourage prosecutors and judges to make use of alternative measures to detention wherever possible, and to devise their penal policies with a view to reducing recourse to imprisonment, in order to tackle the problem of the growth in the prison population. . . .

With regard to the domestic remedies needed to address this systemic problem, the Court observed that, where an applicant was being held in conditions contrary to Article 3, the most appropriate form of redress was to bring about a rapid end to the violation of his right Where the person concerned had been but was no longer being held in conditions undermining his dignity, he must be afforded the opportunity to claim compensation for the violence to which he had been subjected.

The Court concluded that the Government must put in place, within one year from the date on which the present judgment became final, an effective domestic remedy or a combination of such remedies capable of affording, in accordance with Convention principles, adequate and sufficient redress in cases of overcrowding in

prison. It ruled that the examination of applications dealing solely with overcrowding in Italian prisons would be adjourned during that period, pending the adoption by the domestic authorities of measures at national level.

The Court held that Italy was to pay the applicants a total of 99,600 euros (EUR) in respect of non-pecuniary damage, and EUR 1,500 each to Mr Sela, Mr El Haili, Mr Hajjoubi and Mr Ghisoni in respect of costs and expenses.”

In 2015, the European Committee on Crime Problems (CDPC) and the Council for Penological Cooperation (PC-CP) issued a White Paper on Prison Overcrowding. In addition to surveying the caselaw of the ECtHR on prison conditions, the White Paper called for “all relevant parties, including parliamentarians, prosecutors, judges and representatives of monitoring bodies” to respond to prison overcrowding. Given the fundamental right of freedom, “deprivation of liberty should be a sanction of last resort” and, hence, reductions of pre-trial and post-conviction prison populations were essential. Recommendations ranged from de-criminalization and individualization to community sanctioning and conditional release opportunities for all prisoners, including those serving life-sentences. Underscoring the role played by courts addressing the rights of prisoners, the White Paper also noted that when *Torreggiani* was decided, Italy had 66,028 prisoners; in 2015, the number was down to 52,243.

In 2016, the Committee of Ministers returned to *Torreggiani* and closed the case. The Committee cited the “establishment of a system of computerised monitoring of the living space and conditions of detention of each detained and an independent internal mechanism of supervision of detention facilities,” coupled with new “domestic remedies, preventative and compensatory” and of other measures improving “the material conditions of detention” to ensure compliance with Convention law and the standards of the European Committee. *See* Resolution CM/ResDH(2016)28, *Execution of the judgments of the European Court of Human Rights, Two cases against Italy*.

Brown v. Plata
Supreme Court of the United States
563 U.S. 493 (2011)

Justice KENNEDY delivered the opinion of the Court.

This case arises from serious constitutional violations in California’s prison system. The violations have persisted for years. They remain uncorrected. The appeal

comes to this Court from a three-judge District Court order directing California to remedy two ongoing violations of the Cruel and Unusual Punishments Clause, a guarantee binding on the States by the Due Process Clause of the Fourteenth Amendment. The violations are the subject of two class actions in two Federal District Courts [involving treatment of prisoners with serious mental disorders and serious medical conditions]. . . .

The appeal presents the question whether the remedial order issued by the three-judge court is consistent with requirements and procedures set forth in a congressional statute, the Prison Litigation Reform Act of 1995 (PLRA). The order leaves the choice of means to reduce overcrowding to the discretion of state officials. But absent compliance through new construction, out-of-state transfers, or other means—or modification of the order upon a further showing by the State—the State will be required to release some number of prisoners before their full sentences have been served. . . .

At the time of trial, California’s correctional facilities held some 156,000 persons. This is nearly double the number that California’s prisons were designed to hold, and California has been ordered to reduce its prison population to 137.5% of design capacity. . . . For years the medical and mental health care provided by California’s prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners’ basic health needs. . . .

Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve. . . .

If government fails to fulfill . . . [the obligation to provide prisoners with basic sustenance, including adequate medical care], the courts have a responsibility to remedy the resulting Eighth Amendment violation. . . . Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.

Courts faced with the sensitive task of remedying unconstitutional prison conditions must consider a range of available options, including appointment of special masters or receivers and the possibility of consent decrees. When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s population. . . .

[T]he three-judge court must . . . find by clear and convincing evidence that “crowding is the primary cause of the violation of a Federal right” and that “no other relief will remedy the violation of the Federal right.” As with any award of prospective relief under the PLRA, the relief “shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs.” The three-judge

court must therefore find that the relief is “narrowly drawn, extends no further than necessary . . . , and is the least intrusive means necessary to correct the violation of the Federal right.” In making this determination, the three-judge court must give “substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.” Applying these standards, the three-judge court found a population limit appropriate, necessary, and authorized in this case. . . .

Having engaged in remedial efforts for 5 years in [one case] . . . and 12 in [in another], the District Courts were not required to wait to see whether their more recent efforts would yield equal disappointment. . . .

The common thread connecting the State’s proposed [alternative] remedial efforts is that they would require the State to expend large amounts of money absent a reduction in overcrowding. The Court cannot ignore the political and fiscal reality behind this case. California’s Legislature has not been willing or able to allocate the resources necessary to meet this crisis absent a reduction in overcrowding. There is no reason to believe it will begin to do so now

The medical and mental health care provided by California’s prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding. The relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA. The State shall implement the order without further delay. . . .

[Justice Kennedy’s majority decision was followed by three photographs, reproduced below.]

Mule Creek State Prison
August 1, 2008



California Institution for Men
August 7, 2006



Salinas Valley State Prison
July 29, 2008

Correctional Treatment Center (dry cages/holding cells for people waiting for mental health crisis bed)



Justice SCALIA, with whom Justice THOMAS joins, dissenting. . . .

[T]he notion that the plaintiff class can allege an Eighth Amendment violation based on “systemwide deficiencies” is assuredly wrong. It follows that the remedy decreed here is also contrary to law, since the theory of systemic unconstitutionality is central to the plaintiffs’ case. . . . If (as is the case) the only viable constitutional claims consist of individual instances of mistreatment, then a remedy reforming the system as a whole goes far beyond what the statute allows. . . . Even if I accepted the implausible premise that the plaintiffs have established a systemwide violation of the

Eighth Amendment, I would dissent from the Court’s endorsement of a decrowding order. That order is an example of what has become known as a “structural injunction.” . . .

[S]tructural injunctions depart from . . . historical practice, turning judges into long-term administrators of complex social institutions such as schools, prisons, and police departments. Indeed, they require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials. Today’s decision not only affirms the structural injunction but vastly expands its use, by holding that an entire system is unconstitutional because it *may produce* constitutional violations. . . .

This case illustrates one of . . . [the] most pernicious aspects [of structural injunctions]: that they force judges to engage in a form of factfinding-as-policymaking that is outside the traditional judicial role. The factfinding judges traditionally engage in involves the determination of past or present facts based (except for a limited set of materials of which courts may take “judicial notice”) exclusively upon a closed trial record. . . .

In view of the incoherence of the Eighth Amendment claim at the core of this case, the nonjudicial features of institutional reform litigation . . . and the unique concerns associated with mass prisoner releases, I do not believe this Court can affirm this injunction. . . .

Justice ALITO, with whom THE CHIEF JUSTICE joins, dissenting. . . .

I do not dispute that general overcrowding *contributes* to many of the California system’s healthcare problems. But it by no means follows that reducing overcrowding is the only or the best or even a particularly good way to alleviate those problems. . . . The release order is not limited to prisoners needing substantial medical care but instead calls for a reduction in the system’s overall population. Under the order issued by the court below, it is not necessary for a single prisoner in the plaintiff classes to be released. . . .

[I]n largely sustaining the decision below, the majority is gambling with the safety of the people of California. Before putting public safety at risk, every reasonable precaution should be taken. The decision below should be reversed, and the case should be remanded for this to be done. I fear that today’s decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong. In a few years, we will see.

Nunes da Silva v. Estado de Mato Grosso do Sul
Supreme Federal Court of Brazil
RE 580.252 (May 6, 2015) (review pending)*

Entry of Judgment: Administrative Law. Extraordinary Appeal. State Civil Liability. Moral damages inflicted to a prisoner as a result of prison overcrowding and degrading conditions of incarceration.

1. State civil liability applies in cases of moral damages confirmedly inflicted on prisoners as a result of violations of their dignity by prison overcrowding and incarceration under inhumane or degrading circumstances.

2. The failure of the State to comply with its duty to provide suitable conditions of incarceration is directly related to a chronic shortage of appropriate public penitentiary policies, a problem that affects a great share of the prison population and is complex and expensive to overcome.

3. It is not legitimate to invoke the principle of the reserve for contingencies in order to deny a stigmatized minority the right for indemnity in the face of a clear violation of its fundamental rights. The duty to repair the damages stems from a direct and immediately applicable constitutional provision, which does not depend on the execution of public policies or any other State action for its effectiveness.

4. In light of the systematic and chronical nature of the dysfunctions verified in the Brazilian prison system, the payment of a monetary compensation provides a poorly effective answer to the moral damages suffered by the prisoners, aside from draining the scarce resources that could otherwise be spent on the improvement of incarceration conditions.

5. It is necessary, therefore, to adopt an alternative mechanism of compensation that privileges *in natura* indemnification or in the specific form of the damages, through the partial redemption of the length of the punishment The monetary compensation should be of a subsidiary nature, being applicable only in cases in which the prisoner has already fully served his or hers sentence or redemption of punishment is not possible. . . .

7. . . . “The State has civil liability in what regards damages, including moral damages, confirmedly inflicted on prisoners as a result of violations of their dignity by prison overcrowding and incarceration in inhuman or degrading conditions. In light of the systematic and chronical nature of the dysfunctions verified in the Brazilian prison system, the compensation for the moral damages must be preferably non-monetary,

* Justice Barroso provided this translation of the syllabus of his decision. As of June 2016, the judgment was stayed pending review by another justice.

consisting in a redemption of 1 day of punishment for each 3 to 7 days served under conditions harmful to human dignity, what is to be pursued before the criminal court with jurisdiction over the sentence enforcement. Alternatively, in cases which the prisoner has already fully served his or hers sentence or redemption of punishment is not possible, the compensation for moral damages shall be monetary, to be set under the jurisdiction of a civil court.”

UNENDING INCARCERATION

We turn from conditions *within* prisons to the duration of time spent, so as to explore whether the questions of judicial role change when the issue is the constitutionality of mandates that people live in prison until they die.

Life Imprisonment Case Federal Constitutional Court of Germany BVerfGE 45, 187 (1977)*

[A criminal defendant, Detlev R., shot a drug addict, Guentler L., . . . in the back of the head three times at close range. Under the 1969 Penal Code, the prescribed mandatory penalty was life imprisonment for persons who killed another out of wanton cruelty or to cover up some other criminal activity. The Verden Regional Court, where the defendant was tried, considered that sanction incompatible with the dignity clause of Article 1,** and referred the question to the Constitutional Court.]

A sentence of life imprisonment represents an extraordinarily severe infringement of a person’s basic rights. Of all valid punishments in the catalogue of

* Excerpted and translated in THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (Donald P. Kommers & Russell A. Miller eds., 3d ed. 2012).

** The Basic Law for the Federal Republic of Germany provides:

Article 1: “(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.”

Article 2: “(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.”

[criminal] penalties, this one is the most invasive of the inviolable right to personal freedom guaranteed by Article 2 (2). . . . [T]he state not only limits the basic right secured by Article 2(2), but it also—depending of course on the individual case—implicates numerous other rights guaranteed by the Basic Law. . . .

The free human person and his or her dignity are the highest values of the constitutional order. . . . This is based on the conception of human persons as spiritual-moral beings endowed with the freedom to determine and develop themselves. . . . [T]he state must regard every individual within society with equal worth. It is contrary to human dignity to make persons the mere tools of the state. The principle that “each person must shape his own life” applies unreservedly to all areas of law; the intrinsic dignity of each person depends on his or her status as an independent personality. . . . Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. The state cannot turn the offender into an object of crime prevention to the detriment of his or her constitutionally protected right to social worth and respect. . . . Thus, Article 1 (1) considered in tandem with the principle of the state based on social justice requires the state to guarantee that minimal existence—especially in the execution of criminal penalties—necessary for a life worth of a human being. If human dignity is understood in this way, then it would be intolerable for the state forcefully to deprive [persons of their] freedom without at least providing them with the chance to someday regain their freedom. . . .

A sentence of life imprisonment must be supplemented, as is constitutionally required, by meaningful treatment of the prisoner. Regarding those prisoners under life sentences, prisons also have the duty to strive toward their resocialization, to preserve their ability to cope with life and to counteract the negative effects of incarceration and the destructive changes in personality that accompany imprisonment. This task finds its justification in the constitution itself; it can be inferred from the guarantee of the inviolability of human dignity within the meaning of Article 1 (1) of the Basic Law. . . .

An assessment of the constitutionality of life imprisonment from the vantage point of Article 1(1) and the constitutional state principle shows that a humane enforcement of life imprisonment is possible only when the prisoner is given a concrete and realistically attainable chance to regain his or her freedom at some later point in time; the state strikes at the very heart of human dignity when treating prisoners without regard to the development of their personalities, stripping them of all hope of ever earning their freedom. The legal provisions relating to the granting of pardons do not sufficiently guarantee this hope, which makes a life sentence acceptable as a matter of human dignity. . . .

* * *

In 2005, the German Federal Constitutional Court, Second Senate, considered the case of an American who had fled to Germany after having been charged in

California with “first-degree murder, burglary, false imprisonment . . . , assault with a deadly weapon, . . . and cruelty to a child.” The United States sought extradition; the accused objected because, if convicted, his conviction could lead to a life sentence without possibility of parole, a sentence unlawful in Germany, where “the person prosecuted must at all events have the prospect of being released at some time in the future.”

The Constitutional Court concluded that German courts “are constitutionally required to review whether the extradition . . . [satisfies] the minimum standards of international law . . . and mandatory constitutional principles of its constitutional order,” which included proportionality and that punishments not be “cruel, inhuman, or degrading.” While German law required that the extradited “have a chance of attaining their liberty at some future time,” and therefore did not have to “abandon all hope of ever regaining liberty,” that prospect need not be the equivalent of the procedures provided under German law.

The Court noted that the California Board of Prison Terms could recommend a pardon or commutation to the state’s Governor. Although that pathway was possibly a “reduced prospect” of release when compared to German law, the Court concluded that “there is no reason to refuse extradition on the basis that there is no procedure modelled on judicial proceedings as required under German constitutional law.” *See* BVerfGE 113,154 Order of the Second Senate of 6 July 2005 – 2 BvR 2259/04.

Vinter and Others v. United Kingdom
European Court of Human Rights (Grand Chamber)
[2013] ECHR 786

[The Grand Chamber, composed of: Dean Spielmann, *President*, Josep Casadevall, Guido Raimondi, Ineta Ziemele, Mark Villiger, Isabelle Berro-Lefèvre, Dragoljub Popović, Luis López Guerra, Mirjana Lazarova Trajkovska, Nona Tsotsoria, Ann Power-Forde, Işıl Karakaş, Nebojša Vučinić, Linos-Alexandre Sicilianos, Paul Lemmens, Paul Mahoney, Johannes Silvis, *judges*, and Michael O’Boyle, *Deputy Registrar*, delivered the following judgment.

After England and Wales abolished the death penalty in 1965, the maximum sentence for murder became life imprisonment. A sentencing judge was required to set a minimum term of imprisonment, which reflected the seriousness of the offense. Once the minimum term has been served, the prisoner could apply to the Parole Board for release on licence. Trial judges also have the option of imposing a “whole life order,” under which the prisoner cannot be released except at the discretion of the Secretary of State.] . . .

1. This case originated in three applications against the United Kingdom of Great Britain and Northern Ireland lodged . . . by three British nationals, [including] Mr. Douglas Gary Vinter

15. On 20 May 1996, [Mr. Vinter] was sentenced to life imprisonment for the murder of a work colleague, with a minimum term of ten years. He was released on licence on 4 August 2005. . . .

17. On 5 February 2008 [Vinter] . . . gave himself up to the police, telling them that he had killed his wife. . . .

18. [In April 2008, Vinter pled guilty to murder.] The trial judge considered that Vinter fell into that small category of people who should be deprived permanently of their liberty . . . [and entered] a whole life order. . . .

83. It was common ground between the parties in their submissions before the Chamber that any grossly disproportionate sentence would amount to ill-treatment contrary to Article 3. . . .

108. . . . [N]o Article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she continued to pose a danger to society. . . . Indeed, preventing a criminal from re-offending is one of the “essential functions” of a prison sentence. . . . States may fulfil [their] obligation [to protect the public] by continuing to detain such life sentenced prisoners for as long as they remain dangerous.

109. . . . Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3. . . .

111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. . . . [T]hese grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. . . . What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.

112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is

condign punishment at the time of its imposition, with the passage of time it becomes . . . a poor guarantee of just and proportionate punishment. . . .

117. . . . [A] large majority of Contracting States either do not impose life sentences at all or, if they do impose life sentences, provide some dedicated mechanism, integrated within the sentencing legislation, guaranteeing a review of those life sentences after a set period, usually after twenty-five years' imprisonment. . . .

119. . . . Article 3 must be interpreted as requiring reducibility of the sentence . . . which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.

120. However, . . . having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing, it is not its task to prescribe the form (executive or judicial) which that review should take. . . . [I]t is not for the Court to determine when that review should take place. . . . [C]omparative and international law materials . . . show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter. . . .

126. . . . [T]he Secretary of State has not altered the terms of his explicitly stated and restrictive policy on when he will exercise his [review] power. [T]he Prison Service Order . . . provides that release will only be ordered in certain exhaustively listed, and not merely illustrative, circumstances, namely if a prisoner is terminally ill or physically incapacitated and other additional criteria can be met (namely that the risk of re-offending is minimal, further imprisonment would reduce the prisoner's life expectancy, there are adequate arrangements for the prisoner's care and treatment outside prison, and early release will bring some significant benefit to the prisoner or his or her family). . . .

130. . . . [Accordingly,] the Court . . . finds that the requirements of Article 3 . . . have not been met

FOR THESE REASONS, THE COURT . . .

Holds, by sixteen votes to one, that there has been a violation of Article 3 in respect of each applicant

CONCURRING OPINION OF JUDGE POWER-FORDE . . .

[W]hat tipped the balance for me in voting with the majority was the Court's confirmation, in this judgment, that Article 3 encompasses what might be described as

“the right to hope.” It goes no further than that. The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.

[The concurring opinions of Judge Mahoney, focused on the procedural breach of Article 3, and of Judge Ziemele, addressing the question of the award of damages under Article 41, are omitted.]

PARTLY DISSENTING OPINION OF JUDGE VILLIGER . . .

[T]his general and abstract application of Article 3 to the present case does not, in my view, square easily with the principle of subsidiarity underlying the Convention, not least when, as the judgment itself recognises, issues relating to just and proportionate punishment are the subject of rational debate and civilised disagreement

R v. McLoughlin

Court of Appeal of England and Wales (Criminal Division)

[2014] EWCA Crim 188 (Feb. 18, 2014)

Before Lord Chief Justice Thomas, Lord Justice Treacy, and Mr Justice Burnett

Lord Thomas, Chief Justice: . . .

17. We do not read the judgment of the Grand Chamber in *Vinter* as in any way casting doubt on the fact that there are crimes that are so heinous that just punishment may require imprisonment for life. . . .

28. The Grand Chamber . . . concluded [that Article 3 was violated] . . . because of the lack of certainty [under the governing British law] . . . and [of an] adequate avenue of redress

29. We disagree. In our view, the domestic law of England and Wales is clear as to “possible exceptional release of whole life prisoners”. . . .

31. First, the power of review under the section arises if there are exceptional circumstances. . . . It is not necessary to specify what such circumstances are or specify criteria; the term “exceptional circumstances” is of itself sufficiently certain.

32. Second, the Secretary of State must then consider whether such exceptional circumstances justify the release on compassionate grounds. The policy set out in the Lifer Manual is highly restrictive and purports to circumscribe the matters which will be considered by the Secretary of State. The Manual cannot restrict the duty of the Secretary of State to consider all circumstances relevant to release on compassionate grounds. . . .

33. Third, the term “compassionate grounds” must be read . . . in a manner compatible with Article 3. They are not restricted to what is set out in the Lifer Manual. . . .

34. Fourth, the decision of the Secretary of State must be reasoned by reference to the circumstances of each case and is subject to scrutiny by way of judicial review.

35. In our judgment the law of England and Wales therefore does provide to an offender “hope” or the “possibility” of release in exceptional circumstances which render the just punishment originally imposed no longer justifiable. . . .

37. Judges should therefore continue to apply the statutory scheme in the CJA 2003 and in exceptional cases, likely to be rare, impose whole life orders

Hutchinson v. United Kingdom

European Court of Human Rights (Fourth Section)
[2015] ECHR 111 (Feb. 3, 2015) (review pending)*

. . . The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of: Guido Raimondi, *President*, George Nicolaou, Ledi Bianku, Nona Tsotsoria, Zdravka Kalaydjieva, Paul Mahoney, Krzysztof Wojtyczek, *judges*, and Fatoş Aracı, *Deputy Section Registrar*

1. The case . . . against the United Kingdom . . . [was] lodged . . . by a British national, Mr Arthur Hutchinson (“the applicant”), on 10 November 2008. . . .

6. In October 1983, the applicant broke into a family home, stabbed to death a man, his wife and their adult son and repeatedly raped their 18 year-old daughter,

* Referred to the Grand Chamber on June 1, 2015.

having first dragged her past her father's body. . . . On 14 September 1984, . . . he was convicted of aggravated burglary, rape and three counts of murder.

7. . . . On 15 January 1988 the Lord Chief Justice recommended that the period should be set at a whole life term stating that "I do not think that this man should ever be released, quite apart from the risk which would be involved". On 16 December 1994, the Secretary of State informed the applicant that he had decided to impose a whole life term.

8. Following the entry into force of the Criminal Justice Act 2003, the applicant applied to the High Court for a review of his minimum term of imprisonment . . . [which upheld] the Secretary of State's decision. . . .

20. . . . Having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing, it is not the Court's task to prescribe the form – executive or judicial – which that review should take, or to determine when that review should take place. . . .

[A] whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3 A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 of the Convention on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration

24. . . . [I]t is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation . . . [and] in the United Kingdom, as in the other Convention States, the progressive development of the law through judicial interpretation is a well-entrenched and necessary part of legal tradition. . . .

26. . . . [T]here has been no violation of Article 3 in the present case. . . .

DISSENTING OPINION OF JUDGE KALAYDJIEVA

I voted against the conclusion of the majority that the applicant's complaints are admissible . . . as it is unclear whether the applicant ever availed himself of the opportunity to apply to the Secretary of State for Justice in order to test the manner in which the latter would exercise his power to assess whether any exceptional circumstances justified the applicant's release. . . .

Montgomery v. Louisiana
Supreme Court of the United States
136 S. Ct. 718 (2016)

Justice KENNEDY delivered the opinion of the Court.

Petitioner is Henry Montgomery. In 1963, Montgomery killed Charles Hurt, a deputy sheriff in East Baton Rouge, Louisiana. Montgomery was 17 years old at the time of the crime. . . . The jury returned a verdict of “guilty without capital punishment.” Under Louisiana law, this verdict required the trial court to impose a sentence of life without parole. The sentence was automatic upon the jury’s verdict, so Montgomery had no opportunity to present mitigation evidence to justify a less severe sentence. . . . Montgomery, now 69 years old, has spent almost his entire life in prison.

Almost 50 years after Montgomery was first taken into custody, this Court decided *Miller v. Alabama* in 2012 . . . [holding] that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment’s prohibition on “cruel and unusual punishments.” “By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence,” mandatory life without parole “poses too great a risk of disproportionate punishment.” *Miller* required that sentencing courts consider a child’s “diminished culpability and heightened capacity for change” before condemning him or her to die in prison. Although *Miller* did not foreclose a sentencer’s ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect “irreparable corruption.” . . .

The Court . . . holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. . . . A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. . . . A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner’s sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution’s substantive guarantees. . . .

This leads to the question whether *Miller*’s prohibition on mandatory life without parole for juvenile offenders indeed did announce a new substantive rule that, under the Constitution, must be retroactive. . . . [A] procedural rule “regulate[s] only the *manner of determining* the defendant’s culpability.” A substance rule, in contrast, forbids “criminal punishment of certain primary conduct” or prohibits “a certain category of punishment for a class of defendants because of their status or offense.” . . .

As a corollary to a child’s lesser culpability, *Miller* recognized that “the distinctive attributes of youth diminish the penological justifications” for imposing life

without parole on juvenile offenders. Because retribution “relates to an offender’s blameworthiness, the case for retribution is not as strong with a minor as with an adult.” The deterrence rationale likewise does not suffice, since “the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment.” The need for incapacitation is lessened, too, because ordinary adolescent development diminishes the likelihood that a juvenile offender “‘forever will be a danger to society.’” Rehabilitation cannot justify the sentence, as life without parole “forfeits altogether the rehabilitative ideal.” . . .

Miller . . . did more than require a sentencer to consider a juvenile offender’s youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of “the distinctive attributes of youth.” . . . Because *Miller* determined that sentencing a child to life without parole is excessive for all but “‘the rare juvenile offender whose crime reflects irreparable corruption,’” it rendered life without parole an unconstitutional penalty for “a class of defendants because of their status”—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it “‘necessarily carr[ies] a significant risk that a defendant’”—here, the vast majority of juvenile offenders—“‘faces a punishment that the law cannot impose upon him.’” . . .

Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment. . . .

Henry Montgomery has spent each day of the past 46 years knowing he was condemned to die in prison. Perhaps it can be established that, due to exceptional circumstances, this fate was a just and proportionate punishment for the crime he committed as a 17-year-old boy. In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored. . . .

Justice SCALIA, with whom Justice THOMAS and Justice ALITO join, dissenting. . . .

[T]o say that a punishment might be inappropriate and disproportionate for certain juvenile offenders is not to say that it is unconstitutionally void. All of the

statements relied on by the majority do nothing more than express the *reason* why the new, youth-protective *procedure* prescribed by *Miller* is desirable: to deter life sentences for certain juvenile offenders. On the issue of whether *Miller* rendered life-without-parole penalties unconstitutional, it is impossible to get past *Miller*'s unambiguous statement that “[o]ur decision does not categorically bar a penalty for a class of offenders” and “mandates only that a sentencer follow a certain process . . . before imposing a particular penalty.” It is plain as day that the majority is not applying *Miller*, but rewriting it.

And the rewriting has consequences beyond merely making *Miller*'s procedural guarantee retroactive. If, indeed, a State is categorically prohibited from imposing life without parole on juvenile offenders whose crimes do not “reflect permanent incorrigibility,” then even when the procedures that *Miller* demands are provided the constitutional requirement is not necessarily satisfied. It remains available for the defendant sentenced to life without parole to argue that his crimes did not in fact “reflect permanent incorrigibility.” . . .

INSIDE AND OUT: THE RIGHT TO VOTE

A series of cases in several jurisdictions address the lawfulness of prisoner disenfranchisement. Given the many examples above of horrific conditions of confinement, the question of voting may appear to be a kind of luxury less than central to the questions of this chapter. Yet, as the ongoing conflict between the UK and the ECtHR illustrates, voting rights are continuous with the questions of the boundaries of licit punishment explored thus far.

Central to the voting debate are the issues of a) when and why may the state divest attributes of liberty from individuals; b) which organs of government make those decisions. Below, we excerpt the UK/ECtHR exchanges and a 2015 decision by the Court of Justice of the European Union, and then briefly discuss decisions from Canada, South Africa, and South Korea. This segment closes with the United States, where the debate is whether the Fourteenth Amendment of the U.S. Constitution should be read to permit states to disenfranchise felons, including after release from prison.

As the disagreements within the opinions reflect, disagreements center on whether the role of the judiciary changes when the form that punishment takes shifts from the conditions and duration of punishment to participation through voting in the body politic. Do judges have a special obligation to protect the disenfranchised? Does the answer change if, as the dissenters in South Africa argue, crime rates become disablingly high?

**Recommendation of the Committee of Ministers to Member States on
the Management by Prison Administrations of Life Sentence and
Other Long-Term Prisoners**

Council of Europe, Committee of Ministers

Rec (2003) 23 (October 9, 2003)*

. . . 3. Consideration should be given to the diversity of personal characteristics to be found among life sentence and long-term prisoners and account taken of them to make individual plans for the implementation of the sentence (individualisation principle).

4. Prison life should be arranged so as to approximate as closely as possible to the realities of life in the community (normalisation principle).

5. Prisoners should be given opportunities to exercise personal responsibility in daily prison life (responsibility principle). . . .

Hirst v. United Kingdom (No. 2)

European Court of Human Rights (Grand Chamber)

[2005] ECHR 681

The European Court of Human Rights, sitting as a Grand Chamber composed of: Mr L. Wildhaber, President, Mr C.L. Rozakis, Mr J.-P. Costa, Nicolas Bratza, Mr G. Bonello, Mr L. Caflisch, Mrs F. Tulkens, Mr P. Lorenzen, Mrs N. Vajić, Mr K. Traja, Mr A. Kovler, Mr V. Zagrebelsky, Mrs A. Mularoni, Mrs L. Mijović, Mr S.E. Jebens, Mrs D. Jočienė, Mr J. Šikuta, judges, and Mr E. Fribergh, Deputy Registrar

12. On 11 February 1980 the applicant pleaded guilty to manslaughter on the ground of diminished responsibility. His guilty plea was accepted on the basis of medical evidence that he was a man with a severe personality disorder to such a

* In 1973, the Council of Europe promulgated the Standard Minimum Rules for the Treatment of Prisoners. Committee of Ministers, *Standard Minimum Rules for the Treatment of Prisoners*, Resolution (73) 5, Council of Europe (1973). In 1987, the Council of Europe replaced those rules with the European Prison Rules, and then revised those provisions in 2006. See Committee of Ministers, *Recommendation No. R (87) 3 of the Committee of Ministers to Member States on the European Prison Rules*, Council of Europe (1987). The 2006 European Prison Rules endorsed a separate set of Council of Europe prison recommendations on “Management by Prison Administrations of Life-Sentence and Other Long-Term Prisoners,” created in 2003 and applied to life-sentence and long-term prisoners. Committee of Ministers, *Management by Prison Administrations of Life-Sentence and Other Long-Term Prisoners: Recommendation (REC) 2003 23*, Council of Europe (2003).

degree that he was amoral. He was sentenced to a term of discretionary life imprisonment.

13. The applicant's tariff (that part of the sentence relating to retribution and deterrence) expired on 25 June 1994. His continued detention was based on . . . the Parole Board considering that he continued to present a risk of serious harm to the public.

14. The applicant, who is barred by section 3 of the Representation of the People Act 1983 from voting in parliamentary or local elections, . . . [seeks] a declaration that this provision was incompatible with the European Convention on Human Rights. . . .

16. In . . . 2001, Lord Justice Kennedy . . . cited the Secretary of State's reasons . . . for maintaining the current policy: . . .

Removal from society means removal from the privileges of society, amongst which is the right to vote for one's representative. . . .

21. Section 3 of the Representation of the People Act 1983 ("the 1983 Act") provides:

"(1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence . . . is legally incapable of voting at any parliamentary or local election."

22. . . . [T]he substance of [this provision] dated back to the Forfeiture Act 1870 . . . which in turn reflected earlier rules of law relating to the forfeiture of certain rights by a convicted "felon" (the so-called "civic death" of the times of King Edward III). . . .

33. . . . [E]ighteen countries allowed prisoners to vote without restriction (Albania, Azerbaijan, Croatia, the Czech Republic, Denmark, Finland, "the former Yugoslav Republic of Macedonia," Germany, Iceland, Lithuania, Moldova, Montenegro, the Netherlands, Portugal, Slovenia, Sweden, Switzerland and Ukraine), in thirteen countries all prisoners were barred from voting or unable to vote (Armenia, Belgium, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Ireland, Russia, Serbia, Slovakia, Turkey and the United Kingdom), while in twelve countries prisoners' right to vote could be limited in some other way (Austria, Bosnia and Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Romania and Spain).

34. . . . [I]n Romania prisoners may be debarred from voting if the principal sentence exceeds two years, while in Latvia prisoners serving a sentence in penitentiaries are not entitled to vote; nor are prisoners in Liechtenstein. . . .

40. The applicant . . . relied on Article 3 of Protocol No. 1 . . . :

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” . . .

60. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. . . . [The] Contracting States must be allowed a margin of appreciation in this sphere. . . .

69. . . . [T]he Court . . . begin[s] by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty

70. There is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion. . . .

77. The Government have argued that the measure was proportionate, pointing out, *inter alia*, that it only affected some 48,000 prisoners . . . and . . . that the ban was in fact restricted in its application as it affected only those convicted of crimes serious enough to warrant a custodial sentence and did not apply to those detained on remand, for contempt of court or for default in payment of fines. . . . [The] bar . . . concerns a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity. . . .

79. . . . [T]here is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. . . .

82. Therefore, while the Court reiterates that the margin of appreciation is wide, it is not all-embracing. . . .

84. In a case such as the present one, where Contracting States have adopted a number of different ways of addressing the question of the right of convicted prisoners to vote, the Court must confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1. . . .

CONCURRING OPINION OF JUDGE CAFLISCH

2. . . . [T]here must . . . be limits to [restrictions on the right to vote, to elect, and to stand for election]; and it is up to this Court, rather than the Contracting Parties, to determine whether a given restriction is compatible with the individual right to vote, to elect and to stand for election. To make this determination, the Court will rely on the legitimate aim pursued by the measure of exclusion and on the proportionality of the latter. . . .

7. . . . The legislation in question must provide that disenfranchisement, as a complementary punishment, is a matter to be decided by the judge, not the executive. This element, too, will be found in the Code of Good Practice adopted by the Venice Commission.*

. . . Finally—and this may be the essential point for the present case—in those Contracting States where the sentence may comprise a punitive part (retribution and deterrence) and a period of detention based on the risk inherent in the prisoner’s release, the disenfranchisement must remain confined to the punitive part and not be extended to the remainder of the sentence. . . .

JOINT CONCURRING OPINION OF JUDGES TULKENS AND ZAGREBELSKY . . .

[T]he same criminal offence and the same criminal character can lead to a prison sentence or to a suspended sentence. In our view this, in addition to the failure to take into consideration the nature and gravity of the offence, demonstrates that the real reason for the ban is the fact that the person is in prison.

This is not an acceptable reason. There are no practical grounds for denying prisoners the right to vote (remand prisoners do vote) and prisoners in general continue to enjoy the fundamental rights guaranteed by the Convention, except for the right to liberty. As to the right to vote, there is no room in the Convention for the old idea of “civic death” that lies behind the ban on convicted prisoners’ voting.

* The Venice Commission’s Guidelines on Elections stated: “The five principles underlying Europe’s electoral heritage are *universal, equal, free, secret and direct suffrage*.” While deprivations of voting and electoral rights are permissible according to the Commission, “[t]he proportionality principle must be observed,” such that “conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them.” Furthermore, any deprivations must be “based on mental incapacity or a criminal conviction for a serious offence.” Eur. Comm’n for Democracy Through Law (Venice Commission), *Code of Good Practice in Electoral Matters*, 51st Sess., Op. No. 190/2002, available at [http://www.venice.coe.int/docs/2002/CDL\(2002\)139-e.pdf](http://www.venice.coe.int/docs/2002/CDL(2002)139-e.pdf).

JOINT DISSENTING OPINION OF JUDGES WILDHABER, COSTA,
LORENZEN, KOVLER AND JEBENS . . .

6. We do not dispute that it is an important task for the Court to ensure that the rights guaranteed by the Convention system comply with “present-day conditions,” and that accordingly a “dynamic and evolutive” approach may in certain situations be justified. However, . . . the Court is not a legislator and should be careful not to assume legislative functions. An “evolutive” or “dynamic” interpretation should have a sufficient basis in changing conditions in the societies of the Contracting States, including an emerging consensus as to the standards to be achieved. We fail to see that this is so in the present case. . . .

[L]egislation in Europe shows that there is little consensus about whether or not prisoners should have the right to vote. In fact, the majority of member States know such restrictions, although some have blanket and some limited restrictions. Thus, the legislation in the United Kingdom cannot be claimed to be in disharmony with a common European standard. . . .

8. . . . [W]e do not rule out the possibility that restrictions may be disproportionate in respect of minor offences and/or very short sentences. . . .

DISSENTING OPINION OF JUDGE COSTA . . .

5. . . . [O]nce I had . . . accepted that the States have a wide margin of appreciation to decide on the aims of any restriction, limitation or even outright ban on the right to vote (and/or the right to stand for election), how could I, without being inconsistent, reduce that margin when it came to assessing the proportionality of the measure restricting universal suffrage (a concept which, of course, remains the democratic ideal)? . . .

9. The point is that one must avoid confusing *the ideal* to be attained and which I support—which is to make every effort to bring the isolation of convicted prisoners to an end, even when they have been convicted of the most serious crimes, and to prepare for their reintegration into society and citizenship—and the *reality* of *Hirst (no. 2)*, which on the one hand theoretically asserts a wide margin of appreciation for the States as to the conditions in which a subjective right (derived from judicial interpretation!) may be exercised, but goes on to hold that there has been a violation of that right, thereby depriving the State of all margin and all means of appreciation.

The UK Parliament did not alter its rule at issue in *Hirst*. In 2010, other prisoners returned to the ECtHR to seek relief; applicants in *Greens and M.T.* argued that the British ban had prevented them from participating in European Parliament elections in 2009 and that they would lose their opportunity in 2011 to vote in elections to the Scottish Parliament. In its decision, the ECtHR admonished the U.K. for its continuing violation of Convention rights and its failure “to abide by the final judgment.” The Court directed that, “in light of the lengthy delay in implementing that decision and the significant number of repetitive applications,” the U.K. was, within six months, to propose legislation to amend its felon disenfranchisement laws to be “Convention-compliant” and thereafter to enact such legislation “within any such period as may be determined by the Committee of Ministers.”

In 2012, the ECtHR gave the U.K. another extension in light of the 2012 decision in *Scoppola v. Italy*, which distinguished *Hirst* and permitted the Italian prohibition on prisoners serving sentences of five years or more from ever being able to vote, absent special permission. The Court described the Italian rule as unlike the “general, automatic, and indiscriminate character” of the law in question in *Hirst*. Judge David Thór Björgvinsson dissented; he argued that the Italian rule was as “blunt” an “instrument” as the U.K. rule found objectionable in *Hirst*. The U.K. rule in *Hirst* extended disenfranchisement only for the period of incarceration while the Italian law “deprives prisoners of their right to vote beyond the duration of their prison sentence, and for a large group of prisoners, for life.” He concluded that by affording a margin of appreciation to the Italian ban, the Court had “stripped the *Hirst* judgment of all of its bite as a landmark precedent for the protection of prisoners’ voting rights in Europe.”

The Supreme Court of the United Kingdom returned to the issue in 2013.

R (Chester) v. Secretary of State for Justice
Supreme Court of the United Kingdom
[2013] UKSC 63

Before Lady Hale, Deputy President, Lord Hope, Lord Mance, Lord Kerr,
Lord Clarke, Lord Sumption, Lord Hughes

LORD MANCE (with whom Lord Hope, Lord Hughes and Lord Kerr agree)

[The appeal was brought by two prisoners . . . convicted of murder and sentenced to life imprisonment. Neither was eligible for parole, and both claimed that disenfranchisement violated their rights under the UK’s Human Rights Act and the obligation to “take into account” decisions of the ECtHR, such as *Hirst*.] . . .

73. I reject the submission that the Supreme Court could or should simply disapply the whole of the legislative prohibition on prisoner voting It is clear

from [ECtHR case law that] . . . a ban on eligibility will be justified in respect of a very significant number of convicted prisoners. . . . [He concluded that neither applicant had a claim to a remedy and that their appeals be dismissed.]

LADY HALE (with whom Lord Hope and Lord Kerr agree) . . .

86. Prisoners' voting is an emotive subject. Some people feel very strongly that prisoners should not be allowed to vote. And public opinion polls indicate that most people share that view. A YouGov poll in November 2012 found that 63% of respondents said that "no prisoners should be allowed to vote", 15% said that those serving sentences of less than six months should be allowed to vote, 9% said that those serving less than four years should be allowed to vote, and 8% said that all prisoners should be allowed to vote. [This increase in support for voting rights from prior polls] suggests that public opinion may be becoming more sympathetic to the idea, with 32% now favouring some relaxation in the present law, but there is still a substantial majority against it. It is not surprising, therefore, that in February 2011 elected Parliamentarians also voted overwhelmingly against any relaxation of the present law. . . .

88. Of course, in any modern democracy, the views of the public and Parliamentarians cannot be the end of the story. Democracy is about more than respecting the views of the majority. It . . . is also about safeguarding the rights of minorities, including unpopular minorities. . . . It follows that one of the essential roles of the courts in a democracy is to protect those rights. . . .

89. The present Attorney General . . . recognises that it is the court's task to protect the rights of citizens and others within the jurisdiction of the United Kingdom in the ways which Parliament has laid down for us in the Human Rights Act 1998. But insofar as he implied that elected Parliamentarians are uniquely qualified to determine what the franchise should be, he cannot be right. If the current franchise unjustifiably excludes certain people from voting, it is the court's duty to say so and to give them whatever remedy is appropriate. More fundamentally, Parliamentarians derive their authority and legitimacy from those who elected them, in other words from the current franchise, and it is to those electors that they are accountable. They have no such relationship with the disenfranchised. Indeed, in some situations, they may have a vested interest in keeping the franchise as it is.

90. To take an obvious example, we would not regard a Parliament elected by an electorate consisting only of white, heterosexual men as uniquely qualified to decide whether women or African-Caribbeans or homosexuals should be allowed to vote. If there is a Constitution, or a Bill of Rights, or even a Human Rights Act, which guarantees equal treatment in the enjoyment of its fundamental rights, including the right to vote, it would be the task of the courts, as guardians of those rights, to declare the unjustified exclusion unconstitutional. Given that, by definition, Parliamentarians

do not represent the disenfranchised, the usual respect which the courts accord to a recent and carefully considered balancing of individual rights and community interests . . . may not be appropriate.

91. Of course, the exclusion of prisoners from voting is of a different order from the exclusion of women, African-Caribbeans or homosexuals. It is difficult to see how any elected politician would have a vested interest in excluding them (save just possibly from local elections in places where there are very large prisons). The arguments for and against their exclusion are quite finely balanced. On the one hand, unlike women, African-Caribbeans and homosexuals, prisoners share a characteristic which many think relevant to whether or not they should be allowed to vote: they have all committed an offence deemed serious enough to justify their removal from society for at least a while and in some cases indefinitely. While clearly this does not mean that all their other rights are forfeited, why should they not for the same time forfeit their right to take part in the machinery of democracy?

92. Hence I see the logic of the Attorney General's argument, that by deciding that an offence is so serious that it merits a custodial penalty, the court is also deciding that the offence merits exclusion from the franchise for the time being. The custody threshold means that the exclusion, far from being arbitrary and disproportionate, is tailored to the justice of the individual case.

93. One problem with that argument is that it does not explain the purpose of the exclusion. Any restriction of fundamental rights has to be a proportionate means of pursuing a legitimate aim. Is it simply an additional punishment, a further mark of society's disapproval of the criminal offence? Or is it rather to encourage a sense of civic responsibility and respect for democratic institutions? If so, it could well be argued that this is more likely to be achieved by retaining the vote, as a badge of continuing citizenship, to encourage civic responsibility and reintegration in civil society in due course. This is indeed . . . a matter on which thoughtful people can hold diametrically opposing views.

94. A more concrete objection to the Attorney General's argument is that the custody threshold in this country has never been particularly high. . . . Between 1992 and 2002, the custodial sentencing rate rose from 5% to 15% in the magistrates' courts and from 44% to 63% in the Crown Court Some of the rise may be accounted for by the greater seriousness of the offences coming before the courts, but this cannot be the whole explanation. There are many people in prison who have not committed very serious crimes, but for whom community punishments are not available, or who have committed minor crimes so frequently that the courts have run out of alternatives.

96. All of this suggests an element of arbitrariness in selecting the custody threshold as a unique indicator of offending so serious as to justify exclusion from the democratic process. To this may be added the random impact of happening to be in prison on polling day and the various reasons why someone who has been sentenced

to a period of imprisonment may not in fact be in prison on that day. He may . . . be on bail pending an appeal; or he may be released early under electronic monitoring. . . .

98. . . . [Thus], I have some sympathy for the view of the Strasbourg court . . . that our present law is arbitrary and indiscriminate. But I acknowledge how difficult it would be to devise any alternative scheme which would not also have some element of arbitrariness about it. The Strasbourg court, having stepped back from the suggestion . . . that exclusion from the franchise requires a judicial decision in every case and . . . approved the Italian law in *Scoppola v Italy*, must be taken to have accepted this.

99. However, . . . I cannot envisage any law which the United Kingdom Parliament might eventually pass on this subject which would grant either of them the right to vote. . . .

101. In this case, there can be no question of Mr Chester having a cause of action under section 6(1) of the Human Rights Act. The Electoral Registration Officer for Wakefield refused his application for inclusion on the electoral roll. But in my view that could not have been incompatible with his Convention rights, because (at least following *Scoppola*) the Convention does not give him the right to vote. . . .

[Lord Clarke and Lord Sumption also provided separate opinions concurring in the judgment.]

Thereafter, applicants continued to see relief before the ECtHR. In *McHugh and Others v. United Kingdom*, decided in 2015, the Court addressed “1,015 applications against the United Kingdom of Great Britain and Northern Ireland,” all arguing a violation of their voting rights. The Court reiterated that “the statutory ban on prisoners voting in elections was, by reason of its blanket character, incompatible with Article 3 of Protocol No. 1 to the Convention.” Because that “impugned legislation remains unamended,” the Court found a continuing violation. Yet the opinion discouraged future applicants by following a 2014 ruling that such applicants were not entitled to costs, as “legal assistance was [not] required to lodge an application. . . . since [the prior] judgment was both concise and unambiguous.” Rather, “the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage sustained by the applicants. . . .”

As of June 2016, one pending bill, Bill 44 2015-16, would continue the ban in place; its text states that “A prisoner serving a custodial sentence is disqualified from voting at a parliamentary or local government election. Another, proposed by the Ministry of Justice, provided three options to Members of Parliament: “[1] ban for

prisoners sentenced to 4 years or more [2] ban for prisoners sentenced to more than 6 months . . . [and 3] ban for all prisoners.” *Voting Eligibility (Prisoners) Draft Bill*.

In 2015, the Court of Justice of the European Union addressed the question of prisoner voting, and its ruling upholding a French ban as proportionate relative to the sentence and the crime in question, while not referencing the ongoing debates in the ECtHR case law.

Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde
Court of Justice of the European Union (Grand Chamber)
C-650/13 (Oct. 6, 2015)

THE COURT (Grand Chamber), composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, M. Ilešič, C. Vajda, S. Rodin and K. Jürimäe (Rapporteur), Presidents of Chambers, A. Rosas, E. Juhász, A. Borg Barthet, J. Malenovský and F. Biltgen, Judges, Advocate General: P. Cruz Villalón, Registrar: L. Carrasco Marco, Administrator, . . .

1. This request for a preliminary ruling concerns the interpretation of Articles 39 and 49 of the Charter of Fundamental Rights of the European Union (‘the Charter’).*

2. The request has been made in proceedings between Mr Delvigne and (1) the Commune de Lesparre-Médoc (municipality of Lesparre-Médoc) (France) and (2) the Préfet de la Gironde (Prefect of Gironde) concerning the removal of Mr Delvigne from the electoral roll of that municipality. . . .

* The Charter of Fundamental Rights of the European Union provides:

Article 39: “1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State. 2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.”

Article 49: “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable. . . . 3. The severity of penalties must not be disproportionate to the criminal offence.”

3. Article 1 of the Act concerning the election of the members of the European Parliament by direct universal suffrage . . . provides:

‘1. In each Member State, members of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote. . . .

3. Elections shall be by direct universal suffrage and shall be free and secret.’

4. Article 8 of the 1976 Act states:

‘Subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions.

These national provisions, which may if appropriate take account of the specific situation in the Member States, shall not affect the essentially proportional nature of the voting system.’

5. Article 28 of the Criminal Code . . . [of France] of 12 February 1810, [as] . . . applicable [to this proceeding] (‘the old Criminal Code’), provided . . . :

‘A sentence for a serious criminal offence will entail the loss of civic rights.’

6. Under Article 34 of the old Criminal Code, the “loss of civil rights” [consisted of] . . . the loss of the right to vote, of the right to stand for election and, in general, of all civic and political rights . . . ‘

7. The old Criminal Code was repealed . . . [as of] 1 March 1994 Article 131-26 of the new Criminal Code provides that a court may rule that a person is to be deprived of all or part of his civic rights for a period which may not exceed ten years in the case of a conviction for a serious offence (crime) and five years in the case of a conviction for a less serious offence (délit).

8. [The 1994 mandatory sentencing law] . . . also [provided that its provisions did not preclude the penalties of] . . . deprivation of civic, civil and family rights and of exclusion from jury service, resulting, by operation of law, from a criminal conviction by a final judgment delivered before the entry into force of this Law

9. [A 2009 law] . . . states . . . :

‘Anyone subject to deprivation, ban or legal incapacity or any published notice whatsoever resulting by operation of law from a criminal conviction or imposed on conviction as an additional

penalty may apply to the court which passed sentence or, in the event of more than one conviction, to the last court to have ruled, for that deprivation, ban or legal incapacity to be lifted in whole or in part, including with regard to its duration. . . .

[A French law also provided for disenfranchisement from participation in European Parliament elections.]

20. . . . [T]he tribunal d'instance de Bordeaux (Bordeaux District Court) . . . refer[red] the following questions . . .

‘(1) Is Article 49 of the Charter . . . to be interpreted as preventing a provision of national law from maintaining a ban, which, moreover, is indefinite and disproportionate, on allowing persons convicted before the entry into force of a more lenient criminal law, namely, Law No 94-89 of 1 February 1994, to receive a lighter penalty?

(2) Is Article 39 of the Charter . . . , applicable to elections to the European Parliament, to be interpreted as precluding the Member States of the European Union from making provision for a general, indefinite and automatic ban on exercising civil and political rights, in order to avoid creating any inequality of treatment between nationals of the Member States?’

24. The French, Spanish and United Kingdom Governments claim that the Court does not have jurisdiction to reply to the request for a preliminary ruling, since, according to those governments, the national legislation at issue in the main proceedings falls outside the scope of EU law. They submit, in particular, that the national court has not invoked any provision of EU law that would establish a connection between the national legislation and EU law, and that therefore the national legislation does not constitute an implementation of EU law for the purposes of Article 51(1) of the Charter*

26. Article 51(1) of the Charter confirms the Court’s settled case-law, which states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law

* Article 51 of the Charter of Fundamental Rights of the European Union provides: “1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. . . .”

31. Admittedly, as regards the beneficiaries of the right to vote in elections to the European Parliament, the Court has held in its judgments in *Spain v United Kingdom* [2006] [and in another case] . . . that Articles 1(3) and 8 of the 1976 Act do not define expressly and precisely who are to be entitled to that right, and that therefore, as EU law currently stands, the definition of the persons entitled to exercise that right falls within the competence of each Member State in compliance with EU law.

32. However, as the German Government, the Parliament and the European Commission submitted in their observations, the Member States are bound, when exercising that competence, by the obligation set out in Article 1(3) of the 1976 Act, read in conjunction with Article 14(3) TEU, to ensure that the election of Members of the European Parliament is by direct universal suffrage and free and secret.

33. Consequently, a Member State which, in implementing its obligation under Article 14(3) TEU and Article 1(3) of the 1976 Act, makes provision in its national legislation for those entitled to vote in elections to the European Parliament to exclude Union citizens who, like Mr Delvigne . . . must be considered to be implementing EU law within the meaning of Article 51(1) of the Charter.

34. Accordingly, the Court has jurisdiction.

46. . . . Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights such as those set forth in Article 39(2) of the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others

47. . . . [T]he deprivation of the right to vote at issue stems from the application of the combined provisions of the Electoral Code and the Criminal Code, it must be held that it is provided for by law.

48. Furthermore, that limitation respects the essence of the right to vote since it has the effect of excluding certain persons, under specific conditions and on account of their conduct, from those entitled to vote in elections to the Parliament, as long as those conditions are fulfilled.

49. Lastly, a limitation such as that at issue in the main proceedings is proportionate in so far as it takes into account the nature and gravity of the criminal offence committed and the duration of the penalty.

50. As the French Government notes . . . , the deprivation . . . was applicable only to persons convicted of an offence punishable by a custodial sentence of between five years and life imprisonment.

51. Furthermore, the French Government submitted that national law . . . provides for the possibility of a person in Mr. Delvigne’s situation applying for, and obtaining, the lifting of the additional penalty of loss of civic rights leading to the deprivation of his right to vote..

58. . . . Article 39(2) and the last sentence of Article 49(1) of the Charter must be interpreted as not precluding legislation of a Member State [from excluding] . . . from those entitled to vote in elections to the European Parliament persons who, like Mr Delvigne, were convicted of a serious crime and whose conviction became final before 1 March 1994. . . .

Other jurisdictions have addressed the issues. Famously, in *Sauvé v. Canada*, [2002] 3 S.C.R. 519, Chief Justice McLachlin for the Supreme Court of Canada addressed the disenfranchisement of individuals serving two or more years in a correctional institution. The Court concluded that the Government had failed to establish a rational connection between denying the vote to penitentiary inmates and its stated purposes of promoting responsibility and respect for the law. Nor could the government justify the denial of the right to vote—a fundamental democratic right—as an appropriate tool in “its arsenal of punitive implements,” because the negative effects of which “outweigh the tenuous benefits that might ensue.” In dissent, Justice Gonthier objected to the majority’s reliance on “arguments of principle or value statements.” Given that “different social or political philosophies,” Gonthier argued that the Court ought to accept the government’s justifications. “The salutary effects [of the disenfranchisement] . . . are particularly difficult to demonstrate by empirical evidence given their largely symbolic nature. . . . [I]t would be difficult for the Crown to justify all penal sanctions, if scientific proof was the standard which was required.”

**Minister of Home Affairs v. National Institute for Crime Prevention
and the Re-Integration of Offenders (NICRO) and Others**
Constitutional Court of South Africa
Case CCT 03/04 [2004] (March 3, 2004)

CHASKALSON CJ: . . .

[2] The dispute arises out of the Electoral Laws Amendment Act (the Amendment Act) . . . [that] introduced provisions . . . [depriving] convicted prisoners serving sentences of imprisonment without the option of a fine of the right to participate in elections during the period of their imprisonment. . . .

[20] Section 1 reads as follows:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. . . .
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.” . . .

[24] Section 3 of the Constitution makes provision for a common and equal citizenship. Section 3 provides:

- “(1) There is a common South African citizenship
- (2) All citizens are—
 - (a) equally entitled to the rights, privileges and benefits of citizenship; and
 - (b) equally subject to the duties and responsibilities of citizenship.
- (3) National legislation must provide for the acquisition, loss and restoration of citizenship.” . . .

[27] The right to vote is entrenched in section 19(3)(a) of the Constitution which provides: “Every adult citizen has the right—

- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret.” . . .

[33] Section 36 [of the Constitution] calls for a proportionality analysis in which the question ultimately “is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.” . . .

[39] . . . [T]he government’s reasons for limiting the voting rights of prisoners [included] the need to make provision for voting by people qualified to vote, but who would not be able to find their way to polling stations on election day. Arrangements necessary for this purpose would involve sanctioning the casting of special votes at places other than polling stations, and the use of mobile voting stations on election day to enable people unable to travel to polling stations to cast their votes. . . .

[43] . . . [I]t was decided that some but not all prisoners should be allowed to vote. A distinction was made between three classes of prisoners. Awaiting trial prisoners were entitled to the benefit of the presumption of innocence and should not

be excluded from voting. Prisoners sentenced to a fine with the alternative of imprisonment who were in custody because they had not paid the fine should also be allowed to vote. Their being in custody was in all probability due to their inability to pay the fines and they should not lose the right to vote because of their poverty. [For p]risoners serving sentences of imprisonment without the option of a fine were . . . [i]t was considered reasonable to deny them the right to register or vote whilst they were serving their sentences.

[48] Resources cannot be ignored in assessing whether reasonable arrangements have been made for enabling citizens to vote. There is a difference, however, between a decision by Parliament or the Commission as to what is reasonable in that regard, and legislation that effectively disenfranchises a category of citizens.

[49] . . . [T]he factual basis for the justification based on cost and the lack of resources has not been established. Arrangements for registering voters were made at all prisons to accommodate unsentenced prisoners and those serving sentences because they had not paid the fines imposed on them. Mobile voting stations are to be provided on election day for these prisoners to vote. There is nothing to suggest that expanding these arrangements to include prisoners sentenced without the option of a fine will in fact place an undue burden on the resources of the Commission. . . .

Langa DJC, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Chaskalson CJ.

MADALA J [Dissenting]: . . .

[113] The objectives of government in denying certain prisoners the right to vote are multi-pronged and must be treated holistically as an attempt by government to inculcate responsibility in a society which, for decades, suffered the ravages of apartheid; demeaning its citizens and creating irresponsible persons whose lives have become a protest.

[114] Unfortunately what happens in South Africa today results squarely from our unsavoury recent past. It also means, for me, that uniquely South African problems require uniquely South African solutions and that one cannot simply import into a South African situation a solution derived from another country—no matter how democratic it is said to be. It is true that many old democratic countries generally enfranchise the majority if not in fact all their citizens. . . .

[116] . . . [T]he temporary removal of the vote and its restoration upon the release of the prisoner is salutary to the development and inculcation of a caring and responsible society. Even if the prisoner loses the chance to vote by a day, that will cause him or her to remember the day he or she could not exercise his or her right because of being on the wrong side of the law.

[117] . . . This must be more so in a country which is notoriously plagued by the scourge of crime. You cannot reward irresponsibility and criminal conduct by affording a person who has no respect for the law the right and responsibility of voting. . . .

NGCOBO J [Dissenting]: . . .

[139] . . . The level of crime in our country is unacceptably high. The government has taken a number of measures to deal firmly with crime. The government has also embarked upon a campaign of zero tolerance. . . .

[145] In my view, the government has a legitimate purpose in pursuing a policy of denouncing crime and to promote a culture of the observance of civic duties and obligations. . . .

[152] However, the problem with the present limitation is that it makes no distinction between those prisoners who are serving a prison sentence while awaiting the outcome of an appeal and those whose appeals have been finalised. This distinction is important because the former may still be found not guilty on appeal or have their sentence reduced to a prison sentence with an option of a fine. . . .

[153] To this extent, and this extent only, the limitation goes too far. . . .

**Restriction on Right to Vote of Prisoners and Probationers
with Suspended Sentence**
Constitutional Court of South Korea
26-1(A) KCCR 136 (2014)*

[Justices Park Han-Chul (Presiding Justice), Lee Jung-Mi, Kim Yi-Su, Lee Jin-Sung, Kim Chang-Jong, Ahn Chang-Ho, Kang Il-Won, Seo Ki-Seog and Cho Yong-Ho.] . . .

[The complainants in this case had been sentenced to between one and a half and two years for various offenses. They] were prevented from exercising their right to vote in the election for the 19th National Assembly held on April 11, 2012 on the ground that they fell under the category of disfranchised people stipulated in Article

* CONSTITUTIONAL COURT DECISIONS 2014, CONSTITUTIONAL COURT OF KOREA (2015).

18 Section 1 Item 2 of the Public Official Election Act.* Upon this, the complainants filed this constitutional complaint . . . arguing that [this act] . . . violates their fundamental rights including the right to vote. . . .

[T]he subject matters of review in this case are . . . whether the part relating to ‘a person who is sentenced to imprisonment for a limited term or without prison labor for a limited term and the execution of his/her sentence is suspended’ (hereinafter, for the sake of convenience, we will use the term ‘prisoner’. . .) and the part relating to ‘a person who is sentenced to imprisonment for a fixed term or imprisonment without prison labor for a fixed term and his/her sentence is suspended’ (hereinafter, for the sake of convenience, we will use the term ‘probationer with suspended sentence’. . .) . . . and . . . the part relating to ‘the right to vote under the public Acts’ of probationer with suspended sentence or prisoners in Article 43 Section 2 of the Criminal Code** . . . infringe upon the complainants’ fundamental rights. . . .

The Provisions . . . monolithically restrict the right to vote of probationers with suspended sentences and prisoners: considering the legislative purposes [of the acts] . . . and the principle of sovereignty of the people, the Provisions at Issue fail to meet the requirements of legitimacy of legislative purposes and reasonableness of means to achieve the legislative purposes. Further, the Provisions at Issue also do not satisfy the least restrictive means test as they impose blanket limitation on the right to vote of criminals including negligent offenders, parolees, probationer with suspended sentence or those who are sentenced to short term imprisonment, without any serious consideration of possible causal relationship between restriction on the right to vote and the types and elements of each crime or degree of culpability and illegality. Also, as the public interests to be achieved by the Provisions at Issue are smaller than the private and public interests to be infringed by the Provisions at Issue, they fail to strike the balance between legal interests. Therefore, the Provisions at Issue infringe upon the complainants’ right to vote, right to equality and right to pursue happiness. . . .

* Article 18(1), Item 2 of the Public Official Election Act provides: “1. A person falling under any of the following Items, as of the election day, shall be disfranchised: 2. A person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated or whose sentence execution has not been decided to be exempted”

** Article 43 of the Criminal Code provides: “(1) A person who is sentenced to death penalty, imprisonment for life or imprisonment without prison labor for life, shall be deprived of the qualifications prescribed as follows: . . . 2. Suffrage and eligibility under public Act; (2) A person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term shall be under suspension of qualifications as mentioned in subparagraphs 1 through 3 of the preceding paragraph until the execution of punishment is completed or remitted.”

Article 1 Section 2 of the Constitution, by stipulating that “the sovereignty of the Republic of Korea shall reside in the people and all state authority shall emanate from the people,” affirms the principle of people’s sovereignty. . . .

The principle of universal suffrage and the right to vote based on it should be restricted to the minimum extent only when it is necessary. As the restriction on the right to vote does not naturally derive from the essence of imprisonment sentenced to criminals, criminal’s right to vote should be restricted to the minimum necessary extent based on the principle of universal suffrage. . . .

The scope of application of the Provisions at Issue is very broad, spanning from those who are guilty of relatively minor crimes to those who are guilty of felonies. The Provisions at Issue consider neither the type of crimes such as whether it is a criminal negligence or intentional offence nor the type of legal interests infringed by the crimes such as whether it is state interest, social interest or personal interest. . . . [B]lanket restriction on both prisoners and probationer with suspended sentences, without considering the gravity of illegality of crimes committed by each of them, is contrary to the least restrictive requirement. . . .

[T]he public interests expected to be achieved . . . [are] less valuable than . . . the private interests of prisoners and probationers . . . expected to be infringed by the Provisions at Issue. . . . As such, the Provisions at Issue fail to meet the least restrictive requirement and the balance of interests test while satisfying the legitimacy of legislative purpose and the appropriateness of means. . . .

Among the Provisions at Issue, the part relating to probationers with suspended sentence can regain its constitutionality by declaring it unconstitutional, which instantly removes the infringement on the right to vote. . . . [R]egarding the part relating to prisoners, its unconstitutionality results from the blanket and uniform restriction on the right to vote. But it is within the scope of legislative discretion to remove such unconstitutionality and to constitutionally grant prisoners the right to vote. . . . Therefore, . . . the part relating to prisoners is not compatible with the Constitution but is to temporarily remain effective until the legislature makes a proper revision, which is to be made at the latest by December 31, 2015. . . .

Concurring Opinion on the part of probationers with suspended sentence and
Dissenting Opinion on the part of prisoners by Justice Lee Jin-Sung

I agree with the majority opinion in that the part relating to probationers with suspended sentence is unconstitutional but based on different reasons. And I believe the part relating to prisoners is also unconstitutional. . . . The legislative purpose of the Provisions at Issue, the deprivation of the right to vote in order to impose a social sanction on those who are convicted of crimes, is not legitimate. . . . The State’s correctional administration should aim at prisoners’ successful return to normal and free social life after being discharged from correctional institutions and the restriction

on prisoners' fundamental rights can only be justified to the extent that such restriction corresponds to the purpose of social rehabilitation. Restricting fundamental rights of prisoners only because they are sentenced to imprisonment cannot be constitutionally allowed as it does not conform to the purpose to help prisoners to successfully return to normal and free social life.

Committing crimes and doing harm to society therefrom cannot be a logical and necessary reason that gives justification to restrict the suffrage for participating in the formation of state. . . . [R]estricting the right to vote, as a punishment added to the sentence of imprisonment, goes beyond the scope of liability because exercising the sovereignty and criminal liability are totally different issues. . . . Moreover, it seems unnecessary to impose the social sanction of restricting the right to vote against probationers with suspended sentence as they are not confined in prison but already living in our society as components of community. . . .

[R]estricting the right to vote of prisoners and probationers with suspended sentence tends to damage the respect to law and democracy, not to consolidate the values of law and democracy. . . . It is unclear as to how the means of . . . depriving the right to vote . . . appropriately functions in order to achieve the purpose of strengthening the 'law abiding spirit,' and expectation to meet the appropriateness of the means test seems a vague hope. . . . Rather, granting prisoners or probationers with suspended sentence a chance to exercise their voting right may help them to develop robust political awareness, which is more accordant with the purposes of rehabilitating criminals and reinforcing the law abiding spirit. . . . Therefore, the whole Provisions at Issue should be declared unconstitutional.

[Justice Ahn Chang-Ho dissented in part.]

Hunter v. Underwood
Supreme Court of the United States
471 U.S. 222 (1985)

Justice REHNQUIST delivered the opinion of the Court.

We are required in this case to decide the constitutionality of Art. VIII, § 182, of the Alabama Constitution of 1901, which provides for the disenfranchisement of persons convicted of, among other offenses, "any crime . . . involving moral turpitude." Appellees Carmen Edwards, a black, and Victor Underwood, a white, have been blocked from the voter rolls pursuant to § 182 . . . because they each have been convicted of presenting a worthless check. . . .

The predecessor to § 182 . . . denied persons “convicted . . . [of various crimes]” the right to register, vote or hold public office. These offenses were largely, if not entirely, felonies. The drafters of § 182, which was adopted by the 1901 convention, expanded the list of enumerated crimes substantially . . . [and] also added a new catchall provision covering “any . . . crime involving moral turpitude” . . . [, which was] subsequently interpreted by the Alabama Supreme Court to mean an act that is “ ‘immoral in itself, regardless of the fact whether it is punishable by law’

Section 182 on its face is racially neutral Appellee Edwards nonetheless claims that the provision has had a racially discriminatory impact. . . . Presented with a neutral state law that produces disproportionate effects along racial lines . . . [the] correct . . . approach [is] . . . to determine whether the law violates the Equal Protection Clause of the Fourteenth Amendment:

“[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” Once racial discrimination is shown to have been a “substantial” or “motivating” factor behind enactment of the law, the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor. Proving the motivation behind official action is often a problematic undertaking. . . . “Inquiries into congressional motives or purposes are a hazardous matter What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.”

But [these] sort[s] of difficulties . . . do not obtain in this case. Although understandably no “eyewitnesses” to the 1901 proceedings testified, testimony and opinions of historians were offered and received without objection. These showed that the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks. The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address:

“And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.” . . .

[T]he evidence . . . demonstrates conclusively that § 182 was enacted with the intent of disenfranchising blacks. . . . As such, it violates equal protection. . . .

Richardson v. Ramirez
Supreme Court of the United States
418 U.S. 24 (1974)

Mr. Justice REHNQUIST delivered the opinion of the Court.

The three individual respondents in this case were convicted of felonies and have completed the service of their respective sentences and paroles. They filed a petition for a writ of mandate in the Supreme Court of California to compel California county election officials to register them as voters. They claimed . . . the California Constitution and implementing statutes which disenfranchised persons convicted of an ‘infamous crime’ denied them the right to equal protection of the laws under the Federal Constitution. . . .

All three respondents were refused registration because of their felony convictions. . . . [R]espondents’ claim implicates not merely the language of the Equal Protection Clause of § 1 of the Fourteenth Amendment, but also the provisions of the less familiar § 2 of the Amendment:

Representatives shall be apportioned among the several States according to their respective numbers. . . . But when the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. . . .

[The State] contends that the italicized language of § 2 expressly exempts from the sanction of that section disenfranchisement grounded on prior conviction of a felony. . . . [W]hat legislative history there is indicates that this language was intended by Congress to mean what it says. . . . [A]t the time of the adoption of the Amendment, 29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes.

[We also consider] . . . the congressional treatment of States readmitted to the Union following the Civil War. . . . Congress passed . . . the so-called Reconstruction Act. Section 5 [of that Act] . . . provided:

“That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or

previous condition, who have been resident in said State for one year previous to the day of such election, *except such as may be disenfranchised for participation in the rebellion or for felony at common law*”

We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment’s applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court. . . .

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting. . . .

The Court construes § 2 of the Fourteenth Amendment as an express authorization for the States to disenfranchise former felons. Section 2 does except disenfranchisement for ‘participation in rebellion, or other crime’ from the operation of its penalty provision. As the Court notes, however, there is little independent legislative history as to the crucial words ‘or other crime’. . . .

The historical purpose for § 2 itself is, however, relatively clear and, in my view, dispositive of this case. The Republicans who controlled the 39th Congress were concerned that the additional congressional representation of the Southern States which would result from the abolition of slavery might weaken their own political dominance. There were two alternatives available—either to limit southern representation, which was unacceptable on a long-term basis, or to insure that southern Negroes, sympathetic to the Republican cause, would be enfranchised; but an explicit grant of suffrage to Negroes was thought politically unpalatable at the time. Section 2 of the Fourteenth Amendment was the resultant compromise. It put Southern States to a choice—enfranchise Negro voters or lose congressional representation.

The political motivation behind § 2 was a limited one. It had little to do with the purposes of the rest of the Fourteenth Amendment. . . . It is clear that § 2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment. . . . Although § 2 excepts from its terms denial of the franchise not only to ex-felons but also to persons under 21 years of age, we held that the Congress, under § 5, had the power to implement the Equal Protection Clause by lowering the voting age to 18 in federal elections. . . .

There is no basis for concluding that Congress intended by § 2 to freeze the meaning of other clauses of the Fourteenth Amendment to the conception of voting rights prevalent at the time of the adoption of the Amendment. In fact, one form of disenfranchisement—one-year durational residence requirements—specifically authorized by the Reconstruction Act, . . . has already been declared unconstitutional by this Court in *Dunn v. Blumstein* [1972].

Disenfranchisement for participation in crime, like durational residence requirements, was common at the time of the adoption of the Fourteenth Amendment. But ‘constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber.’ . . . Accordingly, neither the fact that several States had ex-felon disenfranchisement laws at the time of the adoption of the Fourteenth Amendment, nor that such disenfranchisement was specifically excepted from the special remedy of § 2, can serve to insulate such disenfranchisement from equal protection scrutiny. . . .

REFLECTING ON THE LAW OF PUNISHMENT

Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe

James Q. Whitman (2005)*

. . . Contemporary American criminal punishment is more *degrading* than punishment in continental Europe. The susceptibility to degradation lies at the core of what makes American punishment harsh. And our susceptibility to degradation has to do precisely with our lack of an “aristocratic element.” . . .

[C]ontemporary France and Germany are countries . . . with a deep commitment to the proposition that criminal offenders must not be degraded—that they must be accorded *respect* and *dignity*. The differences between continental and American practices can be little short of astonishing. Some of the most provocative examples come from continental prisons. Prison is a relatively rare sanction in continental Europe, by sharp contrast with the United States, and sentences are dramatically shorter. Nevertheless, there are continental prisons, and there are continental prisoners. But those comparatively few continental offenders who do wind up in prison are subjected to a regime markedly less degrading than that that prevails in the United States. Thus continental prisons are characterized by a large variety of practices intended to prevent the symbolic degradation of prison inmates. Prison uniforms have generally been abolished. Rules have been promulgated attempting to guarantee that inmates be addressed respectfully—as “Herr So-and-So” or “Monsieur So-and-So.” Rules have also been promulgated protecting inmate privacy, through such measures as the elimination of barred doors. Most broadly, these measures include what in Germany is called “the principle of approximation” or “the principle

* Excerpted from JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (Oxford University Press 2005).

of normalcy”: the principle that life in prison should approximate life in the outside world as closely as possible.

Like all ideals in the law of punishment, this one is sometimes realized only fitfully: to study norms of dignity in prison is often to study aspirations rather than realities. France in particular lags well behind Germany in implementing these practices, and life in French prisons can be very tough. Nevertheless, the “principle of approximation” does have real meaning, and indeed it has led to some practices that will seem astounding to Americans. German convicts, for example, are supposed to work at jobs that are real jobs, like jobs in the outside world. . . . Convicts are not to be thought of as persons of a different and lower status than everybody else. As we shall see, these same ideas also pervade European political debate over prison policy. . . .

France and Germany are countries in which, two centuries or so ago, there were sharp distinctions between high-status people and low-status people. In particular, there were two classes of punishments: high-status punishments, and low-status punishments. Forms of execution are the most familiar example: nobles were traditionally beheaded; commoners were traditionally hanged. . . . Two and a half centuries ago, high-status continental convicts—who included such famous eighteenth-century prisoners as Voltaire or Mirabeau—could expect certain kinds of privileged treatment. They were permitted a relatively normal and relatively comfortable existence, serving their time in “fortresses” rather than in prisons. Their “cells” were something like furnished apartments, where they received visitors and were supplied with books and writing materials. They were immune from forced labor and physical beatings. . . . Low-status prisoners by contrast were subjected to conditions of effective slavery, often resulting in horrifically high mortality. . . .

[O]ver the course of the last two centuries, in both Germany and France, . . . the *high-status punishments have slowly driven the low-status punishments out*. Gradually, over the last two hundred years, Europeans have come to see historically low-status punishments as unacceptable survivals of the inegalitarian status-order of the past. . . . [W]hat used to be the privilege of relatively respectful imprisonment has slowly been extended to every inmate. . . .

Nothing of the kind has happened in the United States, by contrast; and this reflects the fact that the history of social status in the American world is very different. . . . Where nineteenth-century continental Europeans slowly began to *generalize* high-status treatment, nineteenth-century Americans moved strongly to *abolish* high-status treatment. . . .

The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies

Nicola Lacey (2008)*

. . . I have suggested that there are, or at least have until recently been, key differences in the dynamics of criminal justice—indeed in the very problem posed by ‘law and order’—in political economies organized along systematically varying lines. Co-ordinated systems which favour long-term relationships—through investment in education and training, generous welfare benefits, long-term employment relationships—have been able to resist the powerfully excluding and stigmatising aspects of punishment. By contrast, liberal market systems oriented to flexibility and mobility have turned inexorably to punishment as a means of managing a populations consistently excluded from the post-Fordist economy. As John Sutton put it in his telling analysis of fifteen affluent democracies [in 2004], ‘incarceration rates are higher in countries where capacities for regulating the macroeconomy and containing inequality are weak.’ Sadly, the converse is true of systems with low regulatory capacity. And this has been true, unfortunately, even in the case of left-of-centre, welfare-oriented administrations like the Blair government in Britain. . . .

The ‘culture of control,’ in other words, is a product of the dynamics of liberal market economies. These dynamics have reached their most extreme expression in the neo-liberal post-war order of the USA, but they are also present, in an attenuated form, in Britain, in Australia, in New Zealand. In particular, the electoral arrangements and other features of political organisation in these countries have set up a genuine ‘prisoners’ dilemma,’ in which the strategic capacity for co-ordination necessary to resolve the collective action problem posed by the politicisation of criminal justice is lacking. But the story of the Scandinavian countries, of Japan, and even of many of the corporatist counties of north-western Europe, is a different one. Even in the light of recent increases in punishment in some of these countries, differences between the two main families of systems remain striking.

But does this mean that the world is destined to remain one of persistent ‘contrasts in tolerance,’ with path-dependence and comparative advantage aligning countries on either side of the liberal/co-ordinated market economy distinction for the foreseeable future? Or might external conditions or policy initiatives change the prevailing pattern? . . . In a world of globalisation and migration, will the co-ordinated market economies be able to draw upon their long-standing institutional capabilities to resist the temptation of ‘governing through crime’?

* Excerpted from NICOLA LACEY, *THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* 109-112 (Cambridge University Press 2008).

CONSTITUTIONAL EMERGENCIES

DISCUSSION LEADERS

JOHN FABIAN WITT, AMY KAPCZYNSKI, DOUGLAS KYSAR,
PATRICK WEIL, AND ANDRÁS SAJÓ

III. CONSTITUTIONAL EMERGENCIES

DISCUSSION LEADERS:

JOHN FABIAN WITT, AMY KAPCZYNSKI, DOUGLAS KY SAR,
PATRICK WEIL, AND ANDRÁS SAJÓ

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One consequence of our interconnected planet is a new vulnerability to crisis. In his 1999 book, *Normal Accidents*, Charles Perrow described the failure of complex systems as an inevitable byproduct of their very complexity. So, too, with the inordinately complex systems that link modern social life around the globe. Emergency promises to become the new normal.

To think about emergencies in 2016 is to think of Paris last November. Security crises often loom large. But there are other sources of crisis, too. We know for certain that from time to time an interconnected world will face fast-moving public health crises of the first order. We experience an avian influenza scare in Asia every year or so. The Zika virus is now sweeping through the Americas. Ebola recently dominated the headlines from West Africa to New York City.

Of course public health is only one of many sources of emergencies that make the planet feel small. Global interdependence seems to have produced mounting environmental emergencies and is likely to lead to many more in the decades to come. Economic emergencies have surged to the fore, as well, since we now know about the systemic risks faced by our interconnected financial systems. Financial collapse on Wall Street is intimately linked to prices in Iceland and Greece and beyond. And when policy emergencies arise, states create crises of citizenship, too. Instability in Syria results in denationalization efforts in France. The sense of emergency can also be contagious, spreading beyond its actual bounds. Ebola was a genuine emergency in West Africa and required an urgent global response. But it was also experienced as a *local* emergency in the United States, though the virus cannot spread successfully where rudimentary health infrastructures are in place.

What is the role of the judiciary when such crises strike? In her Newman Lecture at Yale Law School in 2016, Justice Susanne Baer of the German Federal Constitutional Court observed that “many discussions seem to suggest there is an either-or-answer to the problem: either you engage in judicial activism, or you practice restraint.” Under one view, lawyers and judges are hard-pressed to intervene effectively when times get tough. Following the iconoclastic Nazi jurist Carl Schmitt, Eric Posner and Adrian Vermeule insist that in the modern administrative state, it is “practically inevitable” that crisis will push courts to the periphery, leaving the field to the “sweeping power” of the executive.* In one sense, Posner and Vermeule are indisputably correct. Moments of emergency regularly produce calls for the judiciary to step aside and make way for the

* Eric Posner and Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 UNIVERSITY OF CHICAGO LAW REVIEW 1613, 1614 (2009).

executive or for elected representatives. The idea that judges ought to defer to executive officials and their representatives is a familiar one. Judges by their nature are less well equipped to collect the kinds of information critical to sensible policy formulation. They are often removed from democratic legitimacy.

But is judicial deference the only option? Justice Baer's Newman Lecture calls for an "embedded constitutionalism" in times of emergency, one that situates decisionmaking for crises in regional and global context. Justice Stephen Breyer of the United States Supreme Court observes, too, that courts in moments of crisis are institutionally more attentive to the "longer view" and less reactive to the imperatives of the moment.*

The question is especially pointed today because globalization is reorganizing the very institutional arrangements to which judges are thought to have obligations of deference. In Europe, regional crises generate controversy over whether the relevant political unit is the Member State or the European Union. Even if deference is the right model, the proliferation of administrators at the transnational level now requires the judge to decide which officials are the appropriate subjects of deference. Decisions on such questions are reflexive, too. They shape the very institutions to which they are urged to defer. In this sense, there is no position of deference available, only questions of institutional choice. Any argument for an exceptional response must also make a case for the very existence of emergency, a claim that itself requires examination.

The Global Constitutionalism Seminar has engaged the problem of emergency before. We have taken up such topics as detention policy, the laws of armed conflict, and the problem of surveillance. In this Chapter, we explore four kinds of emergencies: the environment, public health, the economy, and citizenship. As the materials demonstrate, these problems are upon us already. Regrettably, we should expect to see more of them in the future. And when we do, what will be the role of the judge?

* STEPHEN BREYER, *THE COURT AND THE WORLD* 61 (Knopf 2015).

THE ENVIRONMENT

Scientists expect the coming century to be one in which environmental emergencies—such as floods, droughts, wildfires, and hurricanes—occur with increasing regularity and severity. According to the Intergovernmental Panel on Climate Change’s most recent scientific assessment, published in 2014, concentrations of greenhouse gases in the earth’s atmosphere are at levels not seen for at least 800,000 years. Indeed, scientists believe the last time greenhouse gas concentrations were this high, the oceans were as much as 100 feet higher and global average surface temperatures as much as 11 degrees Fahrenheit warmer than today.

The impacts of climate change and other anthropocentric alterations of global environmental processes will be widespread, difficult to predict, and frequently devastating. Legal systems must address such challenges both proactively—by attempting to plan for, mitigate, and avoid environmental emergencies—and reactively—by addressing the loss, damage, and recovery needs brought about by environmental emergencies when they do happen. The materials gathered in this section focus on the role of courts in addressing these two tasks, sometimes as a constitutional obligation and in other instances through tort law.

Prods and Pleas: Limited Government in an Era of Unlimited Harm Benjamin Ewing and Douglas A. Kysar (2011)*

Society today faces realistic threats of unlimited harm. This is true in at least two important senses. First, the sources of some injuries are now so numerous and dispersed, or so unpredictable and evasive, as to be unregulable in any traditional fashion. Climate change is the obvious example. As we are repeatedly reminded, domestic efforts to mitigate greenhouse gas emissions will matter naught without a mechanism for limiting the remainder of the globe’s nearly seven billion anthropogenic emitters. Global economic risk is similarly diffuse and wide-reaching. Interlinkages of finance and trade create opportunities for growth and efficiency but also render any individual jurisdiction vulnerable to systemic risks arising from far outside its regulatory purview. The frequency and

* Excerpted from Benjamin Ewing and Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE LAW JOURNAL 350 (2011).

density of international travel and migration create a similar dilemma with respect to infectious diseases and the risk of global pandemics. Threats of terrorism are not pervasive in this sense, but they may still be practically unlimited. Clandestine weapons markets and global communications channels enable the recruiting of anyone anywhere into the cause of destruction. The pipeline of recruitment may be monitored, perhaps even constricted, but it may not be shut off.

Second, the potential impact of harms is frequently both catastrophic and resistant to confident characterization. For instance, climate scientists have identified a variety of scenarios under which global warming and ocean acidification spin wildly out of control, with harmful effects of unprecedented magnitude. Yet, the mechanisms underlying these scenarios are not sufficiently well understood to assign the kind of probabilities that policymaking in the rationalist tradition demands. As a result, the tails of our probability distributions are fat and fuzzy; somewhat paradoxically, more knowledge often only makes them more so. The challenge is similar for other catastrophic threats. Before the events of September 11, 2001, the financial collapse of 2008, and the Deepwater Horizon oil spill disaster of 2010, knowledgeable observers warned that such threats were not only imaginable but likely. Yet, their warnings were not easily assimilated into our safety protocols and risk models. How do we guard against an agent determined to be indeterminable? How do we price a risk to the very mechanism that gives rise to price? How do we prepare for the worst when our history with an activity is limited and deceptively reassuring?

Threats of unlimited harm resist figuration within conventional regulatory frameworks—not least because their drivers and impacts span the globe, fall under multiple agency mandates, and confound conventional risk assessment techniques. Accordingly, many theorists of the administrative state argue that contemporary regulatory tasks require new modes of management, ones built on an understanding of regulation as a continual process of experimentation, monitoring, and adjustment against the prospect of unpleasant surprise. This “new governance” framework treats regulatory targets as embedded within intricate systems that defy precise prediction and control. Rapidly evolving, globally interconnected, and wickedly complex, such systems do not yield to straightforward command-and-control regulation or other familiar lawmaking forms. Instead, “governance” only emerges from the decentralized, overlapping, and continually evolving interventions of public and private actors—each operating at different levels and from different spheres of authority, utilizing a range of policy tools both hard and soft, and representing diverse interests and stakeholder groups. Rather than aggregated into hierarchical state authority, power within these systems is widely distributed and decidedly fractional. Indeed,

even the state itself increasingly appears as a complex tissue of actors and networks, rather than a unified or even neatly stratified sovereign.

Limited government faces grave challenges in this brave new world. . . . Accordingly, many twenty-first-century threats to social welfare appear to demand greater governmental responsiveness and openness to institutional and structural experimentation.

One way in which government actors . . . can promote greater openness and responsiveness is by performing their official roles with a self-conscious appreciation for the ways in which they can signal to other institutional actors that a given problem demands attention and action. Call this function “prods and pleas” and a corollary to the more traditionally emphasized function of checks and balances. . . .

[Such] actions can be understood as efforts to trigger dormant institutional hydraulics that help limited government acknowledge and address areas of social harm and discontent. . . .

[P]rods and pleas are as conservative as they may appear radical, for they serve not to undermine the basic structure and principles of limited government, but rather to protect them against daunting threats to their perpetuation. Put more grandly, liberal anxiety today should focus not just on whether our system of checks and balances can safely constrain collective political action, but also on whether the system can ensure that collective action *does* happen when it is necessary. Prods and pleas are a modest but essential step toward that end. . . .

On June 24, 2015, the District Court of The Hague in the Netherlands issued a historic judgment, excerpted below, concluding that the government’s minimum greenhouse gas emissions-reduction target fell below the duty of care owed to its citizens, pursuant to Article 21 of the Dutch Constitution. The case, brought by the Dutch environmental organization Urgenda Foundation, placed significant emphasis on the growing international consensus concerning the imminent impact of climate change. The court, frequently referencing the UN Climate Change Convention to which the Netherlands is a signatory, and the UN’s Intergovernmental Panel on Climate Change (IPCC), held that such

international sources were to serve as the basis for Dutch and European climate policies.*

Through a series of international scientific consensus reports beginning in 1988, the IPCC established that a temperature rise of more than two degrees Celsius over pre-industrial levels would cause dangerous and irreversible climate change and therefore recommended that industrialized nations pursue an emissions reduction target of twenty-five to forty percent reduction, as compared to 1990 levels, by 2020. The European Council considered that industrialized countries should take the lead in promoting global action and committed to a collective thirty percent reduction target of greenhouse gas emissions by 2020. However, the EU-wide reduction target was lowered to twenty percent for 2020. Meanwhile, the Netherlands, which had similarly pursued a more ambitious thirty percent reduction target from 2007-2009, deviated from its earlier target and adopted a revised goal of only fourteen to seventeen percent reduction, as compared to 1990 levels, by 2020.

While neither the Dutch government nor Urgenda Foundation disputed the need for mitigation measures, the two parties did dispute the reduction targets required for the government to fulfill its duty of care in maintaining the livability of the country. The Urgenda Foundation claimed that, in keeping with international obligations and established scientific findings, the State should be required to reduce its greenhouse gas emissions levels, as compared to 1990 levels, by 40 percent—and at the very least by 25 percent—by 2020. We excerpt below the lower court’s 2015 decision. The Dutch government has appealed, and as of this writing, that appeal has not been decided.

* The Constitution of the Kingdom of the Netherlands provides:

Article 90: “The Government shall promote the development of the international legal order.”

Article 94: “Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.”

**Urgenda Foundation v. The State of the Netherlands
(Ministry of Infrastructure and the Environment)**

District Court of The Hague, The Netherlands
Case No. C/09/456689 (2015) (appeal pending)*

[This judgment was passed by Mr. H.F.M. Hofhuis, Mr. J.W. Bockwinkel and Mr. I. Brand and pronounced in open court on 24 June 2015.] . . .

4.1. This case is essentially about the question whether the State has a legal obligation towards Urgenda to place further limits on greenhouse gas emissions—particularly CO₂ emissions Urgenda argues that the State does not pursue an adequate climate policy and therefore acts contrary to its duty of care towards Urgenda and the parties it represents as well as, more generally speaking, Dutch society. Urgenda also argues that because of the Dutch contribution to the climate policy, the State wrongly exposes the international community to the risk of dangerous climate change, resulting in serious and irreversible damage to human health and the environment. . . .

4.36. Article 21 of the Dutch Constitution** imposes a duty of care on the State relating to the liveability of the country and the protection and improvement of the living environment. . . . The manner in which this task should be carried out is covered by the government’s own discretionary powers. . . .

4.39. . . . Urgenda also brought up the international-law “no harm” principle, which means that no state has the right to use its territory, or have it used, to cause significant damage to other states. The State has not contested the applicability of this principle. . . .

4.42. . . . [T]he State is bound to UN Climate Change Convention, the Kyoto Protocol . . . and the “no harm” principle. However, this international-law binding force only involves obligations towards other states. When the State fails one of its obligations towards one or more other states, it does not imply that the State is acting unlawfully towards Urgenda. . . .

4.43. This does not affect the . . . fact that a state can be supposed to want to meet its international-law obligations. . . . This means that when applying and

* English translation provided by the official website of the Judiciary of the Netherlands, de Rechtspraak. The translation notes that only the Dutch text of the ruling is authoritative.

** Article 21 of the Constitution of the Kingdom of the Netherlands provides: “It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.”

interpreting national-law open standards and concepts . . . the court takes account of such international-law obligations. . . .

4.44. The comments above regarding international-law obligations also apply, in broad outlines, to European law The Netherlands is obliged to adjust its national legislation to the objectives stipulated in the directives, while it is also bound to decrees (in part) directed at the country. . . .

4.53. The question whether the State is in breach of its duty of care for taking insufficient measures to prevent dangerous climate change, is a legal issue which has never before been answered in Dutch proceedings In the first place, it has to be assessed whether there is a[n] unlawful hazardous negligence on the part of the State. Secondly, the State's discretionary power is relevant in assessing the government's actions. . . . However, this discretionary power vested in the State is not unlimited: the State's care may not be below standard. . . .

4.55. . . . [U]nder Article 21 of the Constitution, the State has a wide discretion of power to organise the national climate policy in the manner it deems fit. However, the court is of the opinion that due to the nature of the hazard (a global cause) and the task to be realised accordingly (shared risk management of a global hazard that could result in an impaired living climate in the Netherlands), the objectives and principles, such as those laid down in the UN Climate Change Convention and the [Treaty on the Functioning of the European Union (TFEU)], should also be considered in determining the scope for policymaking and duty of care. . . .

4.65. . . . [I]t is an established fact that the current global emissions and reduction targets of the signatories to the UN Climate Change Convention are insufficient to realise the 2° target and therefore the chances of dangerous climate change should be considered as very high [I]t is also an established fact that without far[-]reaching reduction measures, the global greenhouse gas emissions will have reached a level in several years, around 2030, that realising the 2° target will have become impossible, these mitigation measures should be taken expeditiously. . . . The court also takes account of the fact that the State has known since 1992, and certainly since 2007, about global warming and the associated risks. These factors lead the court to the opinion that, given the high risk of hazardous climate change, the State has a serious duty of care to take measures to prevent it. . . .

4.66. . . . [I]t is an established fact that the State has the power to control the collective Dutch emission level (and that it indeed controls it). . . . Moreover, citizens and businesses are dependent on the availability of non-fossil energy

sources to make the transition to a sustainable society. . . . The State therefore plays a crucial role in the transition to a sustainable society and therefore has to take on a high level of care for establishing an adequate and effective statutory and instrumental framework to reduce the greenhouse gas emissions in the Netherlands. . . .

4.70. . . . [T]he State confirmed that it would be possible for the Netherlands to meet the EU's 30% target for 2020 Based on this, the court concludes that there is no serious obstacle from a cost consideration point of view to adhere to a stricter reduction target. . . .

4.79. . . . It is an established fact that climate change is a global problem and therefore requires global accountability. . . . It compels all countries, including the Netherlands, to implement the reduction measures to the fullest extent as possible. The fact that the amount of the Dutch emissions is small compared to other countries does not affect the obligation to take precautionary measures in view of the State's obligation to exercise care. . . . Moreover, it is beyond dispute that the Dutch per capita emissions are one of the highest in the world. . . .

4.86. . . . Although it has been established that the State in the past committed to a 30% reduction target and it has not been established that this higher reduction target is not feasible, the court sees insufficient grounds to compel the State to adopt a higher level than the minimum level of 25%. According to the scientific standard, a reduction target of this magnitude is the absolute minimum and sufficiently effective

4.93. Based on the foregoing, the court concludes that the State—apart from the defence to be discussed below—has acted negligently and therefore unlawfully towards Urgenda by starting from a reduction target for 2020 of less than 25% compared to the year 1990. . . .

4.95. The court states first and foremost that Dutch law does not have a full separation of state powers, in this case, between the executive and judiciary. . . . This does not mean that the one power in a general sense has primacy over the other power. . . . Separate from any political agenda, the court has to limit itself to *its own* domain, which is the application of law. . . .

4.97. It is worthwhile noting that a judge, although not elected and therefore has no democratic legitimacy, has democratic legitimacy in another—but vital—respect. His authority and ensuing “power” are based on democratically established legislation, whether national or international, which has assigned him the task of settling legal disputes. This task also extends to cases

in which citizens, individually or collectively, have turned against government authorities. The task of providing legal protection from government authorities, such as the State, pre-eminently belong to the domain of a judge. This task is also enshrined in legislation.

4.98. . . . [T]he claim does not fall outside the scope of the court’s domain. The claim essentially concerns legal protection and therefore requires a “judicial review.” . . . The possibility—and in this case even certainty—that the issue is also and mainly the subject of political decision-making is no reason for curbing the judge in his task and authority to settle disputes. Whether or not there is a “political support base” for the outcome is not relevant in the court’s decision-making process. . . .

4.100. . . . The State has put forward that allowing the claim regarding the reduction order would damage the Netherlands’ negotiation position at, for instance, the conference in Paris in late 2015. In the opinion of the court, this does not have independent significance in the sense that—if the court rules that the law obliges the State towards Urgenda to realise a certain target—the government is not free to disregard that obligation in the context of international negotiations. . . .

4.101. . . . [T]he claim discussed here is not intended to order or prohibit the State from taking *certain* legislative measures or adopting a *certain* policy. If the claim is allowed, the State will retain full freedom, which is pre-eminently vested in it, to determine how to comply with the order concerned. . . .

In Pakistan, a country known for disastrous floods that severely impact rural agriculture, a farmer brought a case in the Lahore High Court Green Bench* against the Government of Pakistan and alleged that the government’s inaction and delay in implementing the National Climate Change Policy violated his

* In March 2012, the Supreme Court of Pakistan, with the support of the Asian Development Bank (ADB) and the United Nations Environment Program (UNEP), hosted the South Asia Conference on Environmental Justice, bringing together justices from the highest courts of Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka, Brazil, Malaysia, and Indonesia. The countries unanimously approved the Bhurban Declaration, agreeing to establish “green benches” in their respective courts to address cases concerning environmental issues and to strengthen the knowledge of judges on environmental matters. Pursuant to the declaration, the Supreme Court of Pakistan announced that all high courts and district courts in the country would establish such green benches in order to prioritize environmental cases.

fundamental constitutional rights to life and dignity. The court ordered the government to implement the National Climate Change Policy and instructed responsible government ministries to appoint “focal persons,” or point persons, who would prepare a list of implementing measures by the end of 2015. The court also established a Climate Change Commission to help the court to monitor progress and achieve compliance with such guidelines.

Ashgar Leghari v. Federation of Pakistan
Lahore High Court Green Bench, Pakistan
Case No. 25501 (2015)

[This order was signed by Syed Mansoor Ali Shah, Judge.]

The petitioner has approached this Court as a citizen of Pakistan for the enforcement of his fundamental rights. He submits that [the] overwhelming majority of scientists, experts, and professional scientific organizations . . . agree that evidences are sufficient that climate change is real. . . . Further, most of the experts agree that the major cause is human activities, which include a complex interaction with the natural environment coupled with social and economic changes that are increasing the heat trapping CO₂ and other greenhouse gases (GHG) in the atmosphere, which are increasing global temperature and in turn causing climate change. . . .

3. For Pakistan, climate change is no longer a distant threat The country experienced devastating floods during the last three years. These changes come with far reaching consequences and real economic costs.

4. The petitioner submits that in order to address the threat of climate change the National Climate Change Policy, 2012 (“NCCP”) and the Framework for Implementation of Climate Change Policy (2014-2030) [“Framework”] has been announced by the Ministry of Climate Change, Government of Pakistan, however, no implementation on the ground has taken place. He submits that inaction on the part of Ministry of Climate Change and other Ministries and Departments in not implementing the Framework, offends his fundamental rights in particular Articles 9 and 14 of the Constitution* besides the constitutional principles of social and economic justice. He submits that international

* The Constitution of Pakistan provides:

Article 9: “No person shall be deprived of life or liberty save in accordance with law.”

Article 14: “The dignity of man . . . shall be inviolable.”

environmental principles like the doctrine of public trust, sustainable development, precautionary principle and intergenerational equity form part of the fundamental rights. . . .

8. . . . Notwithstanding the fact that Pakistan’s contribution to global greenhouse gas emissions is very small, its role as a responsible member of the global community in combating climate change has been highlighted by giving due importance to mitigation efforts in sectors such as energy, forestry, transport, industries, urban planning, agriculture and livestock.

9. The Framework . . . has been developed not as an end in itself, but rather a catalyst for mainstreaming climate change concerns into decision making that will create enabling conditions for integrated climate compatible development processes. It is, therefore, not a stand-alone document, but rather an integral and synergistic complement to future planning in the country. The Framework is a “living document.” This is because we are still uncertain about the timing and exact magnitude of many of the likely impacts of climate change. . . . The goal of NCCP is to ensure that climate change is mainstreamed in economically and socially vulnerable sectors of the economy and to steer Pakistan towards climate resilient development. . . .

11. I have heard the representatives of the Ministries and the respective Provincial Departments. It is quite clear to me that no material exercise has been done on the ground to implement the Framework. In order to expedite the matter and to effectively implement the fundamental rights of the people of Punjab, [the] Climate Change Commission (“CCC”) is constituted

[Judge Syed Mansoor Ali Shah then announced a twenty-one member Commission. That group included representatives from the Ministry of Climate Change, Ministry of Water and Power, Ministry of Foreign Affairs, Government of Punjab’s Irrigation and Agricultural Departments to monitor effective implementation of the NCCP and Framework.]



Disaggregating Disasters

Lisa Grow Sun and RonNell Andersen Jones (2013)*

. . . When Hurricane Katrina struck on August 29, 2005, just four short years after the September 11 attacks and two and a half years after the Federal Emergency Management Agency (FEMA) was engulfed in the sprawling national security bureaucracy of the new Department of Homeland Security, war rhetoric quickly emerged as a powerful driver of both public perception of the disaster and official decisionmaking. Indeed, war was one of the most consistently employed narratives of post-Katrina New Orleans. . . .

Early in the coverage of Katrina, reports began “characteriz[ing] the events in New Orleans as the equivalent of war—and, more specifically, the urban insurgency the U.S. military [] face[d] in Iraq [at the time].” . . . In a similar vein, the title of one prominent article in the Washington Post proclaimed: “Troops Back From Iraq Find Another War Zone; In New Orleans, ‘It’s Like Baghdad on a Bad Day.’” . . .

Shortly after Katrina made landfall, FEMA Director Michael Brown advised President George W. Bush to invoke the Insurrection Act, which would allow the president to federalize the National Guard and invest law enforcement authority in both federalized national guard troops and active-duty federal military. . . .

Katrina war rhetoric continued to influence policy debates about appropriate emergency powers for natural disasters long after the floodwaters had subsided This rhetoric culminated in October 2006 in a successful call to amend the Insurrection Act The amendments conferred power on the president to invest federal military with law enforcement powers to respond to “domestic violence” that results from a “natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident.”

Katrina is not the only natural disaster realm in which the rhetoric of war and national security has made significant inroads in shaping the public narrative of disaster. War rhetoric has also been gaining momentum in the planning for public health emergencies such as pandemics. . . . The events of September 11 and the anthrax attacks later that same year accelerated the evolution of a “new paradigm” identifying infectious disease outbreaks not merely as public health challenges, but as critical national security threats. . . .

* Excerpted from Lisa Grow Sun and RonNell Andersen Jones, *Disaggregating Disasters*, 60 UNIVERSITY OF CALIFORNIA, LOS ANGELES LAW REVIEW 884 (2013).

Moreover, war rhetoric has also spread beyond natural disasters to technological disasters and accidents. Indeed, war rhetoric permeated the official response to the BP oil spill. President Obama declared the spill “an assault on our shores,” and pledged to “fight back with everything that we’ve got.” . . .

The legal and rhetorical melding of war and disaster . . . presents real, concrete risks to government openness and press access during disasters, and thus to effective and appropriate disaster planning and response. The rhetoric of war frames public discourse about appropriate disaster management and justifies measures like information withholding that would otherwise clearly appear troubling. The statutory extension of wartime transparency exceptionalism to cover nonthinking-enemy disasters, in turn, provides legal cover for the lack of transparency that the war framing both suggests and legitimizes. . . .

[T]he disaster-as-war paradigm has important real-world consequences that should not be ignored. . . . As with the war on terror, the heavy involvement of the military in much disaster response and the historic pedigree of disasters as potential “states of exception,” outside of the normal legal structure, create a serious risk that policymakers, and even the public, will forget—at least for truly catastrophic disasters—that war is merely metaphorical. . . .

Following the devastation in the United States caused by Hurricane Katrina, property owners in Louisiana filed over 400 cases in federal district court and alleged that the United States Army Corp of Engineers’ negligent construction and maintenance of the Mississippi River–Gulf Outlet (MR–GO, or MRGO) had caused the levee breaches that resulted in massive destruction during and immediately after Hurricane Katrina, thereby violating the Federal Torts Claims Act (FTCA) and Louisiana negligence laws.

Under the FTCA, the U.S. government can be sued in federal court, thereby waiving its sovereign immunity. However, an important exception to the FTCA is the “discretionary function exception,” in which the waiver of immunity does not apply to a claim “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” The challenged conduct must “involve[] an element of judgment or choice” and implicate public policy in order to bar FTCA claims. See *Berkovitz v. United States* (1988).

The MRGO has had a fraught history. In 1956, Congress authorized the construction of the MRGO to provide a shorter route for ships to travel between the Port of New Orleans and the Gulf of Mexico. By 1968, the channel had attained its full dimensions. However, in constructing the channel, engineers had to penetrate layers of “fat clay,” a type of soil that is known to shift if made to bear a load. The channel’s designers decided to forego measures to bolster the sides of the bank, thereby leaving the banks vulnerable to erosion. The MRGO eventually reached a total average width of 1,970 feet, over three times its authorized width. The increased channel size stimulated more forceful wave surges on the levees and ultimately allowed a magnified storm surge to develop during Hurricane Katrina, resulting in the catastrophic levee breaches at issue in the two cases excerpted below.

The cases brought in the aftermath of Hurricane Katrina were later consolidated. With respect to one group of plaintiffs, known as the Robinson plaintiffs, the U.S. District Court determined in 2009 that the Army Corps’ negligent failure to maintain and properly operate the MRGO was a substantial cause of the fatal levee breaches and catastrophic flooding during Hurricane Katrina. The District Court held that those actions were not subject to immunity under the Flood Control Act of 1928, which provides that “[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters in any place.” Further, the court held that the defendants were not immune under the “discretionary function” exception of the FTCA.

While the United States Court of Appeals for the Fifth Circuit originally affirmed the lower court’s judgment on March 2, 2012, the court agreed at the Government’s request to rehear the case. On September 24, 2012, the three-judge panel reversed its prior ruling that the Army Corps was not immune under the discretionary function exception of the FTCA and thereby insulated the Government and the Army Corps from liability. The property owners’ petition for writ of certiorari was denied by the U.S. Supreme Court.

The district judge used his last opinion of the Katrina floodwall breach cases, excerpted below, as an opportunity to express his concerns over a legal system that allows troubling and well-documented government action—or, rather, inaction—to go unchecked. Two Katrina-related opinions from the U.S. Court of Federal Claims are also excerpted below.

In re Katrina Canal Breaches Consolidated Litigation
United States District Court for the Eastern District of Louisiana
2013 WL 1562765 (E.D. La. 2013)

STANWOOD R. DUVAL, JR., District Judge.

The last of the Katrina floodwall breach cases came to trial in this Court on September 12, 2012, and continued through September 28, 2012. . . . [Local residents] allege that the negligent remediation of the East Bank Industrial Area (“EBIA”) performed by United States and the Washington Group International, Inc. (“WGI”)* resulted in the North and South Breaches of the EBIA floodwall. That floodwall ran along the east bank of the Inner Harbor Navigational Canal (“IHNC”) providing protection to the Lower Ninth Ward and parts of Chalmette. On the morning of August 29, 2005, when Hurricane Katrina (“Katrina”) came on shore, these breaches resulted in the inundation and destruction of the Lower Ninth Ward and parts of Chalmette. Plaintiffs were all victims of this flooding. . . .

Plaintiffs contend that by virtue of the defendants’ failure to conduct a full and competent geotechnical site assessment, failure to evaluate fully the impact of their activities on the floodwall and failing to employ prudent engineering practices, WGI and the Corps breached their respective duties to maintain and protect the integrity of the levee and floodwall system along the EBIA. . . .

In response to Plaintiffs’ allegations, WGI maintains that it owed no duty to the Plaintiffs with respect to the harm they suffered as a result of Katrina because the risks were unknown and attenuated. . . . Moreover, WGI contends that it is entitled to certain legal immunities. . . .

The United States argues that Plaintiffs’ claims are barred by the Flood Control Act of 1928** . . . because Plaintiffs’ flood damages were caused by alleged negligence primarily or substantially related to a flood control activity with respect to the activities undertaken with respect to the lock replacement and the EBIA remediation. In addition, the United States maintains immunity under [the Act] because the damages were caused by deficiencies in the original design and construction of the EBIA floodwall. Moreover, the United States maintains that Plaintiffs failed to prove the WGI’s activities were a cause in fact of the

* Washington Group International, Inc., a U.S. engineering and construction company, served as an Army Corps of Engineers contractor.

** The Flood Control Act of 1928 provides: “No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place”

EBIA floodwall failures or that the Corps was negligent in approving WGI's work. . . .

Plaintiffs have not proven that it is more probable than not that the United States' and WGI's remediation, excavations and backfill methods created a "hydrologically charged" condition such that uplift pressures were transmitted through clay soil without any appreciable flow of water to destabilize the floodwall causing its demise. . . .

The Court cannot and will not find as a certainty what exactly caused these breaches. . . . [Nevertheless, it] is noteworthy that the United States opines in its Post Trial Brief that the structural defect in the design and construction . . . was identified by their experts . . . as undesirable and resulted in placing "far greater stresses on the older, shorter sheet pile than were accounted for in the original design.["] . . . [I]t is likewise noteworthy that there was no erosion protection on the land of the floodwall, . . . which would encourage the floodwall's failure. In short, it appears that this floodwall . . . was a disaster waiting to happen. . . .

Since this opinion will likely be the last significant one issued by the Court regarding Hurricane Katrina, I will engage in a bit of judicial license.

I have been the judge presiding over this hydra-like "Katrina Umbrella" litigation for almost eight years. There are presently more than 21,166 entries in the consolidated docket, which for pretrial purposes combined nine categories that have comprised the *In re Katrina Canal Breaches Consolidated Litigation*. There have been many issues which have been vexing and unique. . . .

One central theme has been painfully obvious throughout this entire process; many of the levees protecting New Orleans and the surrounding area were tragically flawed. . . . However, lamentably, there has been no judicial relief for the hundreds of thousands of people and tens of thousands of businesses impacted by these defalcations. The Flood Control Act of 1928 as interpreted over the years gives the United States Army Corps of Engineers virtually absolute immunity, no matter how negligent it might have been in designing and overseeing the construction of the levees. . . .

In the trial of that case, it was proven [beyond] cavil that the Corps was aware that the drastic widening of the MRGO, due to the Corps' failure to maintain it, endangered the levees protecting St. Bernard Parish and the Lower Ninth Ward. Indeed, one memorandum from an agency of the Army Corps of Engineers stated that the resulting losses in the event of a major hurricane could be catastrophic. Therefore, this very real possibility was known by the Corps for

almost 20 years prior to Katrina and the Corps did nothing to rectify the problem, nor did the Corps issue any specific warning to Congress or the public. Notably, the United States did not appeal this Court's findings of fact of its negligent actions in that case.

A representative of the Corps admitted in trial that it was not "policy" for the Corps to blithely stand by and take no action in the face of such danger to human life and property. However, a higher Court in reversing itself and this Court found that the Corps was immune because such decisions were "susceptible to policy considerations" applying the Discretionary Function Exception to the Federal Torts Claim Act.

In the instant case, this Court has found the actions of the Corps in supervising the remediation project executed by WGI along the EBIA did not substantially cause the North and South breaches. . . . Of course, if the levee was designed improperly the Corps is absolutely immune.

I feel obligated to note that the bureaucratic behemoth that is the Army Corps of Engineers is virtually unaccountable to the citizens it protects despite the Federal Tort Claims Act. The public fisc will very possibly be more jeopardized by a lack of accountability than a rare judgment granting relief. The untold billions of dollars of damage incurred by the Greater New Orleans area as a result of the . . . levee failures during Katrina speak eloquently to that point.

I take note that the Corps of Engineers has many excellent and dedicated engineers, supervisors, and staff. I also note that if individuals, corporations, and bureaucracies are never brought to task for substantial negligence, each will be much less assiduous in discharging their respective duties.

Accordingly, and based on the foregoing Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of United States and the Washington Group International, Inc. and against [Plaintiffs], with each party to bear its/his/her own costs.

[An appeal of this case to the U.S. Court of Appeals for the Fifth Circuit was dismissed in June 2013.]

In the case that follows, the Government of Saint Bernard Parish and other residential and business landowners alleged that the MRGO funnelled flood waters into Saint Bernard Parish and the Lower Ninth Ward and thereby gravely compounded the damage wrought by Hurricane Katrina and its aftermath. Relying on the U.S. Supreme Court’s decision in *Arkansas Game and Fish Commission v. United States* (2012), the U.S. Court of Federal Claims found that a temporary taking of property had occurred in violation of the Fifth Amendment and entitled the plaintiffs to just compensation for the loss of value of their property. The court dismissed the U.S. Government’s argument that the hurricane was “an intervening and unpredictable natural force” that broke the causal link between the MRGO and the damage; rather, the court concluded that the evidence and expert opinions demonstrated that the levee breaks and other MRGO-induced flooding were foreseeable and imminent.

St. Bernard Parish Government v. United States

United States Court of Federal Claims

121 Fed. Cl. 687 (May 1, 2015)

MEMORANDUM OPINION AND ORDER ON LIABILITY
REGARDING A TEMPORARY TAKING BY FLOODING

BRADEN, Judge. . . .

Since the Federal Tort Claims Act and Louisiana negligence claims in the United States District Court’s case are now final, the court’s disposition of the substantive merits of Plaintiffs’ Takings Clause claim alleged in this case is now ripe for adjudication. . . .

A 2006 Senate Report on Hurricane Katrina concluded, as for the areas within the federal levee system, that the MRGO:

contributed to a potential “funnel” for storm surges emerging from Lake Borgne and the Gulf into the New Orleans area Prior to Hurricane Katrina, many warned that the potential funnel would accelerate and intensify storm surges emerging from Lake Borgne and the Gulf into the downtown New Orleans area. The funnel had been described as a “superhighway” for storm surges

On July 6, 2011, Plaintiffs filed a Third Amended Complaint that also pled a Fifth Amendment Takings Clause claim. . . . The Takings Clause of the Fifth Amendment to the United States Constitution provides that “private property [shall not] be taken for public use, without just compensation.” . . . To maintain

an action for a compensable taking under the Fifth Amendment, Plaintiffs must show that they have a protectable property interest under state law. . . . Plaintiffs' properties consisted of vacant land, modest personal residences, and small businesses. In a temporary takings case concerning flooding, a property owner's "reasonable investment-backed expectations" necessarily must consider knowledge of any prior flooding. . . .

[A]lthough Plaintiffs' properties were in a floodplain and "had experienced flooding in the past," that flooding was not "comparable" to the flooding during Hurricane Katrina and subsequent hurricanes and severe storms giving rise to the temporary takings claim at issue.

For these reasons, the court has determined that Plaintiffs established that they had "reasonable investment-backed expectations" concerning the use and value of their vacant land, modest personal residences, and small businesses. . . .

In *Arkansas Game and Fish*, the U.S. Supreme Court held that "relevant to the taking inquiry is the degree to which the [government's] invasion is intended *or* the foreseeable result of government action." . . . Army Corps documents evidence that, as early as 1959, it was aware that foreshore protection was required to prevent erosion of the MR-GO's banks, but instead the Army Corps recommended expanding the MR-GO without channel protection to prevent the erosion [T]he Government argues that Plaintiffs have not met their evidentiary burden, because "an intervening and unpredictable natural force—like a hurricane or tropical storm"—precludes the court from finding that the flooding was "the direct, natural and probable result" of the MR-GO. Therefore, the Government posits that "[t]he question is not whether the United States could have foreseen a potential set of circumstances in which indirect effects of the MRGO might exacerbate storm surge in the region." Hurricane Katrina was an "intervening, and unpredictable natural force" that broke the chain of causation. . . .

The Government correctly states that increased risk or knowledge of a risk does not establish a direct, natural, or probable result. . . .

Plaintiffs do not contend that the Army Corps built the MR-GO with the intention to invade Plaintiffs' properties by flooding. But, by December 2001, the Army Corps considered a total closure of the MR-GO, because of the environmental conditions it created. Other Army Corps documents evidence that, in November 2004 and in 2005—prior to Hurricane Katrina—the conditions created by the MR-GO had escalated into a dangerous situation because increased storm surge during any hurricane or tropical storm was predicted to breach the

navigational channel into Lake Borgne, causing flooding. Therefore, by 2004–2005 at the latest—and prior to Hurricane Katrina—it can be fairly said that the risk of injury by flooding was imminent.

As the record reflects, the flooding of Plaintiffs’ properties was the “direct, natural, or probable result” of the Army Corps’ authorized construction, expansions, operation, and failure to maintain the MR–GO and not “incidental or consequential” injury. In other words, the substantially increased storm surge-induced flooding of Plaintiffs’ properties that occurred during Hurricane Katrina and subsequent hurricanes and severe storms was the direct result of the Army Corps’ cumulative actions, omissions, and policies regarding the MR–GO For these reasons, the court has determined that Hurricane Katrina was not an intervening event that broke the chain of events of causation. . . .

[T]he court has determined that Plaintiffs established that the Army Corps’ construction, expansions, operation, and failure to maintain the MR–GO caused subsequent storm surge that was exacerbated by a “funnel effect” during Hurricane Katrina and subsequent hurricanes and severe storms, causing flooding on Plaintiffs’ properties that effected a temporary taking under the Fifth Amendment to the United States Constitution. . . .

The court convened a settlement conference in May 2015, but the parties agreed to ask the court to enter a final partial judgment concerning the just compensation owed to the owners of eleven properties—six private and five government—selected by the plaintiffs and by the U.S. Government.

In the ruling excerpted below, Judge Braden found that the Army Corps of Engineers owed \$3.16 million plus interest to the six private landowners; \$893,363 to St. Bernard Parish for the temporary lost value of three governmental properties and \$2.56 million to the City of New Orleans in lost property tax revenue. Judge Braden certified a class action for the purposes of liability such that potential damage awards could extend to thousands of residents, businesses, and local governmental properties in St. Bernard Parish and the Lower Ninth Ward of New Orleans. If upheld on appeal, for which the Department of Justice has filed as of this writing, the Army Corps may be liable for billions of dollars in damages for the temporary taking of property under the Fifth Amendment.

St. Bernard Parish Government v. United States
United States Court of Federal Claims
2016 WL 2641792 (May 4, 2016) (appeal pending)

... BRADEN, Judge. ...

[I]t is important for the public, property owners that are representative Plaintiffs in this case, and members of the certified class action ordered herein to understand why, since this case was filed in 2005, that it has taken over a decade to reach this juncture.

First, the United States Supreme Court requires federal courts *not* to adjudicate constitutional questions, *if* a case can be resolved by a statute or other grounds. Since over 400 other lawsuits first were filed in the United States District Court in the Eastern District of Louisiana alleging that the Government was liable under the Federal Tort Claims Act and Louisiana state law, those cases had to be finally resolved. While the federal court proceedings in Louisiana were underway, however, this court adjudicated motions to dismiss filed by the Government in 2007 and 2008 and convened a trial on liability in New Orleans in December 2011

Second, on December 4, 2012, an unanimous United States Supreme Court, issued a landmark opinion in *Arkansas Game and Fish Comm'n v. United States* . . . holding “that governmental-induced flooding temporary in duration gains no automatic exemption from Takings Clause [of the Fifth Amendment to the United States Constitution].”). The significance of that opinion on this case cannot be overstated and initiated a new round of briefs. . . .

Third, on May 1, 2015, the court issued a Memorandum Opinion And Order determining that the Army Corps’ construction, expansions, operation, and failure to maintain the MR–GO caused increased storm surge flooding on private property during Hurricane Katrina and subsequent severe storms, effecting a temporary taking under the Fifth Amendment to the United States Constitution. The court’s subsequent request that the Government mediate the amount of Just Compensation due was rejected. . . .

Today, the court has entered a Partial Final Judgment on Just Compensation due only owners of certain “test” Trial Properties, so the United States Court of Appeals for the Federal Circuit may review the court’s decisions in this case. That review likely will take at least another year. While the appellate process is underway, the court will be issuing a series of Orders to the St. Bernard Parish Government and the City of New Orleans (Lower Ninth Ward) in the near future to obtain public information necessary to finalize the amount of Just

Compensation due, so that the court will be in a position to proceed promptly to issue a final money judgment as to all class members, if the appellate court affirms this court's decisions.

PUBLIC HEALTH

The 2014-2015 Ebola epidemic raised pressing questions about the limits of state power in safeguarding public health. The 2003 severe acute respiratory syndrome (SARS) epidemic in China and Canada, the 2015 Middle East respiratory syndrome coronavirus (MERS) outbreak in South Korea, and the sustained and global transmission of tuberculosis and of human immunodeficiency virus (HIV) each witnessed states invoking powers of isolation and quarantine to control the movement of those thought to carry or be at risk of an infectious disease. As such efforts reflect, governments possess extraordinary powers to detain people and goods where grave collective risks to the public's health are feared—powers that have historically not been subject to substantial judicial oversight. But today there is an appreciation among public health experts of the limits and repercussions of these traditional state powers. A traditional zero-sum paradigm casts individual liberties in fatal tension with the collective good during public health emergencies. A new view asserts that that respecting human rights at such moments may be crucial to the success of measures to protect public health.

In evaluating coercive public health measures like quarantine and isolation, three key questions emerge. First, what role should courts play in ensuring that public health restrictions in perceived emergencies respect the rights and basic needs of those upon whom they are placed? Second, how should courts address challenges of proof in complex scientific contexts where the science itself may be evolving? And third, might protections for individual rights be synergistic with the goal of protecting collective public health?

* * *

International Health Regulations
World Health Organization
Second Edition (2005)

A central and historic responsibility for the World Health Organization (WHO) has been the management of the global regime for the control of the international spread of disease. . . . The International Health Regulations [IHR] were adopted by the Health Assembly in 1969, having been preceded by the International Sanitary Regulations adopted by the Fourth World Health Assembly in 1951. . . . The purpose and scope of the IHR (2005) are to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade. . . .

[The WHO's 1969 IHR's efforts "to cover all events potentially constituting a public health emergency of international concern" focused on identifying and controlling six "quarantinable diseases." By 1981, revisions in the IHR reduced that number to three: yellow fever, plague and cholera. However, in the wake of SARS, concerns about the range of potential public health threats led the WHO to drop these disease-specific requirements and instead require countries to consider all public health threats regardless of their source. The current regulations focus on ensuring reporting among states so that public health responses within and across borders can be mounted. One response contemplated is quarantine, defined as "the restriction of activities and/or separation from others of suspect persons who are not ill or of suspect baggage, containers, conveyances or goods in such a manner as to prevent the possible spread of infection or contamination." WHO itself has the authority to recommend "quarantine or other health measures for suspect persons," as well as "isolation and treatment where necessary."]

SARS is a respiratory illness that usually begins with a fever and flu-like symptoms, including headache, body aches, and a cough, that frequently develop into pneumonia. The illness is transmitted by direct physical contact or close conversation (within three feet) through respiratory droplets produced when an infected person coughs or sneezes. SARS was first reported in Asia in 2003, after which it quickly spread to over two dozen countries in North America, South America, Europe, and Asia, although most cases were concentrated in China and

Canada. The WHO reports that more than 8,098 people contracted SARS and 774 died in the 2003 outbreak.

The Statue of Security: Human Rights and Post-9/11 Epidemics
George J. Annas (2005)*

. . . The SARS epidemic . . . appeared in a society equipped with instant global communication that made management of people through information much more important than management of people through police actions. . . .

[S]ince the epidemic has ended in all thirty countries in which suspected SARS cases were reported, and only a few countries used quarantine (detained individuals who showed no symptoms), it seems reasonable to conclude that quarantining “contacts” or even “close contacts” was unnecessarily harmful to those affected. It is not only liberty that is at stake in deciding to quarantine, but the effectiveness of public health itself This is because to be effective in preventing disease spread from either a new epidemic or a bioterrorist attack, public health officials must also prevent the spread of fear and panic. Maintenance of public trust is essential to achieve this goal.

. . . China reacted vigorously, even harshly, especially in Beijing and Hong Kong. Mass quarantines were initiated involving two universities, four hospitals, seven construction sites, and other facilities, like apartment complexes. Sixty percent of the approximately 30,000 people quarantined in mainland China were detained at centralized facilities; the remainder were permitted to stay at home. Those quarantined were “close contacts,” defined as someone who has shared meals, utensils, place of residence, a hospital room, or a transportation vehicle with a probable SARS patient, or visited a SARS patient or been in contact with the secretions of a SARS patient within fourteen days before the SARS patient developed symptoms.

Based on the evidence available, it seems reasonable to conclude that these mass quarantines in China had little or no effect on the epidemic. Moreover, the imposition of quarantine led to panic that could have spread the disease if identification of contacts was necessary to contain SARS. When a rumor spread that Beijing itself might be placed under martial law, *China News Service* reported that 245,000 migrant workers from impoverished Henan province fled the city to return home. . . .

* Excerpted from George J. Annas, *The Statue of Security: Human Rights and Post-9/11 Epidemics*, 38 JOURNAL OF HEALTH LAW 319 (2005).

Canada had the only major outbreak of SARS outside of Asia, and it was limited to the Toronto area. Canada had about 440 probable or suspect SARS cases, resulting in 40 deaths, but many more lives were directly affected. Approximately 30,000 people were quarantined,* although unlike China, almost all Canadians who were quarantined were confined to their own homes. . . .

Canadian officials were generally levelheaded in their advice to the public but seem to have overreacted on two occasions. In mid-April, 2003, before Easter, Ontario health officials published full-page newspaper ads asking anyone who had even one symptom of SARS (severe headache, severe fatigue, muscle aches and pains, fever of 38° Celsius or higher, dry cough, or shortness of breath) to stay home for a few days. Ontario's health minister said, "This is a time when the needs of a community outweigh those of a single person." Again, in June, during the second wave of infections in Ontario, the health minister, responding to reports that some people were not completing their ten-day home quarantines, said, "I don't know how people will like this, but we can chain them to a bed if that's what it takes." While the request may have arguably been reasonable, the threat was not. . . .

As a general rule, sick people seek treatment and accept isolation to obtain it; people do not want to infect others, especially their family members, and will voluntarily follow reasonable public health advice to avoid spreading disease. SARS, like the threat of a bird flu pandemic, emphasizes that effective public health today must rely on actions taken at the national and international level and that public health should be seen primarily as a global issue. . . .

Of course, SARS is not HIV/AIDS, which is not smallpox, which is not plague, or tuberculosis, or bioterrorism. Each infectious disease is different, and epidemiology provides the key to any effective public health and medical response to a new disease. The rapid exchange of information, made possible by the Internet and an interconnected group of laboratories around the world . . . were critical to combating fear with knowledge. . . . People around the world, provided with truthful, reasonable information by public health officials, who are interested in both their health and human rights, will follow their advice. . . .

Quarantining contacts, where it was attempted, seems to have been both ineffective (in that many, if not most, contacts eluded quarantine) and useless (in that almost none of those quarantined developed SARS). Mass quarantine is a

* The majority of these 30,000 individuals voluntarily submitted to quarantine. In only 27 cases, officials issued a written order of quarantine pursuant to Ontario's Health Protection and Promotion Act, and the sole appeal of such an order was withdrawn after public health officials explained to the applicant why the order was served.

relic of the past that seems to have outlived its usefulness. Attempts at mass quarantine, as evidenced by the experience in China, are now likely to create more harm than they prevent by imposing unnecessary liberty restrictions on those quarantined and by encouraging potentially infected people to flee from public health officials. . . .

On March 23, 2014, the WHO announced an outbreak of Ebola virus disease in Guinea. The outbreak, particularly devastating in Guinea, Sierra Leone, and Liberia, grew to be the largest Ebola epidemic in history: all told, the WHO estimates a total of over 28,000 cases and over 11,000 deaths. In October 2014, after the death of Thomas Eric Duncan—the first person to be diagnosed with Ebola in the United States—and in the midst of an election season, state governors began enacting stringent movement restriction policies for travelers returning from West Africa.

Despite the criticisms of prominent Ebola scientists and leading infectious disease societies, states enacted measures far in excess of what the United States Centers for Disease Control and Prevention (CDC) recommended. These experts affirmed that there was no scientific basis for quarantine because Ebola cannot be transmitted before a person is symptomatic. Even in the early symptomatic phases, it is hard to transmit Ebola because the body's viral load is still low and transmission requires contact with bodily fluids. They also warned that quarantines or travel bans (which were urged by some politicians) would in fact *increase* the risk of global transmission, because they would interfere with the response to the disease at its epicenter.

As a result of state quarantines, an unknown number of travelers arriving in the United States from West Africa were forcibly confined to their homes for three weeks.* In Liberia, a mass quarantine of the West Point area of Monrovia—encompassing over 80,000 residents—led to large protests and civilian casualties when the military fired upon the crowd. In Freetown, Sierra Leone, family

* It is estimated that 18 states within the United States implemented at least 40 formal quarantines and 233 *de facto* quarantines, in which the state did not issue a formal order but individuals were nevertheless pressured into “voluntary” quarantines or other severe movement restrictions. However, because many states do not require court involvement in issuing quarantine orders, there is no public record of the total number of quarantines or the states’ justifications for quarantining. See AMERICAN CIVIL LIBERTIES UNION AND YALE GLOBAL HEALTH JUSTICE PARTNERSHIP, FEAR, POLITICS, AND EBOLA: HOW QUARANTINES HURT THE FIGHT AGAINST EBOLA AND VIOLATE THE CONSTITUTION 28-29 (2015), available at https://www.aclu.org/sites/default/files/field_document/aclu-ebolareport.pdf.

members broke patients out of hospitals that lacked sufficient food, water, and basic medical supplies. Outside of West Africa, Spain quarantined at least 16 individuals after a nurse returning from Sierra Leone tested positive for Ebola.

Upon returning from a month volunteering in an Ebola clinic in Sierra Leone, healthcare worker Kaci Hickox was quarantined in a tent at Newark Liberty International Airport in New Jersey under the authority of that state's governor, Chris Christie. After spending three days in quarantine in Newark, Hickox was transferred to her home state of Maine. On October 30, Maine Health Commissioner Mary Mayhew sought a court order to quarantine Hickox within her home for the remainder of the 21-day Ebola incubation period despite her lack of symptoms and her willingness to monitor herself for symptoms. After reviewing the scientific evidence and arguments of counsel, a state trial-level judge issued a temporary order on October 30 restricting Hickox's movements. However, he lifted the majority of those restrictions a day later in an order excerpted below.

Mayhew v. Hickox
Maine District Court, Fort Kent
No. CV-2014-36 (October 31, 2014)

[Order Pending Hearing by Chief Judge Charles C. LaVerdiere.] . . .

The State has requested that the court issue an order restricting Respondent's activities pending the final hearing on its Verified Petition for a Public Health Order. This decision has critical implications for Respondent's freedom, as guaranteed by the U.S. and Maine Constitutions, as well as the public's right to be protected from the potential severe harm posed by transmission of this devastating disease. . . .

Maine Law authorizes a court to "make such orders as it deems *necessary to protect other individuals from the dangers of infection*" pending a hearing on a petition for a public health order. . . . In her affidavit, Dr. Pinette [Director of the Maine Center for Disease Control and Prevention (MeCDC)] averred, inter alia:

8. Ebola Virus Disease is spread through direct contact with the blood, sweat, vomit, feces and other body fluids *of a symptomatic person*. . . .

14. *Individuals infected with Ebola Virus Disease who are not showing symptoms are not yet infectious*. Early symptoms of Ebola are non-specific and common to many other illnesses.

15. Symptoms usually include: fever, headache, joint and muscle aches, weakness, diarrhea, vomiting, stomach pain, and lack of appetite. *Ebola may be present in an individual who does not exhibit any of these symptoms, because they are not yet infectious. . . .*

17. The Respondent remains at risk of being infected with Ebola, until the 21-day time period has [p]assed. . . .

27. Respondent is asymptomatic Therefore the guidance issued by the US CDC states that she is subject to Direct Active Monitoring. . . .

28. Direct active monitoring means the MeCDC provides direct observation at least once per day to review symptoms and monitor temperature with a second follow-up daily by phone. The purpose of direct active monitoring is to ensure that if individuals with epidemiologic risk factors become ill, they are identified as soon as possible after symptoms onset so they can be rapidly isolated and evaluated. . . .

Based on the information in this affidavit with attachments and arguments of counsel, the Court finds by clear and convincing evidence that an order is necessary. With regard to the contents of the order, the court finds that ordering Respondent to comply with Direct Active Monitoring and to engage in the steps outlined below is “necessary to protect other individuals from the dangers of infection.” The Court is aware that Respondent has been cooperating with Direct Active Monitoring and intends to continue with her cooperation. . . .

The State has not met its burden at this time to prove by clear and convincing evidence* that limiting Respondent’s movements to the degree requested is “necessary to protect other individuals from the dangers of infection,” however. According to the information presented to the court, Respondent currently does not show any symptoms of Ebola and is therefore *not* infectious. Should these circumstances change at any time before the hearing on the petition—a situation that will most quickly come to light if Direct Active Monitoring is maintained—then it will become necessary to isolate Respondent from others to prevent the potential spread of this devastating disease. . . .

* Maine law requires that the state show “by clear and convincing evidence” that temporary, immediate custody of an individual is necessary to “avoid a clear and immediate public health threat.” MAINE REVISED STATUTES, Title 22, § 810 (1989).

The Court pauses to make a few critical observations. First, we would not be here today unless Respondent generously, kindly and with compassion lent her skills to aid, comfort, and care for individuals stricken with a terrible disease. We need to remember as we go through this matter that we owe her and all professionals who give of themselves in this way a debt of gratitude.

Having said that, Respondent should understand that the court is fully aware of the misconceptions, misinformation, bad science and bad information being spread from shore to shore in our country with respect to Ebola. The Court is fully aware that people are acting out of fear and that this fear is not entirely rational. However, whether that fear is rational or not, it is present and it is real. Respondent's actions at this point, as a health care professional, need to demonstrate her full understanding of human nature and the real fear that exists. She should guide herself accordingly. . . .

* * *

A final hearing was not held, as Hickox and the State agreed to keep in place the active-monitoring measures set out in Chief Judge LaVerdiere's order for the remainder of the 21-day Ebola incubation period.

In 1966, the United Nations General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR), a seminal human rights treaty that protects core civil and political rights, including the right to life; right to be free from torture or cruel, inhuman, or degrading treatment; freedom of thought and religion; freedom of association; and the right to vote. The ICCPR contains a number of limitation and derogation clauses that list circumstances under which the enunciated rights may be suspended. Article 12, for example, sets out the "right to liberty of movement" and states that it "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

In an effort to clarify the legitimate grounds relying on the provisions, a group of human rights experts met in Siracusa, Sicily in 1984 and produced the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, adopted by the United Nations Economic and Social Council and excerpted below. These principles are

routinely invoked in considering when public health emergencies can justify restrictions on liberties and what standards the state must meet in enacting such restrictions.

**The Siracusa Principles on the
Limitation and Derogation Provisions
in the International Covenant on Civil and Political Rights**
United Nations Commission on Human Rights
E/CN.4/1985/4, Annex (September 28, 1984)

. . . 5. All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant. . . .

7. No limitation shall be applied in an arbitrary manner.

8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application. . . .

10. Whenever a limitation is required in the terms of the Covenant to be “necessary,” this term implies that the limitation:

- (a) Is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
- (b) Responds to a pressing public or social need,
- (c) Pursues a legitimate aim, and
- (d) Is proportionate to that aim. . . .

11. In applying a limitation, a State shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

12. The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the State. . . .

25. Public health may be invoked as a ground for limiting certain rights in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

26. Due regard shall be had to the International Health Regulations of the World Health Organization. . . .

58. No State party shall, even in times of emergency threatening the life of the nation, derogate from the Covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent

HIV attacks the immune system, making it difficult for the body to fight off infections and other diseases. At later stages, HIV infection can lead to acquired immune deficiency syndrome (AIDS). However, it can only be spread through certain bodily fluids—including blood and semen—that come into direct contact with a mucous membrane or the bloodstream, most commonly through sex or shared needles and syringes. After the beginning of the HIV epidemic in 1981, it was not until 1987 that the first treatment for HIV was available. HIV is now well-controlled with antiretroviral therapy medicines, which slow the progression of HIV and dramatically reduce the likelihood of transmitting it.

Enhorn v. Sweden

European Court of Human Rights (Second Section)
ECHR 2005-I 97

. . . The European Court of Human Rights (Second Section), sitting as a chamber composed of: Mr J.-P. Costa, *President*, Mr A.B. Baka, Mr I. Cabral Barreto, Mr R. Türmen, Mr M. Ugrekhelidze, Mrs E. Fura-Sandström, and Mrs D. Jočienė, *judges*, and Mrs S. Dollé, *Section registrar*

8. The applicant was born in 1947 and is homosexual. In 1994 it was discovered that he was infected with the HIV virus and that he had transmitted the virus to a 19-year-old man with whom he had first had sexual contact in 1990.

9. . . . [O]n 1 September 1994 a county medical officer . . . issued the following instructions to the applicant pursuant to the 1988 Infectious Diseases Act

[The applicant] is not allowed to have sexual intercourse without first informing his partner about his HIV infection. He is required to use a condom. He is to abstain from consuming

such an amount of alcohol that his judgment would thereby be impaired and others put at risk of being infected with HIV. If the applicant is to have a physical examination, an operation, a vaccination or a blood test or is bleeding for any reason, he must tell the relevant medical staff about his infection. . . . Finally, he is to visit his consulting physician again and to keep appointments fixed by the county medical officer.

10. The applicant kept three appointments with the county medical officer in September 1994 and one in November 1994. He also received two home visits by the county medical officer. He failed to appear as summoned five times during October and November 1994. . . .

[After Enhorn's failure to comply with the obligation to visit with the medical officer, the county medical officer petitioned the County Administrative Court for a court order that Enhorn be kept in compulsory isolation in a hospital for three months. The order was granted in 1995 and renewed in six-month increments through 2001. During this period, Enhorn absconded several times for extended periods, at one point for over two years.]

27. . . . [Sweden's] 1988 Infectious Diseases Act ("the 1988 Act") divides infectious diseases into diseases dangerous to society and other infectious diseases. One of the diseases described as dangerous to society is the infection by the human immunodeficiency virus (HIV). The relevant provisions of the 1988 Act read as follows:

Section 16. The consulting physician shall issue to a person being examined for a disease dangerous to society any practical instructions needed to prevent the spread of the infection. . . .

Section 25. A consulting physician having reason to believe that a patient infected or suspected of being infected with a disease dangerous to society will not comply, or is not complying with the practical instructions issued, must promptly notify the county medical officer. . . .

Section 28. . . . Before resorting to any coercive measure, the county medical officer must try to obtain voluntary compliance if this can be done without the risk of the infection being spread. . . .

Section 38. The County Administrative Court, on being petitioned by the county medical officer, shall make an order

for the compulsory isolation of a person infected with a disease dangerous to society if that person does not voluntarily comply with the measures needed in order to prevent the infection from spreading. . . .

Section 40. Compulsory isolation may continue for up to three months from the day on which the infected person was admitted to hospital under the isolation order. . . .

29. Numerous charters and declarations which specifically or generally recognise the human rights of people living with HIV/AIDS have been adopted at national and international conferences. . . .

In 1998 the Office of the High Commissioner for Human Rights (OHCHR) and the Joint United Nations Programme on HIV/AIDS (UNAIDS) issued “International Guidelines on HIV/AIDS and Human Rights.” . . . Section 9, “Right to liberty and security of person” reads as follows: . . .

The right to liberty and security of person should . . . never be arbitrarily interfered with, based merely on HIV status by using measures such as quarantine, detention in special colonies, or isolation. There is no public health justification for such deprivation of liberty. Indeed, it has been shown that public health interests are served by integrating people living with HIV/AIDS within communities and benefiting from their participation in economic and public life. . . .

In exceptional cases involving objective judgments concerning deliberate and dangerous behaviour, restrictions on liberty may be imposed. Such exceptional cases should be handled under ordinary provisions of public [health], or criminal laws, with appropriate due process protection. . . .

30. The applicant complained that the compulsory isolation orders . . . had been in breach of Article 5 § 1 of the [European Convention on Human Rights], the relevant parts of which read as follows: . . .

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . .

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants

33. It was common ground between the parties that the compulsory isolation orders and the applicant's involuntary placement in the hospital amounted to a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention. . . .

36. The expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and . . . the obligation to conform to the substantive and procedural rules thereof. . . . It is . . . essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently accessible and precise to allow the person—if necessary with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences a given action may entail

Moreover, an essential element of the "lawfulness" of a detention within the meaning of Article 5 § 1 (e) is the absence of arbitrariness The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it must also be necessary in the circumstances . . . and in accordance with the principle of proportionality

[The Court concluded that Enhorn's detention had a legitimate basis in Swedish law and thus met the first part of the Article 5 § 1 test.]

40. The Court must therefore proceed to examine whether the deprivation of the applicant's liberty amounted to "the lawful detention of a person in order to prevent the spreading of infectious diseases" within the meaning of Article 5 § 1 (e) of the Convention.

41. The Court . . . is . . . called upon to establish which criteria are relevant when assessing whether such a detention is in compliance with the principle of proportionality and the requirement that any detention must be free from arbitrariness.

42. By way of comparison, for the purposes of Article 5 § 1 (e), an individual cannot be deprived of his liberty as being of "unsound mind" unless the

following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; and thirdly, the validity of continued confinement depends upon the persistence of such a disorder Furthermore, there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the “detention” of a person as a mental health patient will only be “lawful” for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution

43. Moreover, Article 5 § 1 (e) of the Convention refers to several categories of individuals, namely persons spreading infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds. It is therefore legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in paragraph 1 (e) of Article 5 to be deprived of their liberty is not only that they are a danger to public safety but also that their own interests may necessitate their detention

44. [T]he Court finds that the essential criteria when assessing the “lawfulness” of the detention of a person “for the prevention of the spreading of infectious diseases” are whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest. When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist.

45. Turning to the instant case, it is undisputed that the first criterion was fulfilled, in that the HIV virus was and is dangerous to public health and safety.

46. It thus remains to be examined whether the applicant’s detention could be said to be the last resort in order to prevent the spreading of the virus, because less severe measures had been considered and found to be insufficient to safeguard the public interest. . . .

48. The Government submitted that a number of voluntary measures had been attempted in vain during the period between September 1994 and February 1995 to ensure that the applicant’s behaviour would not contribute to the spread of the HIV infection. Also, they noted the particular circumstances of the case,

notably as to the applicant's personality and behaviour, as described by various physicians and psychiatrists; his preference for teenage boys; the fact that he had transmitted the HIV virus to a young man; and the fact that he had absconded several times and refused to cooperate with the staff at the hospital. Thus, the Government found that the involuntary placement of the applicant in hospital had been proportionate to the purpose of the measure, namely to prevent him from spreading the infectious disease.

49. The Court notes that the Government have not provided any examples of less severe measures which might have been considered for the applicant in the period from 16 February 1995 until 12 December 2001, but were apparently found to be insufficient to safeguard the public interest. . . .

54. The instructions issued on 1 September 1994 prohibited the applicant from having sexual intercourse without first having informed his partner about his HIV infection. Also, he was to use a condom. The Court notes in this connection that . . . there is no evidence or indication that during that period the [absconded] applicant transmitted the HIV virus to anybody, or that he had sexual intercourse without first informing his partner about his HIV infection, or that he did not use a condom, or that he had any sexual relations at all for that matter. It is true that the applicant infected the 19-year-old man with whom he had first had sexual contact in 1990. This was discovered in 1994, when the applicant himself became aware of his infection. However, there is no indication that the applicant transmitted the HIV virus to the young man as a result of intent or gross neglect, which in many of the Contracting States, including Sweden, would have been considered a criminal offence.

55. In these circumstances, the Court finds that the compulsory isolation of the applicant was not a last resort in order to prevent him from spreading the HIV virus because less severe measures had not been considered and found to be insufficient to safeguard the public interest. Moreover, the Court considers that by extending over a period of almost seven years the order for the applicant's compulsory isolation, with the result that he was placed involuntarily in a hospital for almost one and a half years in total, the authorities failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant's right to liberty.

56. There has accordingly been a violation of Article 5 § 1 of the Convention. . . .

[Judge Costa and Judge Barreto wrote separate concurrences.]

Tuberculosis (TB) is an infectious disease that primarily attacks the lungs and is spread through the air (particularly under conditions of crowding and poor ventilation) when a person with TB coughs, sneezes, or spits. The WHO reports that in 2014, 9.6 million people fell ill with TB and 1.5 million died from the disease, with the most severe burden of disease borne by Africa.

TB is treatable and through global efforts the TB death rate has been reduced 47% since 1990. TB treatment requires adherence to a strict 6-month regime. For the first two months, the intensive phase, patients must collect drugs from a treatment facility every week, and thereafter they must collect on a monthly basis. Adherence is often difficult for those who live far from treatment facilities, must travel for work, or are of low socio-economic status and lack basic necessities, including food and potable water. Non-adherence is fueled by insufficient provision of information about the nature of TB and the importance of completing treatment. Failure to adhere to the treatment regime means that patients may become sicker, remain infectious longer, and can develop drug-resistant tuberculosis, multidrug-resistant tuberculosis (MDR-TB), and extensively drug-resistant TB (XDR-TB).

Because of the possibility of both infecting others and developing new strains of TB resistant to treatment, repeated non-adherence to treatment poses a serious, global public health problem. The case excerpted below considers the permissibility of isolating patients who refuse treatment and the basic conditions that such isolation must meet to respect the rights and needs of those confined. It highlights one of the paradoxes of the use of imprisonment (absent special and carefully maintained medical wards) as a sanction for the ill: the risk that such imprisonment poses to the health of the prison and to the general population.

Ng’etich v. Attorney General of the Republic of Kenya
High Court of Kenya at Nairobi, Milimani Law Courts,
Constitutional and Human Rights Division
Petition No. 329 of 2014 (March 24, 2016)

[This opinion was signed by Mumbi Ngugi, Judge.]

1. This petition relates to the constitutionality of certain actions taken against the petitioners purportedly pursuant to section 27 of the Public Health Act (hereafter “the Act”). The provision has been used by public health authorities to have persons who have infectious diseases, notably tuberculosis (hereafter “TB”), and have defaulted in the treatment of the diseases, arrested, charged and confined to prison on the orders of a Magistrate’s Court. The petitioners argue that the use

of the provisions of the Act to have them committed to prison for the purposes of treatment amounts to a violation of their constitutional rights including the right to dignity, the right to freedom from torture and other cruel and degrading treatment, and the right to freedom of movement. . . .

3. The petitioners have filed the instant petition against the Attorney General (hereafter “AG”) of the Republic of Kenya, who is the principal legal adviser to the Government; the Principal Magistrate at Kapsabet Law Courts[;] the Public Health Officer, Nandi Central District Tuberculosis Defaulter Tracing Co-ordinator[;] and the Minister in charge of Public Health and Sanitation

4. The events giving rise to the petition occurred on or about 13th August, 2010, when the . . . petitioners were arrested by the [Public Health Officer]. They were then charged in court before the [Principal Magistrate] on the allegation that they had failed to take the TB medication prescribed to them. . . . The Court issued an order . . . for the confinement, in isolation, of the . . . petitioners at the Kapsabet G.K Prison for the purposes of TB treatment. The confinement was to be for a period of 8 months or such period as would be satisfactory for their treatment. The two petitioners were as a result confined at the Kapsabet G.K Prison for a period of 46 days.

5. Pursuant to an application made on behalf of the petitioners in Eldoret High Court Petition No 3 of 2010, the High Court . . . on 30th September 2010, ordered the release of the petitioners, to their respective homes from where they would continue their treatment

9. Mr. Ng’etich . . . avers that they slept on the floor of the cells for over a week without bedding and were only issued with a blanket after [the third petitioner, Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN)] intervened, but that the blanket was later taken away by the prison wardens. He deposes further that while they were given medication in prison, they were not given a balanced diet as is required for TB patients on medication.

10. It is also his deposition that they were held together with approximately fifty other prisoners in a room that should ordinarily hold ten inmates

19. The petitioners therefore contend that the incarceration . . . deprived them of their fundamental right to be free from torture, cruel, inhuman or degrading treatment contrary to the provisions of Article 25 of the Constitution, as well as their freedom of movement and personal liberty. They further argue that depriving them of these rights for the purpose of preventing the spread of infectious diseases to members of the public was excessive and punitive and violated the constitutional threshold of reasonableness. It is also their argument

that the choice of prison facilities for such confinement is unprecedented and unreasonable as the congested prison facilities come with a poor diet and the risk of additional infections due to poor hygiene standards. . . .

28. This petition demonstrates the conflict between the need to protect the rights of individuals, such as the petitioners, who have contracted an illness which all acknowledge is infectious and dangerous, and the right of the general public to be protected from infection. It poses to public health authorities the challenge of determining how best, when confronted with a TB patient who will not voluntarily follow the course of treatment prescribed, and who therefore is likely to develop drug or multi-drug resistant TB, to ensure that such a person takes his medication in his own interest and in the interest of the general public.

29. . . . The dispute is whether confining such persons in prison is the best course to follow, whether such action violates the fundamental rights and freedoms of the infected person, and whether . . . such a course of action is likely to achieve the intended result: the protection of other persons from infection, and therefore a reduction in the number of cases of TB. . . .

36. . . . Article 28 of the Constitution guarantees to every individual the right to human dignity and states that. Article 74 of the former constitution contained the constitutional prohibition against torture and other cruel and degrading treatment, which is now contained in Article 29 of the Constitution,* which guarantees the freedom and security of the person. Sub-clause 29(f) recognizes that every person has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading manner. . . .

38. The petitioners have also placed reliance on Article 25(a) of the Constitution which makes provision with regard to which of the rights under the Bill of Rights cannot be derogated from in the following terms:

Despite any other provision in the Constitution, the following rights and fundamental freedoms shall not be limited—

(a) Freedom from torture and cruel, inhuman or degrading treatment or punishment.

* Article 29 of the Constitution of Kenya provides: “Every person has the right to freedom and security of the person, which includes the right not to be— a. deprived of freedom arbitrarily or without cause; b. detained without trial, except during a state of emergency”

39. The petitioners have also relied on Article 51 which provides that a person who is detained, held in custody or imprisoned retains all the rights guaranteed in the Bill of Rights. . . .

41. . . . According to the petitioners, isolation as used in the section is not intended to be punitive. It is a measure to ensure good order in public health by isolating an individual who may be at risk, but who also puts at risk the health of others. . . .

45. Section 27 is titled “isolation of persons who have been exposed to infection” and provides that:

Where, in the opinion of the medical officer of health, any person has recently been exposed to the infection, and may be in the incubation stage, . . . such person may, on a certificate signed by the medical officer of health, be removed, by order of a magistrate and at the cost of the local authority of the district where such person is found, *to a place of isolation* and there detained until, in the opinion of the medical officer of health, he is free from infection or able to be discharged without danger to the public health, or until the magistrate cancels the order.

46. Section 28 which is titled “Penalty for exposure of infected persons and things,” . . . creates an offence and provides a penalty with respect to exposure of persons and things and provides that:

Any person who—

(a) while suffering from any infectious disease, wilfully exposes himself without proper precautions against spreading the said disease . . .

(c) . . . shall be guilty of an offence and liable to a fine not exceeding thirty thousand shillings or to imprisonment for a term not exceeding three years or to both

47. The petitioners have argued that their confinement was not authorized by law, and neither was it based on a legitimate objective nor strictly necessary. It is also their contention that neither was it the least restrictive means, and further, that it was also highly intrusive. They argue further that it was arbitrary as it did not take cognizance of the nature of the disease and its spread, and was unreasonable because confinement was for a much longer time than the disease is

communicable. They relied for this argument on the decision in *Enhorn v. Sweden* [(2005)]

49. The petitioners also relied on the provisions of section 25 of the United Nations Economic and Social Council Siracusa Principles . . . to submit that public health may be invoked as a ground for limiting rights in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population. Their submission, however, was that such measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured, but in the petitioners' view, the measures taken by the respondents were not aimed at preventing the spread of TB but to punish them. . . .

54. What does the World Health Organisation require states to do with regard to treatment of infectious diseases, or isolation of persons with infectious diseases? In its Guidance on ethics of tuberculosis prevention, care and control 2010, the WHO states . . . :

. . . In general, TB treatment should be provided on a voluntary basis, with the patient's informed consent and cooperation. . . . [E]ngaging the patient in decisions about treatment shows respect, promotes autonomy, and improves the likelihood of adherence. . . .

Detention should never be a routine component of TB programmes. However, in rare cases, despite all reasonable efforts, patients will not adhere to the prescribed course of treatment, or will be unwilling or unable to comply with infection control measures. In these cases, the interests of other members of the community may justify efforts to isolate or detain the patient involuntarily. . . .

[T]reating TB patients at home with appropriate infection measures in place generally imposes no substantial risk to other members of the household. By the time a diagnosis is made, the household contacts have already been exposed to the patient's infection and the possibility of contact infection goes down fast as treatment is started. . . .

As such, community-based care should always be considered before isolation or detention is contemplated. . . .

61. While the Act does not provide guidelines on how persons with such diseases are to be isolated, it is clear that the intention behind isolation is not punishment, as the respondents seem to understand it, but to ensure that a person who has failed to follow the course of treatment for TB does so, in his own interests and in the interests of the public. . . .

62. . . . I am inclined to find that while there was a violation of the petitioners' right to liberty as guaranteed under Article 29 and of their freedom of movement guaranteed under Article 39, such limitation was justifiable under Article 24, and was in accordance with the Siracusa Principles.* What was patently wrong and unjustifiable, and still is wrong and unjustifiable, is that such confinement should be in penal institutions. . . .

63. First, in this day and age, it cannot be proper to take any but a human rights approach to the treatment of persons in the position of the petitioners. . . . [T]he reasons for default in treatment by the petitioners was connected to their socio-economic situation. Indeed, . . . it is those who are poor, and therefore dependent on the public health system, who find themselves being punished for defaulting in TB treatment. . . .

66. . . . [T]he onus . . . lay with the respondents to place before the Court material on which it could find that there are proper isolation facilities in prisons for the treatment of persons in the position of the petitioners. This is because this petition is about the right to health of the petitioners, a right which the state has a responsibility to ensure, and in accordance with Article 21, is required to take "legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43," which includes the right to health. . . .

67. . . . [T]he state, having failed to adequately address the needs of the health sector, and confronted with rising cases of TB, has taken the easy option: arrest those who default and lock them away, and keep them away from the law abiding society. Unfortunately, given the state of prisons in Kenya, which are known to be overcrowded and lacking in basic facilities, that does not help in the treatment of the TB patients confined, or in stopping the spread of TB. Not only is such action not sanctioned by the Public Health Act, it is also patently counter-productive. . . .

* Article 39(1) of the Constitution of Kenya provides: "Every person has the right to freedom of movement."

74. In the circumstances, I issue the following declarations: . . .

c) That the confinement of patients suffering from infectious diseases in prison facilities for the purpose of treatment is a violation of their rights under Articles 29 and 39 (1) of the Constitution of Kenya, 2010.

d) That the confinement of patients suffering from infectious diseases in prison facilities for the purposes of treatment under section 27 of the Public Health Act, Chapter 242 of the Laws of Kenya violates the Constitution and any use of this provision to order such detention in prison is at all times unconstitutional. . . .

77. Consequently, I direct . . .

ii. That the [Minister for Public Health] does, in consultation with county governments, within Ninety (90) days from the date hereof, develop a policy on the involuntary confinement of persons with TB and other infectious diseases that is compliant with the Constitution and that incorporates principles from the international guidance on the involuntary confinement of individuals with TB and other infectious diseases.

iii. That the [Minister for Public Health] does, within Ninety (90) days from the date hereof, file an affidavit in this Court detailing the policy measures put in place on the involuntary confinement of persons with TB and other infectious diseases. . . .

THE ECONOMY

The world's interdependence seems more perilous since the economic crash of 2007 and 2008. We are now much more aware of the ways in which global financial entanglements can produce cascading collapse. When economies are poised on the brink, governments take unusual and sometimes even extreme measures. In the eurozone crisis of the past half-dozen years, those measures have produced a series of cases confronting the biggest questions of European constitutionalism. In particular, European courts have been forced to ask whether

the fate of Europe's distinctive and evolving pluralism will be radically altered by the imperatives of economic and monetary regulation.

The fact that economic emergencies have profound implications for the structure of constitutional orders comes as no surprise to much of the world, and in particular to the states of Latin American, where rolling economic crises over decades have produced a deep body of case law on the legal significance of emergencies.

The Philosophy of European Union Law

Neil Walker (2015)*

. . . [T]he pan-European political project has always been . . . fundamentally challenged by the very conditions that invite it. . . . [O]ne of the best-known and influential public philosophies of the EU, and one of the fullest attempts to specify supranationalism as a structural vision of the legal and political order, elevates economic prosperity to a polity-defining ideal within a broader understanding of the EU's mission. . . . For as the EU increasingly sought market-making or market-correcting interventions involving politically salient choices, it simultaneously reduced the capacity of states to act independently in these policy areas. . . .

[D]eep controversy turns on the legitimate boundaries of supranational policy intervention into traditional areas of national democratic competence through regulatory mechanisms that themselves lack the courage of collective democratic conviction. . . .

* * *

The questions Walker raises about the economic promise of the EU, on the one hand, and its structural / constitutional order, on the other, have been brought to the fore in controversies such as the *Pringle* case, excerpted below, in which the Court of Justice of the European Union (CJEU) took up the eurozone's responses to the Euro crisis. One commentator sets the stage, describing *Pringle* as coming "amidst the EU's deepest existential crisis":

* Excerpted from Neil Walker, *The Philosophy of European Union Law*, in OXFORD HANDBOOK OF EUROPEAN UNION LAW (Anthony Arnall and Damian Chalmers editors, Oxford University Press 2015).

At the impulse of the financial markets, several members of the euro area faced growing borrowing costs, sometimes nearing unsustainable levels. The threat of a Member State leaving the euro area became greater as currency devaluation appeared to be the only way to give imperiled economies some breathing room. The effects of the eurozone crisis have been reinforced by the still-lingering 2007-2008 financial crisis. The EU's existential crisis is also, in part, a growing social crisis. The symptoms of this include unemployment figures at record heights (especially for the young), growing social inequality, and real wage cuts. Resentment for austerity measures is tangible in economically troubled eurozone countries.*

The *Pringle* case arose out of circumstances attending to the Greek sovereign debt crisis of 2010. In December of that year the European Council decided to create a permanent lending mechanism to provide assistance to Member States and their financial institutions. Member States signed a treaty creating a European Stabilization Mechanism (ESM) in February 2012. In September of that year, the treaty went into force when Germany's ratification meant that Member States representing over 90% of the ESM's capital requirements had ratified. As of 2016, the ESM, whose shareholders are the 19 euro area Member States, has a total subscribed capital of more than €70 billion and a maximum lending capacity of €500 billion.

The European Council cited Article 122(2) of the Treaty on the Functioning of the European Union (FEU or TFEU) as authority for its actions. That article authorizes financial assistance to Member States in the event of "severe difficulties caused by . . . exceptional circumstances beyond [the member country's] control." Nonetheless, controversy swirled over Europe's authority to enact the ESM. On March 25, 2011, the European Council formally adopted Decision 2011/199, which amended Art 136 of the Treaty on the Functioning of the European Union to bolster the legal basis for the ESM** by removing any legal uncertainty as to the compatibility of the European Stability Mechanism Treaty (ESMT) with EU law. But the amended article of the TFEU raised new

* Pieter-Augustin Van Malleghem, Pringle: *A Paradigm Shift in the European Union's Monetary Constitution*, 14 GERMAN LAW JOURNAL 141, 142 (2013).

** The amendment in Decision 2011/99 provides: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."

questions, too. The CJEU confronted these questions in *Pringle*, a case referred to the CJEU by the Supreme Court of Ireland.

Pringle v. Government of Ireland
Court of Justice of the European Union (Full Court)
Case C-370/12 (2012)

THE COURT (Full Court) composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, A. Tizzano, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, T. von Danwitz, A. Rosas, G. Arestis, J. Malenovský, M. Berger and E. Jarašiūnas, Presidents of Chambers, E. Juhász, A. Borg Barthet, U. Lõhmus, E. Levits, A. Ó Caoimh, J.-C. Bonichot, A. Arabadjiev, C. Toader, J.-J. Kasel, M. Safjan, D. Šváby, A. Prechal, C.G. Fernlund, J.L. da Cruz Vilaça and C. Vajda, Judges. . . .

24. . . . On 13 April 2012 Mr Pringle brought before the High Court (Ireland) an action against the defendants in the main proceedings in support of which he claimed, first, that Decision 2011/199 was not lawfully adopted pursuant to the simplified revision procedure provided by Article 48(6) [of the Treaty on European Union (TEU)] because it entails an alteration of the competences of the European Union contrary to the third paragraph of Article 48(6) [of the] TEU and that Decision 2011/199 is inconsistent with provisions of the EU and FEU Treaties concerning economic and monetary union and with general principles of European Union law.

25. Pringle further claimed that Ireland, by ratifying, approving or accepting the ESM Treaty, would undertake obligations which would be in contravention of provisions of the EU and [Functioning of the European Union] Treaties concerning economic and monetary policy and would directly encroach on the exclusive competence of the Union in relation to monetary policy. He claimed that by establishing the ESM the Member States whose currency is the euro are creating for themselves an autonomous and permanent international institution with the objective of circumventing the prohibitions and restrictions laid down by the provisions of the FEU Treaty in relation to economic and monetary policy. Further, he claimed that the ESM Treaty confers on the Union's institutions new competences and tasks which are incompatible with their functions as defined in the EU and FEU Treaties. Lastly, he claimed that the ESM Treaty was incompatible with the general principle of effective judicial protection and with the principle of legal certainty. . . .

52. It must therefore be determined, first, whether Decision 2011/199 . . . [purports to] grant[] to Member States a competence in the area of monetary

policy for the Member States whose currency is the euro. If that were the case, the Treaty amendment concerned would encroach on the Union's exclusive competence [in monetary policy] as laid down in [the] TFEU. . . .

60. In the light of the objectives to be attained by the stability mechanism the establishment of which is envisaged by Article 1 of Decision 2011/199, the instruments provided in order to achieve those objectives and the close link between that mechanism, the provisions of the FEU Treaty relating to economic policy and the regulatory framework for strengthened economic governance of the Union, it must be concluded that the establishment of that mechanism falls within the area of economic policy. . . .

64. Secondly, as regards whether Decision 2011/199 affects the Union's competence in the area of the coordination of the Member States' economic policies, it must be observed that, . . . the TFEU restrict[s] the role of the Union in the area of economic policy to the adoption of coordinating measures

65. Admittedly, Article 122(2) TFEU confers on the Union the power to grant *ad hoc* financial assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. However, . . . Article 122(2) TFEU does not constitute an appropriate legal basis for the establishment of a stability mechanism The fact that the mechanism envisaged is to be permanent and that its objectives are to safeguard the financial stability of the euro area as a whole means that such action cannot be taken by the Union on the basis of that provision of the FEU Treaty. . . .

93. The referring court seeks to ascertain whether the stability mechanism established by the ESM Treaty falls under monetary policy and, accordingly, under the Union's exclusive competence. It follows from Article 3 of the ESM Treaty that its purpose is to support the stability of the euro. The referring court further refers to the argument of the applicant in the main proceedings that the grant of financial assistance to Member States whose currency is the euro or the recapitalisation of their financial institutions, and the necessary borrowing for that purpose, on the scale envisaged by the ESM Treaty, would increase the amount of euro currency in circulation. The Treaties on which the Union is founded confer on the ECB the exclusive power to regulate money supply in the euro area. The applicant argues that those Treaties do not allow a second entity to carry out such tasks and to act in parallel with the ECB, outside the framework of the European Union legal order. Further, . . . the applicant claims that the activities of the ESM could have a direct impact on price stability in the euro area, which would go to the very core of the Union's monetary policy. . . .

95. However, the activities of the ESM do not fall within the monetary policy which is the subject of those provisions of the FEU Treaty.

96. . . . [I]t is not the purpose of the ESM to maintain price stability, but rather to meet the financing requirements of ESM Members, namely Member States whose currency is the euro, who are experiencing or are threatened by severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. To that end, the ESM is not entitled either to set the key interest rates for the euro area or to issue euro currency

108. The national court refers to the argument of the applicant . . . that the ESM Treaty constitutes an amendment which fundamentally subverts the legal order governing economic and monetary union and which is incompatible with European Union law. The applicant claims that . . . [the TFEU] confer[s] on the Union's institutions the competence for the coordination of economic policy. The referring court also seeks to ascertain whether . . . 'conditionality' provided for by the ESM Treaty is the equivalent of the recommendations provided for by that article.

110. . . . [T]he ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism. . . . [T]he purpose of the ESM is to mobilise funding and to provide financial stability support to ESM Members who are experiencing, or are threatened by, severe financing problems.

111. While it is true that . . . the financial assistance provided to a Member State that is an ESM Member is subject to strict conditionality, . . . the conditionality prescribed nonetheless does not constitute an instrument for the coordination of the economic policies of the Member States, but is intended to ensure that the activities of the ESM are compatible with . . . the coordinating measures adopted by the Union. . . .

117. Next, in relation to Article 122(2) TFEU, the referring court . . . asks whether that provision exhaustively defines the exceptional circumstances in which it is possible to grant financial assistance to Member States and whether that article empowers solely the Union's institutions to grant financial assistance.

118. In that regard, it must be stated that the subject-matter of Article 122 TFEU is solely financial assistance granted by the Union and not that granted by the Member States. Under Article 122(2) TFEU, the Council of the European Union may grant, under certain conditions, such assistance to a Member State

which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.

119. The exercise by the Union of the competence conferred on it by that provision of the FEU Treaty is not affected by the establishment of a stability mechanism such as the ESM.

120. Further, nothing in Article 122 TFEU indicates that the Union has exclusive competence to grant financial assistance to a Member State.

121. It follows that the Member States remain free to establish a stability mechanism such as the ESM

In upholding the European Stabilization Mechanism in *Pringle*, the CJEU eschewed reliance on Article 122(2)'s "severe difficulties" and "exceptional circumstances" language. But the opinion's basic logic nonetheless seemed to support an expansion of eurozone authority in a moment of crisis. The question remained, however, whether the courts of Member States would be willing to accept the assertion of European authority embodied in the EU's Economic Stability Mechanism. The Federal Constitutional Court of Germany took up that question next and gave a qualified answer.

The European Stability Mechanism Case
Federal Constitutional Court of Germany (Second Senate)
2 BvR 1390/12 (March 18, 2014)

. . . The Federal Constitutional Court—Second Senate—with the participation of Justices President Voßkuhle, Lübke-Wolff, Gerhardt, Landau, Huber, Hermanns, Müller, Kessel-Wulf

2. At its meeting of 28/29 October 2010, the European Council agreed to establish a "permanent crisis mechanism to safeguard the financial stability of the euro area as a whole" in order to deal with the financial and sovereign debt crisis. On 28 November 2010, the finance ministers of the Member States of the euro currency area agreed on its general characteristics. . . .

14. On 29 June 2012, the German *Bundestag* adopted the Act for Financial Participation in the European Stability Mechanism (ESMFinG) in the version of

the budget committee's recommendation. On the same day, the *Bundesrat* gave its approval to this Act. Pursuant to § 1 ESMFinG, the Federal Republic of Germany participates in the total amount of the capital of the European Stability Mechanism to be paid in with EUR 21.71712 billion and in the total amount of callable capital with EUR 168.30768 billion. The Federal Ministry of Finance is authorised to give guarantees for the callable capital in the amount of EUR 168.30768 billion. . . .

50. Complainants [contend that] the challenged Acts violate the political freedom of the citizens and the right to democracy entrenched in Art. 38 [of the Basic Law]^{*} . . . [because the Treaty on the Functioning of the European Union (“TFEU”)] deepens the connectedness of the euro currency area to such a degree that a federal state is created and Germany's statehood and sovereignty are largely terminated. This violates the principle of democracy, the rule of law and the principle of a social state, as well as the guarantee of sovereign statehood

183. [The Court rejected the complainants' argument, holding that the Act establishing the European Stability Mechanism satisfied the democracy guarantees of Art. 38 of the Basic Law]. The provisions of the ESM Treaty are compatible with the German *Bundestag*'s overall budgetary responsibility. In particular, the amount of the payment obligations which Germany assumed when the European Stability Mechanism was established does not impair the *Bundestag*'s overall budgetary responsibility. . . .

184. . . . As has been stated, an upper limit for payment obligations and liability commitments following directly from the principle of democracy could at most be exceeded if the *Bundestag*'s budget autonomy were for at least a considerable period of time effectively non-existent. Here, the legislature has a wide margin of appreciation, in particular with regard to the risk of the payment obligations and liability commitments being called upon, and with regard to the consequences to be expected for its legislative discretion; the Federal Constitutional Court must generally respect this.

* Article 38 of the Basic Law for the Federal Republic of Germany provides:

“(1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.

(2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.

(3) Details shall be regulated by a federal law.”

185. In light of this, no impairment of the *Bundestag*'s overall budgetary responsibility can be inferred from the absolute amount of Germany's payment obligations of presently EUR 190.0248 billion, assumed upon the establishment of the European Stability Mechanism. The legislature's assessment that—even taking into account the German participation in the European Financial Stability Facility, the bilateral financial assistance granted to the Hellenic Republic, and the risks resulting from the participation in the European System of Central Banks and in the International Monetary Fund—the payment obligations arising from the participation in the European Stability Mechanism do not lead to an effective failure of budget autonomy is at any rate not evidently erroneous and must therefore be accepted by the Federal Constitutional Court.

186. . . . With its accession to the European Stability Mechanism, the Federal Republic of Germany did not assume payment obligations of an unlimited amount, or which are not sufficiently foreseeable. . . .

188. . . . Art. 8 sec. 5 of the Treaty Establishing the European Stability Mechanism* limits all payment liabilities of the ESM Members under the Treaty to the effect that no provision of the Treaty may be interpreted as leading to payment obligations higher than the portion of the authorised capital stock corresponding to each ESM Member, as specified in Annex II of the Treaty, without prior agreement of each Member's representative and due regard to national procedures. . . .

190. . . . Moreover, the *Bundestag*'s exercise of its overall budgetary responsibility requires that the legitimising relationship between the European Stability Mechanism and parliament is not interrupted under any circumstances

The German Constitutional Court's March 2014 decision confirmed German participation in the ESM. But it did so in a qualified fashion. A European Parliament Briefing summarized the court's ruling this way:

* Article 8, Section 5 of the Treaty Establishing the European Stability Mechanism provides: "The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. The obligations of ESM Members to contribute to the authorised capital stock in accordance with this Treaty are not affected if any such ESM Member becomes eligible for, or is receiving, financial assistance from the ESM."

According to the BVerfG, in order for further EU integration to be in line with the Basic Law (German Constitution) any transfer of powers needs to be democratically legitimated by the Bundestag. Certain state powers, e.g. budgetary decisions, cannot be given up through European integration.*

The ESM satisfied the requirements set by Germany's national independence, as interpreted by the German Constitutional Court—or at least the Court said they did. But these same requirements soon produced a problem for one of the European Central Bank's most important initiatives.

In September 2012, the European Central Bank announced that it would authorize the European System of Central Banks (“ESCB”) to purchase government bonds of Member States of the eurozone on secondary markets, provided that certain conditions were met. The aim of the Outright Monetary Transaction program (“OMT”) was to provide a lender of last resort to Member States whose bonds had become subject to widespread speculation in the markets. By becoming a back-stop for Member States, the ECB would be able to shore-up markets in Member State debt. But here a problem arose. It is in the nature of being a lender of last resort that such a lender cannot specify in advance a limit to the amount it is willing to contribute. To announce a limit invites counterparties to test the margins. And that fact runs headlong into the German Constitutional Court's insistence on *ex ante* limits in the conferral of power to Europe. Among other things, they challenged that the OMT infringed on the economic policy authority of Member States.

Complainants led by economist Johann Heinrich von Stein, journalist Bruno Bandulet, activist Roman Huber, and prominent Euro-skeptic Peter Gauweiler challenged the OMT program in the German Constitutional Court. Additionally, the Fraktion DIE LINKE im Deutschen Bundestag—the Left Party Parliamentary Group in the German Bundestag—brought a claim in dispute resolution proceedings for a declaration that the Deutscher Bundestag is under certain obligations with regard to the OMT decisions. The German Constitutional Court expressed real doubt about whether the OMT program could be consistent with the principles it had articulated in the ESM case. It referred to the European Court of Justice the question of whether the EU Treaties permitted the ESCB to adopt the OMT program. The referral was the first preliminary reference from the German Constitutional Court in more than 60 years of European integration.

* Eva-Maria Poptcheva, *German Constitutional Court decisions on EU anti-crisis measures 1*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (July 2014), available at [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140568/LDM_BRI\(2014\)140568_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140568/LDM_BRI(2014)140568_REV1_EN.pdf).

Gauweiler and Others v. Deutscher Bundestag
Court of Justice of the European Union (Grand Chamber)
Case C-62/14 (June 16, 2015)

THE COURT (Grand Chamber), composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, L. Bay Larsen (Rapporteur), T. von Danwitz, A. Ó Caoimh and J.-C. Bonichot, Presidents of Chambers, J. Malenovský, E. Levits, A. Arabadjiev, M. Berger, A. Prechal, E. Jarašiūnas, C.G. Fernlund and J.L. da Cruz Vilaça, Judges. . . .

2. . . . [This request for a preliminary ruling] has been made in the context of a series of constitutional actions and dispute resolution proceedings between constitutional bodies, which concern the participation of the Deutsche Bundesbank (German Central Bank) in the implementation of the OMT decisions and the alleged failure, of the Bundesregierung (Federal Government) and the Deutscher Bundestag (Lower House of the German Federal Parliament), to act with regard to those decisions. . . .

7. . . . [T]he applicants in the main proceedings submit . . . that the OMT decisions form, overall, an ultra vires act inasmuch as they are not covered by the mandate of the ECB and infringe Article 123 [of the] TFEU [which prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to Member States and from purchasing directly from them their debt instruments]

34. . . . [U]nder Article 119(2) [of the TFEU], the activities of the Member States and the Union are to include a single currency, the euro, as well as the definition and conduct of a single monetary policy and exchange-rate policy. . . .

36. Under Article 282(1) [of the] TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union. . . .

[The Court rejected the view that the OMT program was incompatible with Article 123 of the TFEU. Although the EU Treaties prohibit all financial assistance from the ESCB to a Member State, they do not preclude the possibility of the ESCB purchasing from the creditors of such a State bonds previously issued by that State.]

52. Indeed, a monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area. . . . [I]t is apparent that a programme such as that

announced in the press release, in view of its objectives and the instruments provided for achieving them, falls within the area of monetary policy. The fact that the implementation of such a programme is made conditional upon full compliance with [European Financial Stability Facility] or [European Stability Mechanism] macroeconomic adjustment programmes does not alter that conclusion. . . .

56. The point should also be made that the ESCB, in a wholly independent manner, made implementation of the programme . . . conditional upon full compliance with EFSF or ESM macroeconomic adjustment programmes, thereby ensuring that its monetary policy will not give the Member States whose sovereign bonds it purchases financing opportunities which would enable them to depart from the adjustment programmes to which they have subscribed. The ESCB thus ensures that the monetary policy measures it has adopted will not work against the effectiveness of the economic policies followed by the Member States. . . .

58. . . . [A] bond-buying programme forming part of monetary policy may be validly adopted and implemented only in so far as the measures that it entails are proportionate to the objectives of that policy. . . .

72. . . . [T]he programme is based on an analysis of the economic situation of the euro area, according to which, at the date of the programme's announcement, interest rates on the government bonds of various States of the euro area were characterised by high volatility and extreme spreads. According to the ECB, those spreads were not accounted for solely by macroeconomic differences between the States concerned but were caused, in part, by the demand for excessive risk premia for the bonds issued by certain Member States, such premia being intended to guard against the risk of a break-up of the euro area.

73. According to the ECB, that special situation severely undermined the ESCB's monetary policy transmission mechanism in that it gave rise to fragmentation as regards bank refinancing conditions and credit costs, which greatly limited the effects of the impulses transmitted by the ESCB to the economy in a significant part of the euro area. . . .

80. It follows from the foregoing that, in economic conditions such as those described by the ECB . . . the ESCB could legitimately take the view that [the] programme . . . is appropriate for the purpose of contributing to the ESCB's objectives and, therefore, to maintaining price stability.

81. Accordingly, it should, in the second place, be established whether such a programme does not go manifestly beyond what is necessary to achieve those objectives.

82. It must be noted [that] . . . under the programme at issue . . . the purchase of government bonds on secondary markets is permitted only in so far as it is necessary to achieve the objectives of that programme and that such purchases will cease as soon as those objectives have been achieved. . . .

92. It follows from the foregoing considerations that [the] programme . . . does not infringe the principle of proportionality. . . .

In referring the case, the German Constitutional Court suggested that it was entitled to reject the decisions or opinions of the CJEU if it considers actions taken to be “manifestly in violation of powers, and that the challenged act entails a structurally significant shift in the allocation of powers to the detriment of the Member States.” The OMT is essentially an insurance mechanism that the ECB hopes not to have to actually invoke. The logic of a lender of last resort program is that it functions to ease Member States borrowing merely by its existence. Substantial uncertainty about its legality could well undermine its ability to do so. And yet looking at cases like *Pringle* and *Gauweiler*, the German Constitutional Court’s anxieties that the monetary crisis of the eurozone might become an occasion for the bold expansion of European authority over Member States are not unwarranted.

Economic emergencies have been the occasion for inexorable institutional expansion. Consider how economic emergency doctrines have functioned in the jurisprudence of the domestic constitutional order of Colombia.

Colombian Constitutional Law

Manuel Jose Cepeda and David Landau (forthcoming 2017)*

The [Colombian] Constitution also includes another important instrument, known as the state of economic, social, and ecological emergency. This instrument is regulated in article 215, which provides in part as follows: “when events . . . occur that disrupt or threaten to disrupt in serious or imminent manner the economic, social, or ecological order of the country or which constitute a grave public calamity, the President, with the signature of all the ministers, may declare a state of emergency for periods of up to 30 days in each case, which, in all, may not exceed 90 days in a calendar year.” The article also states that the president, once he has declared the emergency and justified it in writing, may issue decrees having the force of law so long as they are “directed exclusively to checking the crisis and halting the extension of its effects.” . . . [D]ecrees issued during a state of economic, social, and ecological emergency are permanent in nature—they become permanent laws of the Republic and do not expire when the declaration of state of emergency expires. The exception is new taxes, which may only be declared provisionally and expire at the end of the fiscal year unless adopted by Congress.** . . .

When the government has faced a genuine crisis based on new events in some or all of the country, the Court has tended to uphold the emergency. Thus, the instrument has been successfully used in the following cases: to take care of a temporary social emergency caused by the government’s refusal to increase police salaries . . . ; to face a financial emergency in the context of recession at the end of the 1990s . . . ; to respond to the social emergency generated by the massive swindling of savings accounts by a Ponzi scheme fed by laundering narco-trafficking moneys . . . ; and to face the calamities resulting from earthquakes in specific areas of the national territory

At the same time, the Court has prevented the government from using this instrument to respond to problems that are “chronic” or “structural” in nature. It has instead held that these problems should be dealt with by the Congress, through ordinary legislative processes.

* Manuel Jose Cepeda and David Landau, *COLOMBIAN CONSTITUTIONAL LAW* (Oxford University Press, forthcoming 2017).

** Article 215 also provides for a substantive limitation on government power: “The government may not infringe on the social rights of workers through the decrees mentioned in this article.”

Case Concerning Emergency Decree 333
Constitutional Court of Colombia
C-004 (1992)*

Eduardo Cifuentes Muñoz. Decree 333, dated February 24th, 1992 “declar[ed] the state of social emergency,” due to the disturbances created among public servants “in particular by the lack of timely wages rise, which threatened to cause serious trouble affecting public administration, and seriously disrupt the social order of the Nation.”**

Does the Constitutional Court the power to exercise judicial review of legislative decrees declaring states of emergency? And if so, should that control be limited to the procedural issues only, or should it also touch on the substantial content of such measures?

After the issuance of the Constitution of 1991, this was the first decision by which the Constitutional Court ruled about whether a decree declaring the state of emergency was according to the Constitution, for it is known that prior to July 1991, the judicial control of those decrees was a matter assigned to the Supreme Court of Justice. This circumstance is particularly relevant, since the Constitutional Court changed the rule formerly applied by the Supreme Court, which repeatedly assumed that its review was limited to the formal aspects of the declaration of exceptional states only; conversely, the Constitutional Court decided that its control should cover any kind of matter, including the material validity of such declaration with respect to the Constitution.

In this case the Court, explaining the primacy of substantive law, highlighted that the Constitution . . . expressly assigned the Constitutional Court with the responsibility to keep and protect the integrity and supremacy of the Constitution. It also explained that such duty could not be fulfilled if this Court didn’t have the power to fully review legislative decrees issued by the Executive Branch and related to any state of emergency, or if the control were limited to purely formal aspects. This Court pointed out that there are not constitutional distinctions between background checks and material aspects; therefore, neither the judge nor the interpreter should draw such differences.

* Excerpted from a summary in English provided by the Constitutional Court of Colombia, available at <http://english.corteconstitucional.gov.co/sentences/C-004-1992.pdf>. The judgment was published in Spanish.

** Decreto 333 de 1992 (Diario Oficial No. 40.350)

This ruling also referred to the spirit that characterizes the new Constitution of 1991, stressing that according to it the states of emergency should strictly result from “abnormalities” in the social, political, economic or environmental fields, which was said, was defined by the Constitution’s authors as extraordinary changes of what is considered to be “normal.”

The Court also noted that the existence of states of exception does not undermine the Rule of Law, nor opens a door to abuse by the authorities, as it conducted an extensive analysis of the various controls, limitations and restrictions imposed by the Constitution on the President’s discretionary powers to cope with emergency situations.

The Court developed what it considered to be an objective requirement for the declaration of a state of social emergency, explaining that such concept is not definable at the abstract level; therefore it should be looked for in each specific case. Hence, there are not predetermined limitations that prevent the President from declaring a state of social emergency, and it is the Constitutional Court who must determine whether the motivation of each declaration actually corresponds to real circumstances of emergency. Decree 333 of 1992 was declared constitutional. Justice *Ciro Angarita Barón* dissented, arguing that “the deterioration of real wages, which is understood as the event giving rise to labor unrest can not be regarded as one of supervening nature, since it was not unpredictable or suddenly appeared.”

He also noted that “there was not a crisis in society, but a crisis in government,” which is not the situation the Executive Branch is supposed to deal with through the social emergency powers. He concluded that allowing the President to exercise in such situations the exceptional powers resulting from the declaration of emergency means transforming such constitutional provision in a tool readily available to play politics.

Economic crises have often expanded the power of centralizing authorities and executives; that is one of the lessons of the materials we have read on economic emergencies to this point. But courts have asserted their authority as well. Consider the Portuguese experience of cuts to public employee compensation in the wake of the Euro crisis.

Ruling No. 574/14
Portuguese Constitutional Court (2014)*

The President of the Republic asked the Constitutional Court to conduct a prior review of the constitutionality of a Decree in which the Assembly of the Republic approved a regime establishing temporary pay-cut mechanisms and the conditions under which they would be reversed within a maximum of four years.

The Decree included various such mechanisms: a pay cut in 2014 for staff paid out of public funds . . . ; a pay cut in 2015 worth 80% of the 2014 equivalent; and the inclusion in the law of provisions under which similar cuts would apply in the subsequent years up until 2018. Together, these measures added a further five years to past cuts, thus bringing the total consecutive number of years with such cuts to eight (2011-2018). Unlike 2014 and 2015, the Decree did not specify the amount of the reductions that would apply in each of the years between 2016 and 2018.

The Court recalled the essential requisites it has used in its jurisprudence to determine when the Constitution protects the principle of trust (legal certainty), which include the existence of relevant legitimate expectations. It said that in the present case it was credible to think that the fact that the successive pay-cut measures imposed since 2011 had been systematically presented as transitional—i.e. that they would be reversed—had generated such expectations that their remuneratory situation would improve with time on the part of workers paid out of public funds. . . .

The Court pointed to its own case law, in which it has taken the view that the pay-cutting measures adopted since 2011 were designed to safeguard a public interest that should be considered to prevail over other factors, and that this was the decisive reason why the Court rejected the argument that the situation involved a constitutionally unacceptable lack of protection of trust (certainty). These are basically conjunctural financial-policy measures chosen by the country's legislative organ—itsself legitimated by the principle of democracy seen as representation of the people—and also rooted in the need to respect the international commitments the Portuguese State made when it signed the [Financial Assistance Programme for Portugal (FAP)]

* Excerpted from a summary in English provided by the Portuguese Constitutional Court, available at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20140574s.html>.

However, once the country reaches 2016, the FAP is over and the present excessive deficit procedure has been finalised, there would have to be other grounds in order to again conclude that the pay-cut measures were not unconstitutional because they were justified for very important public-interest reasons weighty enough to prevail over expectations of a return to a framework of stability in the law. . . .

The constitutional principles of equality, proportionality and the protection of trust (legal certainty), which have served as parameters by which the Constitutional Court gauges the constitutionality of national norms regarding the issues linked to those before it in the present case, form part of the central core of the state based on the rule of law and are included in the common European legal heritage, which is also binding on the European Union.

As set out in the norms before the Court, the pay cuts imposed on workers paid out of public funds since 2011 could have remained in effect until 2018—i.e. for eight consecutive years. There was no guarantee whatsoever that this would not be the case.

The Court said that if this were to happen, it would be within a context in which the consequences of the overall remuneratory treatment of such workers—once again hit by pay cuts—would be much more negative than just the results of these cuts. The latter would again come on top of the permanent effects of the increase in their working hours (which has effectively cut hourly rates of pay), the increase in their contributions to [pensions with the Directorate-General for the Social Protection of Public Servants], the freeze on promotions and advancements in the career structure, and the programmes for reducing staff numbers and for limiting the intake of new recruits, with both the latter potentially increasing the effective number of hours worked by existing/remaining staff.

The norms did not establish any percentage by which pay would be cut in 2016-2018; this would instead be dependent on “budgetary availability” (for another three years). On top of this, the [government’s strategic economic plan] sets the goal of conditioning the reversal of the pay cut measure “to the reduction in the overall wage bill by means of a quantity effect”—i.e. by cutting the number of public servants. The Court was of the opinion that when seen in the light of the principle of equality, these reasons were not capable of justifying continued cuts in the pay of staff who are paid from public funds, and their pay alone, for another three years. Given the constitutional requirement that public costs must be shared out equally, it is not constitutionally permissible for the strategy for balancing the public finances to be based on cutting spending by continuing to sacrifice those workers in particular.

As such, the Court found that the norms applicable to 2016-2018 would be unconstitutional. . . .

Three Justices dissented (one partially) from the decision not to find the norms that cut the pay of workers paid out of public funds in 2014 and 2015 unconstitutional; five Justices dissented from the decision in which the Court pronounced the unconstitutionality of the norms that cut the pay of such workers in 2016-2018; and one Justice attached a concurring opinion to the Ruling.

The European and Latin American materials in this section have focused on structural questions about the allocation of authority in the state. Judges in the United States have also had occasion to weigh in on economic emergencies. One American contribution has been to produce a jurisprudence of emergency organized around questions of individual rights.

Home Building and Loan Association v. Blaisdell
Supreme Court of the United States
290 U.S. 398 (1934)

[The Minnesota Mortgage Moratorium Act allowed mortgagors who found themselves unable to make their mortgage payments to turn to the state courts for an alteration of their payment schedule. The law was passed in response to a wave of farm foreclosures brought on by the Great Depression. The appellants argued that the Act violated the contracts clause of the U.S. Constitution, which provides that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts.”]

Mr. Chief Justice HUGHES delivered the opinion of the Court. . . .

In determining whether the provision for this temporary and conditional relief exceeds the power of the state by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or

reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

While emergency does not create power, emergency may furnish the occasion for the exercise of power. Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. . . .

The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. . . . It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. . . .

[W]e conclude:

1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community. . . . The finding of the Legislature and state court has support in the facts of which we take judicial notice. . . . It is futile to attempt to make a comparative estimate of the seriousness of the emergency shown in the leasing cases from New York and of the emergency disclosed here. The particular facts differ, but that there were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil. . . .
2. The legislation was addressed to a legitimate end; that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.
3. In view of the nature of the contracts in question—mortgages of unquestionable validity—the relief afforded and

justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions.

4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. . . . [T]he integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period . . . must pay the rental value of the premises The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession. Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as insurance companies, banks, and investment and mortgage companies. These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. . . .

5. The legislation is temporary in operation. It is limited to the exigency which called it forth. . . .

We are of the opinion that the Minnesota statute as here applied does not violate the contract clause of the Federal Constitution. Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned. . . .

* * *

Similar problems have arisen in Latin American economic crises. Argentinian courts, for example, have adopted an approach that illustrates both the power and the limits of its version of the *Blaisdell* reasoning.

Don't Cry For Me Argentina: Economic Crises and the Restructuring of Financial Property

Horacio Spector (2009)*

. . . . During the 1920s and 1930s, American constitutional jurisprudence analogized an economic and social emergency to war, thus justifying an encroachment of private property and freedom of contract as an exercise of Congress's extraordinary powers during times of emergency.

It is common to regard emergency regulations—such as restriction or deferral of the convertibility of deposits into currency, as well as the compulsory currency conversion of bank deposits, bonds, and other creditor rights—as infringements of property rights and freedom of contract that are grounded on public interest reasons. Indeed, resolving an emergency situation seems to be the paradigm of serving the public interest. The emergency paradigm allows individual rights to be sacrificed when necessary to avert a social or economic catastrophe. Emergency norms thus contradict ordinary norms. However, this does impede the coherent functioning of the legal system: emergency norms simply suspend, during a period of time, the application of ordinary norms. . . .

When emergency measures are analyzed in terms of the property / public interest matrix, two different normative stances are possible. Under a conservative-libertarian . . . approach, any infringement on private property that does not seek to prevent nuisance constitutes compensable government taking. Alternatively, . . . Congressional legislation can legitimately curb private property rights in extenuating situations by simply alleging a public interest goal. . . . Argentina followed the latter approach. . . .

[I]n the landmark decision of *Avico v. de la Pesa* [(1934)], the [Supreme Court of Argentina] upheld the constitutionality of a law passed in 1933 that established a three-year moratorium on mortgage payments and foreclosures and capped the interest rate at six percent. In *Avico*, . . . Attorney General Horacio L. Larreta submitted . . . a four-prong test [based on *Blaisdell*] to determine the constitutionality of a moratorium Following *Blaisdell*, Larreta maintained that “a moratorium does not attack property, which is maintained with all its attributes, and only *delays* the application of the remedies that are available to the creditor.” . . .

* Excerpted from Horacio Spector, *Don't Cry for Me Argentina: Economic Crises and the Restructuring of Financial Property*, 14 *FORDHAM JOURNAL OF CORPORATE AND FINANCIAL LAW* 771 (2009).

In the [2006 *Massa v. E.N.*]* decision, the Court again applied the emergency paradigm. It ruled that applying the conversion formula established by Decree 214/2002**—in an extended version that also covers the period of legal proceedings—plus an annual interest rate fixed at four percent, does not cause economic damage when restitution is made at the time of the decision. . . .

The Court declared in . . . *Massa* that it was following the doctrine in *Blaisdell*, and its Argentine analogue in *Avico*. [However], . . . the conversion of dollar deposits into rescheduled peso deposits in 2002 nevertheless altered the substance of the obligations The emergency paradigm permits deferral of the available remedies when necessary to overcome the crisis, but it disallows even a temporary alteration of the nature of the underlying obligations. A compulsory swap for government bonds modifies the essence of an obligation because, among other things, it substitutes the government for the original obligor. The same principle applies to the conversion of bank deposits into pesos at an official rate, because this conversion modifies the economic value of the deposit. . . .

The *Blaisdell / Avico* doctrine of emergency is controversial one. Sometimes it may be taken too far, as in Argentina according to Horatio Spector. At least one U.S. court in 2015 has evinced real skepticism of the government’s authority to reorganize private sector arrangements in a moment of crisis.

* Corte Suprema de Justicia de la Nación [CSJN], 27/12/2006, *Massa, Juan A. v. E.N.*, Jurisprudencia Argentina [J.A.] (2007-II-185) (Arg.).

** In February 2002, the President issued a decree, pursuant to which all bank deposits were “pesified” at \$1.40 pesos per US\$1 and revalued at various time periods. This order also provided for the application of an index of inflationary correction (“CER”) to all rescheduled bank deposits. Because Decree 214/2002 “pesified” loans with the financial system at \$1.00 peso per US\$1—a measure that greatly benefited local and foreign corporations—the overall system was known as “asymmetric pesification.” The free exchange rate, on the other hand, which at the time was approximately \$2.80 pesos per US\$1, doubled the “pesification” rate for depositors; the difference was even larger for debtors.

Starr International Company, Inc. v. The United States

United States Court of Federal Claims

121 Fed. Cl. 428 (2015)

WHEELER, Judge.

. . . Starr challenges the Government’s financial rescue and takeover of American International Group, Inc. (“AIG”) that began on September 16, 2008. Before the takeover, Starr was one of the largest shareholders of AIG common stock. Starr alleges in its own right and on behalf of other AIG shareholders that the Government’s actions in acquiring control of AIG constituted a taking without just compensation and an illegal exaction, both in violation of the Fifth Amendment to the U.S. Constitution. . . . Starr claims damages in excess of \$40 billion. . . .

The weight of the evidence demonstrates that the Government treated AIG much more harshly than other institutions in need of financial assistance. In September 2008, AIG’s international insurance subsidiaries were thriving and profitable, but its Financial Products Division experienced a severe liquidity shortage due to the collapse of the housing market. Other major institutions, such as Morgan Stanley, Goldman Sachs, and Bank of America, encountered similar liquidity shortages. Thus, while the Government publicly singled out AIG as the poster child for causing the September 2008 economic crisis, the evidence supports a conclusion that AIG actually was *less* responsible for the crisis than other major institutions. The notorious credit default swap transactions were very low risk in a thriving housing market, but they quickly became very high risk when the bottom fell out of this market. Many entities engaged in these transactions, not just AIG. . . . The Government did not demand shareholder equity, high interest rates, or voting control of any entity except AIG. Indeed, with the exception of AIG, the Government has never demanded equity ownership from a borrower

The Government did realize a significant benefit in nationalizing AIG. Since most of the other financial institutions experiencing a liquidity crisis were counterparties to AIG transactions, the Government was able to minimize the ripple effect of an AIG failure by using AIG’s assets to make sure the counterparties were paid in full on these transactions. . . . AIG’s benefit was to avoid bankruptcy, and to “live to fight another day.”

Having considered the entire record, the Court finds in Starr’s favor on the illegal exaction claim. With the approval of the Board of Governors, the Federal Reserve Bank of New York [(“FRBNY”)] had the authority to serve as a lender of last resort under . . . the Federal Reserve Act in a time of “unusual and exigent

circumstances,” 12 U.S.C. § 343 (2006), and to establish an interest rate “fixed with a view of accommodating commerce and business,” 12 U.S.C. § 357. However, [the Federal Reserve Act] did not authorize the Federal Reserve Bank to acquire a borrower’s equity The Court will not read into this incidental powers clause a right that would be inconsistent with other limitations in the statute. . . .

A ruling in Starr’s favor on the illegal exaction claim, finding that the Government’s takeover of AIG was unauthorized, means that Starr’s Fifth Amendment taking claim necessarily must fail. If the Government’s actions were not authorized, there can be no Fifth Amendment taking claim. . . .

The Government defends on the basis that AIG voluntarily accepted the terms of the proposed rescue While it is true that AIG’s Board of Directors voted to accept the Government’s proposed terms on September 16, 2008 to avoid bankruptcy, the board’s decision resulted from a complete mismatch of negotiating leverage in which the Government could and did force AIG to accept whatever punitive terms were proposed. . . . AIG was at the Government’s mercy.

Turning to the issue of damages, there are a few relevant data points that should be noted. . . . Starr’s claim for shareholder loss is premised upon AIG’s stock price on September 24, 2008, which is the first stock trading day when the public learned all of the material terms of the FRBNY/AIG Credit Agreement. The September 24, 2008 closing price of \$3.31 per share also is a conservative choice because it represents the lowest AIG stock price during the period September 22-24, 2008. Yet, this stock price irrefutably is influenced by the \$85 billion cash infusion made possible by the Government’s credit facility. To award damages on this basis would be to force the Government to pay on a propped-up stock price that it helped create with an \$85 billion loan.

In the end, the Achilles’ heel of Starr’s case is that, if not for the Government’s intervention, AIG would have filed for bankruptcy. In a bankruptcy proceeding, AIG’s shareholders would most likely have lost 100 percent of their stock value. . . .

[A] troubling feature of this outcome is that the Government is able to avoid any damages notwithstanding its plain violations of the Federal Reserve Act. . . . Any time the Government saves a private enterprise from bankruptcy through an emergency loan, as here, it can essentially impose whatever terms it wishes without fear of reprisal. Simply put, the Government often may ignore the conditions and restrictions of [the Federal Reserve Act] knowing that it will never be ordered to pay damages. With some reluctance, the Court must leave that

question for another day. The end point for this case is that, however harshly or improperly the Government acted in nationalizing AIG, it saved AIG from bankruptcy. Therefore, application of the economic loss doctrine results in damages to the shareholders of zero. . . .

One question for American courts after *Starr* is whether the opinion's logic would have warranted an injunction to stop the government rescue in 2008. Could a lone shareholder have held up the rescue of a firm occupying as central a place in the world's economy as AIG? As Judge Wheeler observed, AIG was a critical counterparty in credit default swaps to "most of the other financial institutions experiencing a liquidity crisis." It occupied an extraordinarily important node in the marketplace. And yet if Judge Wheeler's reasoning is correct, a single objecting shareholder might conceivably obstruct the rescue of a vital piece of the global economy.

The standard move in such situations is to follow Guido Calabresi and A. Douglas Melamed and to protect the legal entitlement with a damages remedy rather than an injunction. Calabresi and Melamed called the former a "liability rule" and the latter a "property rule." And they explained that

a very common reason, perhaps the most common one, for employing a liability rule rather than a property rule to protect an entitlement is that market valuation of the entitlement is deemed inefficient, that is, it is either unavailable or too expensive compared to a collective valuation.*

The logic is that when, as in the AIG case, individual rights stand in the way of great social benefits, a damages remedy allows the law to solve the otherwise thorny problem.

One difficulty is that in modern economic emergency situations like the AIG case, the actual damages of critical counterparties in an interconnected world will often be zero, since the very reason rescue is necessary is that the alternative is bankruptcy. Does the fact of zero damages suggest that no entitlement was violated after all?

* Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARVARD LAW REVIEW 1089, 1110 (1972).

CITIZENSHIP

In the wake of the Paris attacks in November 2015 and other terrorist attacks around the world, the question of whether the state has the power to revoke citizenship has renewed saliency. Hannah Arendt famously argued that citizenship is “the right to have rights.” Through the lens of the United Kingdom, the United States, Canada, and France, this section looks at what it means to be a “citizen.” In what contexts is the revocation of citizenship by the state justifiable? What is the role of judges and courts when citizenship is revoked?

Pham v. The Secretary of State for the Home Department Supreme Court of the United Kingdom [2015] UKSC 19 (March 25, 2015)

Before Lord Neuberger, President; Lady Hale, Deputy President; Lord Mance; Lord Wilson; Lord Sumption; Lord Reed; Lord Carnwath

LORD CARNWATH: (with whom Lord Neuberger, Lady Hale and Lord Wilson agree)

1. The central issue in this appeal is whether the Secretary of State was precluded under the British Nationality Act 1981 from making an order depriving the appellant of British citizenship because to do so would render him stateless. This turns on whether (within the meaning of article 1(1) of the 1954 Convention relating to the Status of Stateless Persons) he was “a person who is not considered as a national by any state under the operation of its law.” If this issue is decided against him he also seeks to argue that the decision was disproportionate and therefore unlawful under European law. . . .

2. The appellant was born in Vietnam in 1983 and thus became a Vietnamese national. In 1989, after a period in Hong Kong, the family came to the UK, claimed asylum and were granted indefinite leave to remain. In 1995 they acquired British citizenship. Although none of them has ever held Vietnamese passports, they have taken no steps to renounce their Vietnamese nationality. . . . Between December 2010 and July 2011 he was in the Yemen, where, according to the security services but denied by him, he is said to have received terrorist training from Al Qaida. It is the assessment of the security services that at liberty he would pose an active threat to the safety and security of this country. That assessment has not yet been subject to judicial examination.

3. On 22 December 2011 the Secretary of State served notice of her decision to make an order under section 40(2) of the British Nationality Act 1981* depriving the appellant of his British citizenship, being satisfied that this would be “conducive to the public good.” She considered that the order would not make him stateless . . . because he would retain his Vietnamese citizenship. . . . Thereafter, the Vietnamese government has declined to accept him as a Vietnamese citizen.

4. The United States of America have asked for him to be extradited to stand trial in that country. . . .

21. . . . [A]cademic texts and international instruments on this subject [of statelessness] have drawn a distinction between *de jure* and *de facto* statelessness: that is, between those who have no nationality under the laws of any state, and those who have such nationality but are denied the protection which should go with it. . . .

24. We have the advantage of even more recent guidance from the [United Nations High Commissioner for Refugees] UNHCR in the form of a handbook issued in June 2014, which draws on the results of the expert meetings and the earlier guidance. The following passage appears under the heading “not considered as a national . . . under the operation of its law”:

Meaning of ‘law’

The reference to ‘law’ in article 1(1) should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice.

When is a person ‘not considered as a national’ under a State’s law and practice?

Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an

* The British Nationality Act 1981 provides:

Section 40(2): “The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.”

Section 40(4): “The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.”

individual's case in practice and any review/appeal decisions that may have had an impact on the individual's status. This is a mixed question of fact and law. . . .

34. . . . It is clear that, as understood by the UNHCR at least, the term "law" is to be interpreted broadly as including ministerial decrees or practices, even if not subject to court review, and even where they appear to depart from the substance of the domestic law. Familiar principles of the rule of law, as it would be understood in this country, are not the governing consideration. . . .

36. . . . The earlier findings by [the Special Immigration Appeals Commission] SIAC . . . indicate that the appellant did not automatically lose his Vietnamese citizenship on acquiring British nationality, and that no action has been taken by the Vietnamese government . . . to deprive him of that citizenship. Nor is there any evidence that the government issued a ministerial decree, or adopted any other form of practice or position which could be treated as equivalent to "law" Rather the implication is that it has simply declined, no doubt for policy reasons, to make any formal decision on the appellant's status, whether under the operation of its own nationality law or at all. . . .

39. These issues raise a new question as to whether the Secretary of State's decision fell within the ambit of European law, given that its effect would be to deprive him not only of British citizenship, but also of citizenship of the European Union; and if so what if any consideration must be given to the "proportionality" of the Secretary of State's action under well-established principles of European law. . . .

62. . . . If an issue of proportionality under EU law is properly raised before SIAC by amendment of the present grounds of appeal, it would in my view be appropriate and helpful for SIAC to reach a view on its merits, even if only on a hypothetical basis. That would ensure that any future consideration by the higher courts will be informed by a clear understanding of the practical differences if any (substantive or procedural) from the remedies otherwise available. . . .

LORD MANCE: (with whom Lord Neuberger, Lady Hale and Lord Wilson agree)

72. . . . The appellant's case on Union law rests on two premises: the first is that Union law applies in some relevant respect to a decision by the Secretary of State to remove the appellant's British citizenship and, second, assuming that it does, that it offers advantages over the relevant domestic law which could make

the difference between upholding and setting aside the Secretary of State's decision. . . .

84. [I]t is clearly very arguable that there are under the Treaties jurisdictional limits to European Union competence in relation to the grant or withdrawal by a Member State of national citizenship. Fundamental though its effects are where it exists, citizenship of the Union is under the Treaties a dependant or derivative concept—it depends on or derives from national citizenship. . . .

85. There is nothing on the face of the Treaties to confer on the EU, or on a Union institution such as the Court of Justice, any power over the grant or withdrawal by a Member State of national citizenship, even though such grant or withdrawal has under the Treaties automatic significance in terms of European citizenship. . . .

LORD SUMPTION: (with whom Lord Neuberger, Lady Hale and Lord Wilson agree)

104. . . . It is hardly satisfactory to apply a proportionality test to the decision so far as it affects his European citizenship but not so far as it affects his British nationality when the decision is a single indivisible act. An alternative approach would be to regard European citizenship as a mere attribute of national citizenship. That would be consistent with the fact that it is wholly parasitic on national citizenship. But it is not consistent with some of the wider dicta of the Court of Justice of the European Union treating European citizenship as “fundamental.”

105. However, although English law has not adopted the principle of proportionality generally, it has for many years stumbled towards a concept which is in significant respects similar, and over the last three decades has been influenced by European jurisprudence even in areas of law lying beyond the domains of EU and international human rights law. . . .

In *Perez v. Brownell*, the petitioner challenged the constitutionality of certain provisions of the Nationality Act of 1940, which were used to deny him his U.S. citizenship. In 1958, the U.S. Supreme Court held some voluntary actions that Congress deemed harmful to the country were sufficient grounds for revoking U.S. citizenship, citing Congress's implied power to direct “foreign affairs.” In this case, the voluntary action was voting in the election of a foreign nation.

Perez v. Brownell
Supreme Court of the United States
356 U.S. 44 (1958)

Mr. Justice FRANKFURTER delivered the opinion of the Court.

Petitioner, a national of the United States by birth, has been declared to have lost his American citizenship [under Section 410 of] the Nationality Act [which provided that] . . . :

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory

Petitioner was born in Texas in 1909 . . . [and in 1920] he moved with his parents to Mexico, where he lived, apparently without interruption, until 1943. In 1928 he was informed that he had been born in Texas. At the outbreak of World War II, petitioner knew of the duty of male United States citizens to register for the draft, but he failed to do so. In 1943 he applied for admission to the United States as an alien railroad laborer, stating that he was a native-born citizen of Mexico, and was granted permission to enter on a temporary basis. He returned to Mexico in 1944 and shortly thereafter applied for and was granted permission, again as a native-born Mexican citizen, to enter the United States temporarily to continue his employment as a railroad laborer. Later in 1944 he returned to Mexico once more. In 1947 petitioner applied for admission to the United States at El Paso, Texas, as a citizen of the United States. At a Board of Special Inquiry hearing . . . , he admitted having remained outside of the United States to avoid military service and having voted in political elections in Mexico. He was ordered excluded on the ground that he had expatriated himself; this order was affirmed on appeal. In 1952 petitioner, claiming to be a native-born citizen of Mexico was permitted to enter the United States as an alien agricultural laborer. He surrendered in 1953 to immigration authorities in San Francisco as an alien unlawfully in the United States but claimed the right to remain by virtue of his American citizenship. After a hearing before a Special Inquiry Officer, he was ordered deported as an alien not in possession of a valid immigration visa

Congress in 1868 formally announced the traditional policy of this country that it is the ‘natural and inherent right of all people’ to divest themselves of their allegiance to any state. . . .

The inference is fairly to be drawn from the congressional history . . . that, in making voting in foreign elections (among other behavior) an act of expatriation, Congress was seeking to effectuate its power to regulate foreign affairs. The legislators . . . were concerned about actions by citizens in foreign countries that create problems of protection and are inconsistent with American allegiance. Moreover, we cannot ignore the fact that embarrassments in the conduct of foreign relations were of primary concern

Broad as the power in the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations. Since Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means—in this case, withdrawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs. . . .

Experience amply attests that in this day of extensive international travel, rapid communication and widespread use of propaganda, the activities of the citizens of one nation when in another country can easily cause serious embarrassments to the government of their own country as well as to their fellow citizens. We cannot deny to Congress the reasonable belief that these difficulties might well become acute, to the point of jeopardizing the successful conduct of international relations, when a citizen of one country chooses to participate in the political or governmental affairs of another country. The citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government It follows that such activity is regulable by Congress under its power to deal with foreign affairs. . . .

The critical connection between [American citizens voting in foreign elections] and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem. Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

Of course, Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily. . . [which is to] engage in conduct to which Acts of

Congress attached the consequence of denationalization irrespective of—and, in those cases, absolutely contrary to—the intentions and desires of the individuals [to lose citizenship]. . . .

[Mr. Chief Justice WARREN, with whom Mr. Justice BLACK and Mr. Justice DOUGLAS joined, filed a dissenting opinion. Chief Justice Warren argued that the “fatal defect in the statute” was that it was not limited to situations “that may rationally be said to constitute an abandonment of citizenship.” He described voting in foreign elections as an “equivocal act,” with no implication as to allegiance, and he noted that aliens became ineligible to vote in U.S. presidential elections only in 1928, and that some 22 states had permitted aliens to vote as well. Moreover, of the “84 nations whose nationality laws ha[d] been compiled by the United Nations,” the U.S. was alone in making foreign voting a predicate to expatriation. The Chief Justice concluded that the statute thus violated the Fourteenth Amendment.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK joined, also filed a dissenting opinion, asserting that given the Constitution’s express provisions concerning citizenship but silence as to expatriation, Congress could not expatriate a native-born citizen absent their voluntary renunciation and transfer of loyalty to another country. Mr. Justice WHITTAKER separately filed a Memorandum in dissent, in which he relied on the grounds that the statute as written went beyond Congress’s permissible power to expatriate citizens.]

* * *

The same day, the Court issued *Trop v. Dulles*, 356 U.S. 86 (1958), in which the Chief Justice, writing for the plurality, held that a statute enabling denaturalization of a soldier based on wartime desertion was unconstitutional in violation of the Eighth Amendment’s prohibition on cruel and unusual punishment. Justice Brennan, who had joined the majority in *Perez*, concurred with the Chief Justice in *Trop*, instead concluding that Congress unconstitutionally exceeded its authority under its war powers. *Trop* is famously invoked for its discussion of the “evolving standards of decency” that inform the Eighth Amendment’s prohibition on “cruel and unusual punishment.”

Nearly a decade after *Perez v. Brownell*, its key holding was reversed by *Afroyim v. Rusk*, as excerpted below.

Afroyim v. Rusk
Supreme Court of the United States
387 U.S. 253 (1967)

Mr. Justice BLACK delivered the opinion of the Court. . . .

Petitioner . . . immigrated to this country in 1912 and became a naturalized American citizen in 1926. He [left for Israel and] . . . voluntarily voted in an election for the Israeli Knesset [in 1951]. In 1960, when he applied for renewal of his United States passport, the Department of State refused to grant it on the sole ground that he had lost his American citizenship by virtue of s 401(e) of the Nationality Act of 1940 which provides that a United States citizen shall ‘lose’ his citizenship if he votes ‘in a political election in a foreign state.’ Petitioner then brought this declaratory judgment action in federal district court alleging that s 401(e) violates both the Due Process Clause of the Fifth Amendment [which provides that “No person shall . . . be deprived of life, liberty, or property, without due process of law”] and [section 1, clause 1] of the Fourteenth Amendment . . . which [provides that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”] . . .

[N]either the Fourteenth Amendment nor any other provision of the Constitution expressly grants Congress the power to take away that citizenship once it has been acquired Since the Government took the position that s 401(e) empowers it to terminate citizenship without the citizen’s voluntary renunciation, petitioner argued that this section is prohibited by the Constitution. The District Court and the Court of Appeals, rejecting this argument, held that Congress has constitutional authority forcibly to take away citizenship for voting in a foreign country based on its implied power to regulate foreign affairs. Consequently, petitioner was held to have lost his American citizenship regardless of his intention not to give it up. This is precisely what this Court held in *Perez v. Brownell*. . . .

The fundamental issue before this Court here, as it was in *Perez*, is whether Congress can consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up. The majority in *Perez* held that Congress could do this because withdrawal of citizenship is ‘reasonably calculated to effect the end that is within the power of Congress to achieve.’ . . .

[W]e reject the idea . . . that, aside from the Fourteenth Amendment, Congress has any general power . . . to take away an American citizen’s citizenship without his assent. This power cannot, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from

theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. . . . The Constitution of course, grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power. . . .

[W]hen the Fourteenth Amendment passed, . . . the Senate insisted on inserting a constitutional definition and grant of citizenship [because they wanted] . . . to provide an insuperable obstacle against every governmental effort to strip Negroes of their newly acquired citizenship. . . .

This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted. Though the framers of the Amendment were not particularly concerned with the problem of expatriation, it seems undeniable from the language they used that they wanted to put citizenship beyond the power of any governmental unit to destroy. . . .

To uphold Congress' power to take away a man's citizenship because he voted in a foreign election in violation of s 401(e) would be equivalent to holding that Congress has the power to 'abridge,' 'affect,' 'restrict the effect of,' and 'take away' citizenship.' Because the Fourteenth Amendment prevents Congress from doing any of these things, . . . the Government is without power to rob a citizen of his citizenship under s 401(e). . . .

Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.

Perez v. Brownell is overruled. The judgment is reversed. . . .

[Mr. Justice HARLAN, whom Mr. Justice CLARK, Mr. Justice STEWART, and Mr. Justice WHITE joined, dissented.]

Terrorist Expatriation Bill

S.3327: 111th Session of the United States Congress
(Introduced May 6, 2010)*

. . . Section 349 of the Immigration and Nationality Act . . . [is amended]
in subsection (a) . . . [by adding at the end the following:]

- (8) (A) providing material support or resources to a foreign terrorist organization;
 - (B) engaging in, or purposefully and materially supporting, hostilities against the United States; or
 - (C) engaging in, or purposefully and materially supporting, hostilities against any country or armed force that is—
 - (i) directly engaged along with the United States in hostilities engaged in by the United States; or
 - (ii) providing direct operational support to the United States in hostilities engaged in by the United States; and . . .
- (c) For purposes of this section—
- (1) the term ‘foreign terrorist organization’ means an organization so designated by the Secretary [of State] . . .
 - (2) the term ‘hostilities’ means any conflict subject to the laws of war; and . . .
 - (3) the term ‘material support or resources’ . . . [means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.];

* This bill was introduced in the United States Senate; it was not enacted.

Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien

Audrey Macklin (2014)*

Denationalization is not only a political analogue to death; it may also be a prelude to it. Once outside the territory, the state has neither legal claim nor legal duty to the former citizen and is relieved of any obligation to object if another state kills one of its nationals. . . . Citizenship revocation provides the opportunity to assay the legal implications that flow from regarding citizenship as a privilege. . . .

The 2013 UK Supreme Court decision in *Secretary of State for the Home Department v Al-Jedda* affirmed that the prohibition on creating statelessness is violated when the Home Secretary issues an order for revocation and the individual does not, at that moment, possess another nationality. The Home Secretary argued unsuccessfully that al-Jedda (a naturalized UK citizen) was eligible to reclaim his former Iraqi citizenship as of right and that his failure to do so made him the author of his own statelessness. . . . The judgment also prompted the British government to amend the [British Nationality Act] to restore the power to render people stateless. The 2014 reform to the British Nationality Act 1981 now empowers the Home Secretary to render naturalized citizens stateless (beyond cases of fraud) if, inter alia, the person “has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom” and the Secretary of State believes on reasonable grounds that the individual is able to acquire citizenship elsewhere. The new provisions are retrospective. Whether the 2014 legislative reform complies with the UK’s obligations under the 1961 Statelessness Convention remains contentious.

Since 2006, the UK has stripped at least fifty-three UK nationals of citizenship. Twenty-seven were deprived on grounds of “conducive to the public good” . . . All but one of the subjects of national security revocations were Muslim males, and in all but two known cases since 2006, the Home Secretary issued the order when the person was abroad. . . .

Notably since 2001, the US has not attempted to use its existing expatriation power against US citizens accused or convicted of terrorist crimes . . .

Both the UK and the US regimes governing citizenship revocation differ from the Canadian model in significant ways. The UK and US models formally

* Excerpted from Audrey Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*, 40 QUEEN’S LAW JOURNAL 1 (2014).

clothe citizenship revocation for misconduct in the rhetoric of risk prevention or voluntary renunciation, respectively. Under Canada's Bill C-24, citizenship revocation is explicitly punitive and non-volitional

In 2014, Canada passed the Strengthening Canadian Citizenship Act (Bill C-24), which expanded executive power to denationalize birthright and naturalized citizens. The Act made citizenship harder to obtain and easier to lose. It expanded revocability by adding new groups and creating a tiered system in which revocation is applied differently to dual nationals, birthright citizens, and naturalized citizens.

However, in 2015, Canada's Liberal party campaigned on a platform committed to repealing certain elements of the newly passed legislation. In June, the House of Commons passed Bill C-6, also excerpted below, which removed some of the grounds for revocation by repealing portions of Bill C-24 that created a ground of citizenship revocation for citizens who commit actions that are contrary to the national interest of Canada, including terrorism, high treason, spying offences, or membership in an armed force or organized arm group engaged in armed conflict with Canada. The bill then passed its first reading in the Senate, which adjourned thereafter. The legislation is expected to be enacted this fall after Parliament returns.

Bill C-24: The Strengthening Canadian Citizenship Act
Statutes of Canada 2014: Chapter 22
(Assented to June 19, 2014)

. . . 10. (1) Subject to subsection 10.1(1), the Minister may revoke a person's citizenship or renunciation of citizenship if the Minister is satisfied on a balance of probabilities that the person has obtained, retained, renounced, or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances.

(2) The Minister may revoke a person's citizenship if the person, before or after the coming into force of this subsection and while the person was a citizen,

(a) was convicted under . . . the *Criminal Code* of treason and sentenced to imprisonment for life or was convicted of high treason under that section;

- (b) was convicted of a terrorism offence as defined in . . . the *Criminal Code*—or an offence outside Canada that, if committed in Canada, would constitute a terrorism offence as defined in that section—and sentenced to at least five years of imprisonment;
- (c) was convicted of an offence under . . . *the National Defence Act* and sentenced to imprisonment for life because the person acted traitorously; . . .

(3) Before revoking a person's citizenship or renunciation of citizenship, the Minister shall provide the person with a written notice that specifies

- (a) the person's right to make written representations;
- (b) the period within which the person may make his or her representations and the form and manner in which they must be made; and
- (c) the grounds on which the Minister is relying to make his or her decision.

(4) A hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required.

(5) The Minister shall provide his or her decision to the person in writing. . . .

10.1. . . . (2) If the Minister has reasonable grounds to believe that a person, before or after the coming into force of this subsection and while the person was a citizen, served as a member of an armed force of a country or as a member of an organized armed group and that country or group was engaged in an armed conflict with Canada, the person's citizenship may be revoked only if the Minister—after giving notice to the person— seeks a declaration . . . that the person so served, before or after the coming into force of this subsection and while they were a citizen, and the Court makes such a declaration. . . .

10.4. (1) Subsections 10(2) and 10.1(2) do not operate so as to authorize any decision, action or declaration that conflicts with any international human rights instrument regarding statelessness to which Canada is signatory.

(2) If an instrument referred to in subsection (1) prohibits the deprivation of citizenship that would render a person stateless, a person who claims . . . [it] would operate in the manner described in subsection (1) must prove, on a balance of probabilities, that the person is not a citizen of any country of which the Minister has reasonable grounds to believe the person is a citizen. . . .

* * *

In response to a question about Bill C-24, Prime Minister Justin Trudeau was quoted as saying that “as soon as you make citizenship for some Canadians conditional on good behaviour, you devalue citizenship for everyone.”* He also commented that the notion that a government could strip citizenship rights because of unlawful actions was “very, very scary” and that “anyone convicted of . . . terrorism or an act of war or an offence against Canada” already faces lifetime imprisonment. Finding the alternative of “a plane ticket to Syria” as undesirable, Trudeau reportedly said to Canada’s largest Islamic conference that a Liberal Party-led government would repeal C-24.

Bill C-6: An Act to Amend the Citizenship Act of Canada
(Passed by the House of Commons on May 5, 2016)

This enactment amends the Citizenship Act to, among other things,

(a) remove the grounds for the revocation of Canadian citizenship that relate to national security;

(b) remove the requirement that an applicant intend, if granted citizenship, to continue to reside in Canada;

(c) reduce the number of days during which a person must have been physically present in Canada before applying for citizenship and provide that, in the calculation of the length of physical presence, the number of days during which the person was physically present in Canada before becoming a permanent resident may be taken into account;

(d) limit the requirement to demonstrate knowledge of Canada and of one of its official languages to applicants between the ages of 18 and 54; and

(e) authorize the Minister to seize any document that he or she has reasonable grounds to believe was fraudulently or improperly obtained or used or could be fraudulently or improperly used. . . .

* Ryan Maloney, *Trudeau Says Terrorists Shouldn’t Be Stripped of Citizenship*, HUFFINGTON POST (September 28, 2015), available at http://www.huffingtonpost.ca/2015/09/28/bill-c-24-trudeau-audio-conservatives_n_8206798.html.

Reflections on French Initiatives to Denaturalize Citizens in the Wake of Terror

Patrick Weil (2016)

The excerpts below present three versions of a French Constitutional Amendment that was presented in the wake of the Paris attacks in November 2015.

To enact a constitutional amendment in France, both Chambers of Parliament must approve identical versions of the text. If both houses approve the same text, the President can then call a joint session of Parliament assembled in Congress at Versailles. To pass, the amendment must get a three-fifths majority vote (555 of 925 elected officials).

On November 16, three days after the Paris attacks, President François Hollande announced in a special meeting of French Congress in Versailles that he wanted the Congress to pass an amendment to the Constitution that would expand the government's emergency powers under the Constitution. In addition, Hollande proposed to extend revocation of citizenship to native-born French citizens only if they had another citizenship in order to prevent statelessness.

In the following weeks, it appeared that President Hollande wanted to include the denationalization provision as an amendment to the Constitution, and he announced the proposal on December 23. The constitutional amendment proposed by the Government would have deprived native-born citizens of their French citizenship if they possessed another citizenship and had been convicted of "serious crimes against the nation."

Hollande's initial proposal provoked a huge reaction both among citizens who felt they were targeted (those who were descendants of foreigners) and the majority of the socialist and left-wing Members of the National Assembly who refused to support an amendment that would create two categories of citizens in the Constitution, in contradiction with the fundamental republican principle of equality before the Law, affirmed by the article 1 of the French Constitution.* The President of the Judiciary Committee (as of Spring 2016, the Minister of Justice) Jean-Jacques Urvoas said he would not sponsor the bill as is the protocol in the French Parliament. Therefore, on January 27, 2016, Hollande changed the amendment's language.

* Article 1 of the French Constitution provides: "France is an indivisible, secular, democratic and social republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organized on a decentralized basis. Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions."

His second version stated that deprivation would affect all French citizens (regardless of whether they had dual citizenship). Moreover, this version was negotiated with former President Nicholas Sarkozy, who heads the main opposition party. “The republicans” would have made it possible for a citizen to be deprived of citizenship not only for a crime but also a misdemeanor “against the life of the nation,” an undefined category.

Given that the new version could strip citizenship of non-dual citizens, it put at risk the basic human right to have a nationality in accordance with the Universal Declaration of Human Rights* and the 1954 UN Convention Relating to the Status of Stateless Persons.** Moreover, because the amendment stated that any “misdemeanor against the life of the nation” could be a ground for deprivation of citizenship, the new provision would have also infringed upon citizens’ civil liberties by allowing future Parliaments to create new grounds for deprivation under this broad heading.

The National Assembly voted on this version, but enough members from both left-wing and right-wing parties either voted against it or abstained (250 of 577 members), hindering making it difficult for the Government to obtain the necessary three-fifths majority needed to pass the amendment. The right-wing controlled Senate was concerned in particular about the National Assembly’s version of the text which would have created statelessness among persons who do not hold dual citizenship and would put at risk civil liberties. However, the Senate was also concerned about why the provision was in the form of a constitutional amendment (which would constrain the power of the Parliament) as opposed to a statute. Since Hollande’s announcement, this question has been expressed through the argument that the Constitution should unite, not divide.

Hollande’s decision to choose a constitutional amendment rather than a legislative measure was rooted in the advice from the General Secretary of the French Government and of the Conseil d’État, which had noted that in the history of the republic, no French-born citizen had ever been deprived of her citizenship as punishment. The Government feared that the Constitutional Court would, therefore, construe the Constitution as barring deprivation of citizenship as punishment, unless the Constitution expressly permits it. The Conseil d’État also advised that the Constitution mandates a guarantee of rights (Article 16 of the French 1789 Declaration of Rights of Man and of the Citizen). The Conseil d’État advised that

* Article 15(1) of the Universal Declaration of Human Rights provides: “Everyone has the right to a nationality.”

** Article 1 of the UN Convention Relating to the Status of Stateless Persons provides: “For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.”

only a constitutional amendment could deprive citizen's of the "right to have rights."

Was the Conseil d'État correct? First, France has revoked the citizenship of Nazis and Fascists, and later during the Cold War, Communists based on a 1938 provision, which remains in the Civil Code as article 23-7. France had done so with the Conseil d'État's approval. Moreover, the Conseil d'État itself has said in full-court decisions related to that provision that deprivation of citizenship is a form of punishment.* (A similar argument was made in the U.S. Supreme Court decision of *Trop v. Dulles* in 1958.)** Second, a guarantee of rights is not always at stake in denationalization cases because some dual citizens have their effective rights within another citizenship meaning and, therefore, do not lose their "right to have rights" if they lose their French citizenship.

The right-wing majority of the Senate knew that the Socialists in the National Assembly would not approve a bill that would reestablish a two-tiered system between those with dual citizenship and those without. Therefore, with the active agreement of left-wing Senators who opposed the constitutional amendment, the Senate decided to vote on a version of the amendment that resembled the first version proposed by Hollande with the full understanding that they were killing the possibility of any agreement between the two chambers.

Therefore, despite the fact that 80% of the public supported Hollande's proposal, the majority of members of Parliament rejected it. The rejection was based on principles—equality before the law and the basic human right to have a nationality, successively endorsed by different wings of the Parliament. From the right-wing perspective, their conviction that Parliament could still pass a statute that allowed for deprivation, without a constitutional amendment, was an important factor. However, at the end of the day, both chambers viewed President Hollande's proposal as divisive, untenable and/or unnecessary.***

* See *Époux Speter*, Assembly of the Conseil d'État (March 7, 1958); *Sieur Godek*, Assembly of the Conseil d'État (February 4, 1966). In 1978, the Conseil d'État in a special report (*Études et Documents du Conseil d'État*) on its jurisprudence on citizenship, stated that citizenship loss—the purpose of the 1938 provision—was first an exercise of a freedom but could also be a punishment.

** 356 U.S. 86 (1958).

*** For more information, see Patrick Weil, *La République, contre François Hollande*, LE MONDE (April 1, 2016), available at <http://weil.blog.lemonde.fr/2016/04/01/la-republique-contre-francois-hollande/>.

French Citizenship Denaturalization Proposals (2015, 2016)

French Government Bill (Introduced December 23, 2015)

Original Text

L'article 34 de la Constitution est ainsi modifié:

1° Le troisième alinéa est remplacé par les dispositions suivantes:—la nationalité, y compris les conditions dans lesquelles une personne née française qui détient une autre nationalité peut être déchue de la nationalité française lorsqu'elle est condamnée pour un crime constituant une atteinte grave à la vie de la Nation.

English Translation:

In Article 34 of the French Constitution [which enumerates the domains that statutes shall determine the rules of] the third paragraph is replaced by the following provision:

Nationality, including the conditions by which a native-born citizen who possesses another citizenship can be deprived of French citizenship, if condemned for a serious crime against the life of the Nation.

French National Assembly Version voted on February 10, 2016 (317 yes, 199 no, 51 abstentions)

Original Text

La nationalité, y compris les conditions dans lesquelles une personne peut être déchue de la nationalité française ou des droits attachés à celle-ci lorsqu'elle est condamnée pour un crime ou un délit constituant une atteinte grave à la vie de la Nation.

English Translation

Nationality, including the conditions by which a person can be deprived of French citizenship or of related rights, if condemned for a serious crime or a misdemeanor against the life of the nation.

French Senate

Version voted on March 22, 2016
(176 yes, 161 no, 11 abstentions)

Original Text

La nationalité, dont la déchéance, prononcée par décret pris sur avis conforme du Conseil d'État, ne peut concerner qu'une personne condamnée définitivement pour un crime constituant une atteinte grave à la vie de la Nation et disposant d'une autre nationalité que la nationalité française

English Translation

Nationality, including deprivation—carried out by decree taken after approval of the Conseil d'État—only to a person definitively condemned for a serious crime against the life of the Nation and who possesses another citizenship.

Turkey is yet another example where the question of revoking citizenship has been raised. With the Turkish government and the outlawed Kurdistan Workers' Party (PKK) in a heated conflict that has claimed an estimated 40,000 lives since 1984, Turkey's President Tayyip Recep Erdogan has reportedly proposed stripping the citizenship of supporters of the PKK.* He was quoted as saying in a speech to lawyers in Ankara that “[t]o prevent them from doing harm we must take all measures, including stripping supporters of the terrorist organization of their citizenship” and that “[t]hese people don't deserve to be our citizens. We are not obliged to carry anyone engaged in the betrayal of their state and their people.” The day before, President Erdogan had ruled out new peace talks with the PKK, which has been designated an extremist organization by Turkey, the European Union, and the United States. A ceasefire negotiated in October 2012 collapsed in July 2015, with the PKK launching attacks against Turkish authorities in southeast Turkey and its affiliate, the Kurdistan Freedom Falcons claiming responsibility for two recent bomb blasts in Ankara.

* Jack Moore, *Erdogan: Strip PKK Supporters of Turkish Citizenship*, NEWSWEEK (April 6, 2016), available at <http://www.newsweek.com/erdogan-strip-pkk-supporters-turkish-citizenship-444637>.

RELIGIOUS ACCOMMODATION
AND EQUALITY

DISCUSSION LEADERS

REVA SIEGEL, DOUGLAS NEJAIME,
AND MANUEL CEPEDA-ESPINOSA

IV. RELIGIOUS ACCOMMODATION AND EQUALITY

DISCUSSION LEADERS:

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APPROACHES TO RELIGIOUS ACCOMMODATION

Freedom of religion protects the right of individuals to hold beliefs without persecution. In many legal orders, freedom of religion is understood to protect more: the freedom to *act* in accordance with religious beliefs. In these jurisdictions, judges must determine when and how government is obliged to accommodate religiously motivated conduct when that conduct contravenes laws of general application. Under what circumstances does the government's interest in uniform enforcement of the law give way to an individual's right to act on her religious convictions?

This Chapter explores religious accommodation with special attention to questions of equality. The accommodation of religiously motivated conduct is commonly understood to be part of religious liberty, but in some legal systems, judges understand accommodation to protect the equality of religious practitioners as well as their liberty of conscience.

Considerations of equality arise when the polity is divided in religious affiliation, with some faiths claiming many more members and much greater political authority than others. In these circumstances, judges may understand religious accommodation as redressing the hostility or indifference of the majority to the minority. In adopting a law of general application, has the government valued and respected the religious practices of minority faiths the ways it values and respects the religious practices of majority faiths?

The accommodation for religion can also stand in direct conflict with equality. Religious accommodation can entrench inequalities within a group. And religious accommodation can entrench inequality between groups. This is especially likely when claimants seek religious exemptions from laws that promote equality for racial minorities and other groups. If granting a religious exemption would harm those individuals protected by the equality mandate, is that a sufficient reason to deny the exemption?

The Chapter begins by examining how courts in Germany, the United States, Canada, South Africa, and other jurisdictions evaluate claims for religious exemption from laws of general application, such as laws that regulate the use of drugs or the safety of schools. How should judges weigh individual claims for religious accommodation against a society's interest in enforcing the legislation? What are the costs of accommodating the religious claimant, and who bears these costs? What are the reasons for treating the religious claimant differently than others who disagree with the law or have an interest in obtaining an exemption from it? In evaluating claims for religious

accommodation, are there special cases in which judges should defer to democratic decision-making or instead should closely scrutinize those decisions?

We then consider cases challenging laws that prevent Muslim women from wearing the veil, focusing on the judgment of the European Court of Human Rights in *S.A.S v. France* (2014). What if anything is distinctive about these claims for religious accommodation? Are they best understood as liberty or equality claims? How does ongoing political conflict over veiling and the presence of Islamic communities in Europe factor into judgments about religious accommodation? How should it?

The third, and final, block of readings focuses on claims for religious exemption from laws that promote the equality of politically vulnerable or underrepresented groups. We examine decisions from courts in the United States, the United Kingdom, and Colombia, as well as a decision from the European Court of Human Rights. In these cases, religious claimants seek exemptions from laws that protect racial and sexual minorities from discrimination, confer on same-sex couples the right to marry, and that provide women reproductive healthcare. As compared to the cases examined earlier in the Chapter, is the religious accommodation inquiry substantially the same when the religious claimant seeks an exemption from a law that promotes the equality of other members of the polity? Who represents the minority in this case, and who represents the majority—and what factors are relevant to that determination? What is the government's interest in uniform enforcement of the law? Are the costs of accommodating the claimant imposed on a particular individual or group, or are they instead borne by society as a whole? Can judges structure an accommodation to ensure that it does not inflict material or dignitary harm on those individuals the law is endeavoring to protect?*

The paradigmatic case of religious accommodation involves religious minorities overlooked in the legislative process who seek exemptions from laws that prohibit or burden their ritual observances. But a number of cases in this Chapter emerge from fierce social conflict. How, if at all, might it matter if a claim for religious accommodation is part of a society-wide conflict and emerges from a struggle in the legislature or the courts over the very law being challenged? Might providing a religious accommodation inflame conflict, or, conversely, might it help to resolve conflict? Is promoting social cohesion a reason to provide religious accommodations to members of groups frustrated in the democratic process? Can judges determine the circumstances in which religious accommodation will in fact promote social cohesion?

* See Douglas NeJaime and Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE LAW JOURNAL 2516 (2015).

Should There Be Special Accommodation for Religion?

While religious accommodation is widespread, its specific contours vary, responding to differences in constitutional tradition and the religious organization of the polity. Supranational, national, and subnational authorities differ over who can claim a right to accommodation, on what basis, from which kinds of laws, and in which government arenas.

Some approaches protect conscience generally, while others single out religious beliefs for special exemptions. Some approaches allow only individuals to claim rights to religious exemptions, while others entitle institutions—not only religious organizations, but also hospitals and businesses—to accommodation. Some approaches protect religious liberty only when the challenged law targets religion for unfavorable treatment, while others furnish exemptions from neutral and generally applicable laws. Some approaches emphasize judicially enforced constitutional rights to accommodation, while others give legislatures wide latitude to decide whether and how to accommodate.

A threshold issue involves whether religion is special in ways that merit exemptions from generally applicable laws that are not available to other citizens. In making the case for providing more favorable treatment to religion, Michael McConnell argues: “Religious claims . . . differ from secular moral claims both because the state is constitutionally disabled from disputing the truth of the religious claim and because it cannot categorically deny the authority on which such a claim rests.”^{*} Distinguishing religion from conscience, McConnell explains that religion “involves much more than conscience” because it “typically includes a set of beliefs about the nature of the universe, it prescribes practices that are sometimes more ritualistic than ethical in character . . . , and it is embedded in authoritative communities involving texts, stories, institutions, leaders, and tradition.”^{**}

Others point to secular reasons that could justify the special treatment of religion. As Michael Sandel puts it, religion “produces ways of being and acting that . . . foster qualities of character that make good citizens.”^{***} Protecting religious liberty, Sandel continues, could also be “justified as a way of avoiding the civil strife that can result when church and state are too closely intertwined.”

In contrast, others argue that religion should not receive special treatment. As Frederick Gedicks concludes, since “religion and religious people [do not] hold the

^{*} Michael W. McConnell, *Accommodation of Religion*, 1985 SUPREME COURT REVIEW 1, 15.

^{**} Michael W. McConnell, *Why Protect Religious Freedom?* 123 YALE LAW JOURNAL 770, 784 (2013) (book review).

^{***} MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE, XIII-XIV (2d edition, 1998).

monopoly on moral conduct that would justify the extraordinary protection bestowed by religious exemptions,” there is not “a persuasive justification for differential protection of religious practice and secular moral action in a morally pluralistic society.”* Arguing for protection of conscience more generally, Brian Leiter claims that “the best arguments for the moral ideal of toleration would not favor singling out only religion . . . for exemptions from generally applicable laws. If matters of religious conscience deserves toleration . . . then they do so because they involve matters of *conscience*, not matters of religion.”**

The cases that follow consider whether to provide special accommodation for religion, and if so, how to balance the religious claimant’s interest in accommodation with the society’s interest in uniform enforcement of the law.

Blood Transfusion Case

Federal Constitutional Court of Germany (First Senate)

[1971] 32 BverfGE 98***

[Defendant’s wife died after her religiously motivated refusal to receive a blood transfusion made necessary after complications from the birth of her fourth child. Although the Defendant called the doctor to report his wife’s complications, he left the decision whether to receive a blood transfusion up to his wife, who was conscious and competent until the time of her death. After the husband’s original conviction for negligent homicide was reversed on appeal for failure to show that his wife’s death was caused by his failure to provide her medical care, he was convicted of a misdemeanor for failing to provide his spouse necessary assistance. Both husband and wife were members of the Association of Evangelical Brotherhood. Their religion does not specifically prohibit blood transfusions, but both opposed blood transfusions on the basis of their religious beliefs. After his conviction, the husband challenged the trial and appellate court decisions as violating Article 4 of the Basic Law.*]

* Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 UNIVERSITY OF ARKANSAS AT LITTLE ROCK LAW JOURNAL 555, 567-68 (1998).

** BRIAN LEITER, WHY TOLERATE RELIGION?, 4, 64 (2014).

*** Excerpted from DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 449-52 (1997).

* Article 4 of the Basic Law for the Federal Republic of Germany provides: “(1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable. (2) The undisturbed practice of religion shall be guaranteed. (3) No person shall be compelled against his

Judgment of the First Senate. [Dr. Müller, Dr. Stein, Ritterspach, Dr. Haager, Rupp-v. Brünneck, Dr. Böhmer, Dr. Brox, Dr. Simon] . . .

B. II. A review of the challenged decisions indicates that they have impermissibly violated the complainant's fundamental right to freedom of faith and creed (Article 4 (1) of the Basic Law).

1. The Constitution guarantees freedom of religion not only to members of recognized churches and religious societies but also to members of other religious organizations. The exercise of religious freedom depends neither upon an association's numerical size nor upon its social relevance. This follows from the command binding the state to ideological and religious neutrality and from the principle of parity of churches and creeds.

2. In a state in which human dignity is the highest value, and in which the free self-determination of the individual is also recognized as an important community value, freedom of belief affords the individual a legal realm free of state interference in which a person may live his life according to his convictions. In this respect freedom of belief is more than religious tolerance, i.e., the mere suffering of religious creeds or ideological convictions. It encompasses not only the internal freedom to believe or not to believe but also the external freedom to manifest, profess, and propagate one's belief. This includes the right of the individual to orient his conduct on the teachings of his religion and to act according to his internal convictions. Freedom of belief protects not only convictions based upon imperative principles of faith; it also encompasses religious convictions which, while not requiring an exclusively religious response to a concrete situation, nevertheless view this response as the best and most appropriate means to deal with the situation in keeping with this belief. Otherwise the fundamental right to freedom of religion could not develop fully.

3. Yet, freedom of belief is not unlimited. . . . [T]he state cannot subject activities and modes of behaviour which flow from a particular religious view to the same sanctions that it provides for such behaviour independent of religious motivation. The effect radiating from the fundamental right contained in Article 4 (1) is such that it can influence the type and extent of permissible state sanctions.

With respect to criminal law, one who acts or fails to act on the basis of a religious conviction may find himself in conflict with the governing morality and the legal obligations flowing from this morality. When someone commits a punishable act on the basis of his religion, then a conflict arises between Article 4 (1) of the Basic Law and the goals of the criminal law. This offender is not resisting the legal order out of any lack of respect for that order; he too wishes to preserve the legal value embodied in that penal law. He sees himself, however, as being in a

conscience to render military service involving the use of arms. Details shall be regulated by a federal law."

borderline situation where the legal order is competing with the dictates of his personal belief, and he feels an obligation to follow the higher dictates of faith. Even if this personal decision objectively conflicts with the values governing society, it is not so reprehensible as to justify the use of society's harshest weapon, the criminal justice system, to punish the offender. Criminal punishment, no matter what the sentence, is an inappropriate sanction for this constellation of facts under any goal of the criminal justice system (retribution, prevention, rehabilitation of the offender). The duty of all public authority to respect serious religious convictions, [as] contained in Article 4 (1) of the Basic Law, must lead to a relaxation of criminal laws when an actual conflict between a generally accepted legal duty and a dictate of faith results in a spiritual crisis for the offender that, in view of the punishment labeling him a criminal, would represent an excessive social reaction violative of his human dignity.

4. The application of these principles to the present case reveals that the superior court and Stuttgart Court of Appeals misinterpreted the significance of Article 4 (1) of the Basic Law in the construction and application . . . of the Criminal Code. One cannot reproach the complainant for not trying to convince his wife to give up their shared convictions. He was bound to her by their common conviction that prayer was "the better way." His behaviour, and that of his wife, was a profession of their shared faith. . . .

Whether to Accommodate: The U.S. Case

While the *Blood Transfusion Case* provides an example of strong constitutional protections for religious liberty, some constitutional orders require much less in the way of accommodation. The United States provides an interesting and complicated case.

The First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." As we show in the following readings, the Free Exercise Clause has been interpreted differently over time. Beginning in the 1960s, the U.S. Supreme Court decided a series of cases interpreting the Free Exercise Clause to require government to provide individuals engaged in religiously motivated conduct exemptions from generally applicable laws. Then, in *Employment Division v. Smith* (1990), a case excerpted below, the Court rejected the view that the Free Exercise Clause required government to accommodate religiously motivated conduct. The Court's decision was widely criticized, and Congress responded in 1993 by enacting a statute, the Religious Freedom Restoration Act (RFRA), to protect religious liberty. In more recent years, the Court has interpreted that statute to be even more protective of religious liberty than had been the constitutional regime prior to RFRA's enactment.

In *Sherbert v. Verner* (1963), a Seventh-day Adventist was fired from her job for refusing to work on Saturday, the observed Sabbath Day in her faith. When the South Carolina Employment Security Commission denied her unemployment benefits on the grounds that her religious reasons were not sufficient justification for her refusal to work, she challenged the state's benefit eligibility restrictions as unconstitutional under the First Amendment. The Court held that these restrictions imposed a significant burden on Sherbert's ability to practice her religion and that there was no compelling state interest to justify such a substantial infringement of her free exercise rights.

In *Wisconsin v. Yoder* (1971), members of conservative Amish religious orders were prosecuted under Wisconsin law for refusing to send their children to school after the eighth grade. Parents challenged the requirements as violating their free exercise rights. While the Court acknowledged the state's important interest in educating children and imposing mandatory attendance, it nonetheless granted an exemption to the Amish parents.

The Court justified its decision in the language of "strict scrutiny," the most stringent standard of review in U.S. constitutional law. After determining whether the law placed a substantial burden on the religious claimant, the Court inquired into whether enforcement of the law was the "least restrictive means" of furthering the government's "compelling" interest. Yet the Court's decisions were not nearly as friendly to accommodation as the language of "strict scrutiny" would suggest; in fact, the Court frequently denied claims to religious exemption.

Following *Sherbert*, the Court tended to interpret free exercise as requiring exemptions from generally applicable laws in the context of unemployment benefits. For example, in *Thomas v. Review Board of the Indiana Employment Security Division* (1981), the Court held that Indiana's denial of unemployment benefits to a Jehovah's Witness who refused to work in the manufacture of munitions violated his free exercise rights.

Yet, in other contexts, the Court rejected a number of free exercise challenges. In *United States v. Lee* (1982), the Court rejected the claim of an Amish employer who objected to paying Social Security taxes. The Court explained that "the Government's interest in assuring mandatory and continuous participation in and contribution to the Social Security system is very high." The Court refused to allow free exercise rights to extend to the "point at which accommodation would 'radically restrict the operating latitude of the legislature.'" In addition, the Court sought to protect the interests of employees, reasoning that "[g]ranted an exemption from social security taxes to an employer [would] operate[] to impose the employer's religious faith on the employees." In *Lyng v. Northwest Indian Cemetery Protective Association* (1988), the Court found that the construction of a road by the U.S. Forest Service through Native American sacred lands did not violate the Native Americans' free exercise rights. The Court reasoned that although "the challenged Government action would interfere significantly

with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," the construction of the road would not force any persons "by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."

Two years after *Lyng*, in another case involving Native American religious claims, the Court explicitly abandoned a test of heightened scrutiny for free exercise claims. Instead, in its controversial decision in *Employment Division v. Smith* (1990), excerpted below, the Court distinguished between laws targeting religion, which would trigger rigorous free exercise review, and neutral and generally applicable laws, which would not. With *Smith*, the question of religious accommodation would become one for legislatures, not courts.

Employment Division v. Smith
Supreme Court of the United States
494 U.S. 872 (1990)

JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use. . . .

Respondents Alfred Smith and Galen Black (hereinafter respondents) were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division (hereinafter petitioner) for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct." . . . [But] citing our decisions in *Sherbert v. Verner* (1963), and *Thomas v. Review Bd. of Indiana Employment Security Div.* (1981), the [Oregon Supreme Court] concluded that respondents were entitled to payment of unemployment benefits. . . .

Respondents . . . contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious

belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. . . . We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. . . . We first had occasion to assert that principle in *Reynolds v. United States* (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. . . .

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." . . . Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. . . .

Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner* (1963). Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. . . . We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied. In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all. . . .

Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . . [O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although . . . we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend

on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself"—contradicts both constitutional tradition and common sense.

The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly. . . .

Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug. The decision of the Oregon Supreme Court is accordingly reversed. . . .

[Justice O'Connor filed an opinion, which Justices Brennan, Marshall, and Blackmun joined in part, concurring in the judgment. Justice O'Connor explained that she would maintain the "compelling interest" test in free exercise challenges but would still find that test satisfied because the state "has a compelling interest in regulating peyote use by its citizens and . . . accommodating respondents' religiously motivated conduct 'will unduly interfere with fulfillment of the governmental interest.'"]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.

Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a "constitutional anomaly." . . .

In weighing the clear interest of respondents Smith and Black . . . in the free exercise of their religion against Oregon’s asserted interest in enforcing its drug laws, it is important to articulate in precise terms the state interest involved. It is not the State’s broad interest in fighting the critical “war on drugs” that must be weighed against respondents’ claim, but the State’s narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. . . .

The State’s interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic. . . . The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone. . . .



The Court’s decision in *Smith* provoked outrage across the political spectrum. Seeking to restore the standard the Court had employed in the *Sherbert* and *Yoder* decisions, Congress responded by enacting the Religious Freedom Restoration Act with near-unanimous support. The Court eventually interpreted and applied this new statutory framework in ways that were more hospitable to claims of religious accommodation than the previous constitutional regime.

Religious Freedom Restoration Act of 1993
United States*

An Act [t]o protect the free exercise of religion. . . .

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED

(a) IN GENERAL.—Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.—Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

* * *

* Pub. L. No. 103-141, codified at 42 U.S.C. § 2000bb through § 2000bb-4.

Soon thereafter, in *City of Boerne v. Flores* (1997), the Supreme Court struck down RFRA as applied to the states on the grounds that Congress had exceeded its constitutional authority. Accordingly, RFRA applies only to the federal government. After *City of Boerne*, many states passed their own state-law RFRA that govern at the state level. We return to the federal RFRA later in this Chapter.

Smith is not unique, as questions regarding the ritual use of banned substances arise across jurisdictions. In *Prince v. South Africa* (2004), a South African citizen, who was a Rastafarian, was denied admission to a law society, despite having the requisite academic credentials. Admission was refused because of Mr. Prince's previous convictions for possession of cannabis and his expressed intention to continue using cannabis. In 2002, the Constitutional Court of South Africa rejected his claim. Prince sought relief at the African Commission on Human and Peoples' Rights (ACHPR) and claimed a violation of, among other provisions, Article 8 of the African Charter on Human and Peoples' Rights, which guarantees "[f]reedom of conscience [and] the profession and free practice of religion."

In 2004, the ACHPR rejected Prince's claim, explaining: "While the right to hold religious beliefs should be absolute, the right to act on those beliefs should not. As such, the right to practice one's religion must yield to the interests of society in some circumstances." As in *Smith*, the ACHPR distinguished between generally applicable laws and laws targeting religion:

As the limitations are of general application, without singling out the complainant and his fellow Rastafari but applying to all across the board, they cannot be said discriminatory so as to curtail the complainant's free exercise of his religious rights.

In contrast to the decisions in *Smith* and *Prince*, in 2008, Italy's Supreme Court of Cassation recognized the religious liberty claim of a Rastafarian who had been jailed for marijuana possession.* The criminal law proscribed possession in order to address drug trafficking. Since the defendant's religious practices indicated that the marijuana he possessed was for personal consumption, the Court reasoned that such facts should be considered in applying the law.

* Case No. 039531/2005 (June 3, 2008).

Weighing Religious Liberty and the Government's Interest in Legislating

Even when courts determine that the protection of religious liberty requires accommodation, there remains another set of questions about how courts weigh claims for accommodation against the government's interest in promoting other important ends. That analysis takes a different form across jurisdictions. In the case excerpted below, the Supreme Court of Canada employed proportionality analysis to weigh the claimants' interests in accommodation against the government's interests in lawmaking.

Multani v. Commission Scolaire Marguerite-Bourgeoys Supreme Court of Canada [2006] 1 S.C.R. 256

[Appellant Balvir Singh Multani and his son, Gurbaj Singh Multani, are orthodox Sikhs required, as part of their religion, to wear a kirpan at all times. A kirpan is a small religious object resembling a dagger that must be constructed from metal. In 2001, Gurbaj Singh accidentally dropped the kirpan he had been wearing under his clothes in the schoolyard. Concerned for children's safety as well as respect for the student's religion, the school board initially proposed a "reasonable accommodation" allowing Gurbaj Singh to wear the kirpan to school as long as it remained sealed inside his clothing, a compromise to which the Multanis agreed. When the school board subsequently refused to ratify this agreement, declaring the wearing of a dagger-shaped kirpan a violation of the school's code of conduct, Balvir Singh Multani, personally and on behalf of his son, filed in Superior Court for an injunction declaring that the initial accommodation be upheld. Although the Superior Court granted the injunction and found the school board's later action null and void, the Quebec Court of Appeal dismissed Multani's motion in 2004.]

On appeal from the court of appeal for Quebec

English version of the judgment of McLachlin C.J. and Bastarache, Binnie, Fish and Charron JJ. delivered by CHARRON J.—

1. . . . This appeal requires us to determine whether the decision of a school board . . . prohibiting one of the students under its jurisdiction from wearing a kirpan to school as required by his religion infringes the student's freedom of religion.* If we find

* Section 2 of the Canadian Charter of Rights and Freedoms provides: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association."

that it does, we must determine whether that infringement is a reasonable limit that can be justified by the need to maintain a safe environment at the school. . . .

3.1. . . . [The trial judge noted] that the need to wear a kirpan was based on a sincere religious belief held by Gurbaj Singh and that there was no evidence of any violent incidents involving kirpans in Quebec schools [and] granted the motion for a declaratory judgment and authorized Gurbaj Singh to wear his kirpan at Sainte-Catherine-Labouré school on the following conditions . . . :

- that the kirpan be worn under his clothes;
- that the kirpan be carried in a sheath made of wood, not metal, to prevent it from causing injury;
- that the kirpan be placed in its sheath and wrapped and sewn securely in a sturdy cloth envelope, and that this envelope be sewn to the [gatra, a strap used to wear a kirpan];
- that school personnel be authorized to verify, in a reasonable fashion, that these conditions were being complied with;
- that the petitioner be required to keep the kirpan in his possession at all times, and that its disappearance be reported to school authorities immediately; and
- that in the event of a failure to comply with the terms of the judgment, the petitioner would definitively lose the right to wear his kirpan at school. . . .

6. . . . This Court has on numerous occasions stressed the importance of freedom of religion. [As explained in] *Big M Drug Mart* [(1985)]:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that. . . .

Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. . . .

In the case at bar, Gurbaj Singh must therefore show that he sincerely believes that his faith requires him at all times to wear a kirpan made of metal. Evidence to this effect was introduced and was not contradicted. . . . Manjit Singh explains in his affidavit that the Sikh religion teaches pacifism and encourages respect for other religions, that the kirpan must be worn at all times, even in bed, that it must not be used as a weapon to hurt anyone, and that Gurbaj Singh's refusal to wear a symbolic kirpan made of a material other than metal is based on a reasonable religiously motivated interpretation.

Much of the [school board's] argument is based on its submission that . . . "the kirpan is essentially a dagger, a weapon designed to kill, intimidate or threaten others." . . . There is no denying that this religious object could be used wrongly to wound or even kill someone, but the question at this stage of the analysis cannot be answered definitively by considering only the physical characteristics of the kirpan. . . .

Finally, the interference with Gurbaj Singh's freedom of religion is neither trivial nor insignificant. Forced to choose between leaving his kirpan at home and leaving the public school system, Gurbaj Singh decided to follow his religious convictions and is now attending a private school. The prohibition against wearing his kirpan to school has therefore deprived him of his right to attend a public school.

Thus, there can be no doubt that the [school board's] decision prohibiting Gurbaj Singh from wearing his kirpan to Sainte-Catherine-Labouré school infringes his freedom of religion. This limit must therefore be justified. . . .

7. . . . [The school board] made its decision pursuant to its discretion under s. 12 of the *Education Act*.^{*} The decision prohibiting the wearing of a kirpan at the school thus constitutes a limit prescribed by a rule of law within the meaning of s. 1 of the *Canadian Charter [of Rights and Freedoms]* and must accordingly be justified in accordance with that section: . . .

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The onus is on the respondents to prove that, on a balance of probabilities, the infringement is reasonable and can be demonstrably justified in a free and democratic society. To this end, two requirements must be met. First, the legislative objective being pursued must be sufficiently important to warrant limiting a constitutional

^{*} Section 12 of the Education Act provides: "The council of commissioners may, if it considers that the request is founded, overturn, entirely or in part, the decision contemplated by the request and make the decision which, in its opinion, ought to have been made in the first instance. . . ."

right. Next, the means chosen by the state authority must be proportional to the objective in question. . . .

7.1. . . . The objective of ensuring a reasonable level of safety in schools is without question a pressing and substantial one. . . .

7.2.2. . . . The second stage of the proportionality analysis is often central to the debate as to whether the infringement of a right protected by the *Canadian Charter* can be justified. The limit, which must minimally impair the right or freedom that has been infringed, need not necessarily be the least intrusive solution. In *RJR-MacDonald Inc. v. Canada (Attorney General)* [(1995)], this Court defined the test as follows:

The impairment must be “minimal,” that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. . . .

The [school board’s] decision establishes an absolute prohibition against Gurbaj Singh wearing his kirpan to school. The [board] contend[s] that this prohibition is necessary, because the presence of the kirpan at the school poses numerous risks for the school’s pupils and staff. It is important to note that Gurbaj Singh has never claimed a right to wear his kirpan to school without restrictions. Rather, he says that he is prepared to wear his kirpan under the . . . conditions imposed by . . . the Superior Court. Thus, the issue is whether the respondents have succeeded in demonstrating that an absolute prohibition is justified. . . .

7.2.2.1. . . . According to the [school board], the presence of kirpans in schools, even under certain conditions, creates a risk that they will be used for violent purposes, either by those who wear them or by other students who might take hold of them by force.

The evidence shows that Gurbaj Singh does not have behavioural problems and has never resorted to violence at school. The risk that this particular student would use his kirpan for violent purposes seems highly unlikely to me. In fact, the [school board] has never argued that there was a risk of his doing so.

As for the risk of another student taking his kirpan away from him, it also seems to me to be quite low, especially if the kirpan is worn under [the] conditions . . . imposed by . . . the Superior Court. In the instant case, if the kirpan were worn in accordance with those conditions, any student wanting to take it away from Gurbaj

Singh would first have to physically restrain him, then search through his clothes, remove the sheath from his [gatra], and try to unstitch or tear open the cloth enclosing the sheath in order to get to the kirpan. . . .

In her brief reasons, [the judge] explained that her decision was based in part on the fact that . . . “the evidence revealed no instances of violent incidents involving kirpans in schools in Quebec” and on “the state of Canadian and American law on this matter.” In fact, the evidence in the record suggests that, over the 100 years since Sikhs have been attending schools in Canada, not a single violent incident related to the presence of kirpans in schools has been reported. . . .

Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is, as I will explain in the next section, at the very foundation of our democracy. . . .

7.2.3. . . . An absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others. This Court has on numerous occasions reiterated the importance of these values. . . .

[S]chools . . . have a duty to foster the respect of their students for the constitutional rights of all members of society. Learning respect for those rights is essential to our democratic society and should be part of the education of all students. These values are best taught by example and may be undermined if the students’ rights are ignored by those in authority. . . .

A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects. . . .

As *Multani* makes clear, under the Canadian Charter, protection for religious liberty is “subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Similar limits are expressed in other jurisdictions. Section 1 of Article 9 of the European Convention on

Human Rights (ECHR) protects the individual's right, "in public or private, to manifest his religion or belief, in worship, teaching, practice and observance." Section 2 then provides limits on that right: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as . . . are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

In *Thlimmenos v. Greece*, [2000] ECHR 162, the European Court of Human Rights (ECtHR) addressed the question of how the guarantees of Article 9 interact with Article 14, which prohibits discrimination on the basis of religion.* The applicant, a Greek national, had been denied an appointment as a chartered accountant due to his previous criminal conviction for disobeying, on the basis of his religious beliefs as a Jehovah's Witness, orders to wear a military uniform. Although the applicant did not challenge his initial conviction for subordination, he did object to the law excluding all persons convicted of serious crimes from service as a chartered accountant on the grounds that it did not distinguish persons convicted as a result of their religious beliefs from those convicted for other reasons.

The ECtHR reasoned that governments could violate Article 14's prohibition on religious discrimination by singling out religious practitioners and by failing to recognize the distinctive features of religious exercise:

The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. . . . However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

Article 14 protections guided the Court's proportionality analysis:

[T]he Court will have to examine whether the failure to treat the applicant differently from other persons convicted of a serious crime pursued a legitimate aim. If it did the Court will have to examine whether

* Article 14 of the European Convention on Human Rights provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The ECtHR then reasoned that although “States have a legitimate interest to exclude some offenders from the profession of chartered accountant . . . , a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender’s ability to exercise this profession.” Given that the applicant had “serve[d] a prison sentence for his refusal to wear the military uniform,” the ECtHR found “that imposing a further sanction on the applicant was disproportionate.” Accordingly, the Court concluded that the applicant’s exclusion from the accounting profession “did not pursue a legitimate aim” and was thus unjustified.

In what ways is the applicant’s status as a Jehovah’s Witness—a relatively small minority faith that historically has been subject to persecution—relevant to understanding his Article 14 claim? Is failure to accommodate, standing alone, sufficient to establish discrimination, or is it significant that there are additional factors raising concerns about subordination, as there are here?

Why Accommodate?

As we have seen, not only do approaches to accommodation vary, but reasons for accommodation vary as well, both within and across jurisdictions. The German *Blood Transfusion Case* explains that religious accommodation can affirm the individual’s dignity and autonomy:

In a state in which human dignity is the highest value, and in which the free self-determination of the individual is also recognized as an important community value, freedom of belief affords the individual a legal realm free of state interference in which a person may live his life according to his convictions.

Multani based the case for accommodation of religion on values of multiculturalism and diversity. The Canadian Supreme Court repeatedly appealed to concerns about equality and the importance of respecting difference, especially differences associated with the less powerful. *Multani* presented accommodation as part of the project of creating “an environment free of bias, prejudice and intolerance.” The Court was concerned that refusal to accommodate would “send[] students the message that some religious practices do not merit the same protection as others,” while “accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches . . . to showing respect

for its minorities.” Is a claim to religious accommodation always an equality claim, or only when certain indicia of subordination are present?

In what respects are equality interests, as distinct from liberty interests, at stake in deciding questions of religious accommodation? In *Prince v. South Africa*, discussed above, a Rastafarian was denied admission to a law society based on his possession and ritual use of cannabis. Both the South African Constitutional Court and the ACHPR rejected his claim.

In dissenting from the judgment of the South African Constitutional Court, Justice Sachs advanced equality-based arguments for accommodation of the claim. In reading Justice Sachs’ observations, consider how the equality dimensions of claims to religious accommodation depend on the claimant’s position in the society. Is Justice Sachs arguing that all religious accommodation claims are equality claims, or that equality considerations predominate in certain circumstances? And if so, what kind of circumstances?

Intolerance may come in many forms. At its most spectacular and destructive it involves the use of power to crush beliefs and practices considered alien and threatening. At its more benign it may operate through a set of rigid mainstream norms which do not permit the possibility of alternative forms of conduct. The case before us by no means raises questions of aggressive targeting. The laws criminalizing the use of dagga were not directed at the Rastafari nor were they intended expressly to interfere with their religious observance. Although they appear to be neutral statutes of general application they impact severely, though incidentally, on Rastafari religious practices. Their effect is accordingly said to be the same as if central Rastafari practices were singled out for prohibition. . . . [As this court said in the earlier *Prince* case decided in 2000:]

“The Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use cannabis exposes them to social stigmatisation. They are perceived as associated with drug abuse and their community is perceived as providing a haven for drug abusers and gangsters. . . . Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views. However, the right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which

laws they will obey and which they will not, the State should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law.”

By concluding that the granting even of a limited exemption in favour of the Rastafari would interfere materially with the ability of the state to enforce anti-drug legislation, I believe that the majority judgment effectively, and in my view unnecessarily, subjects the Rastafari community to a choice between their faith and respect for the law. Exemptions from general laws always impose some cost on the state, yet practical inconvenience and disturbance of established majoritarian mind-sets are the price that constitutionalism exacts from government. In my view the majority judgment puts a thumb on the scales in favour of ease of law enforcement, and gives insufficient weight to the impact the measure will have, not only on the fundamental rights of the appellant and his religious community, but on the basic notion of tolerance and respect for diversity that our Constitution demands for and from all in our society.

Are there features of the Rastafarian’s claim for religious accommodation that differentiate it from other claims for religious accommodation? Should judges treat some claims for religious accommodation differently than others? If so, what factors warrant special scrutiny?

ACCOMMODATING THE VEIL?

Multani presents religious accommodation as implicating questions of equality. The Canadian Supreme Court’s decision raises the possibility that refusal to accommodate unconventional religious practices may reflect and express lack of respect and solicitude for religious minorities. In what respect, if any, did the minority status of claimants in the U.S. cases of *Smith* and *Lyng*, which involved Native American faith traditions, matter to the result?

Across Europe, high-profile conflicts have emerged over Muslim women wearing the veil in public spaces. Like the claims in *Lyng* and *Smith*, claims in the veil context implicate the rights of practitioners of minority faiths in the jurisdiction. Concerns about bias are more acute in these cases as the accommodation decisions occur in the midst of wide-ranging political conflict about the status of Muslims in European nations.

Judgments about whether to accommodate can be shaped by unconscious bias or indifference, where lawmakers fail to value the practices of minority religious practitioners. Judgments about whether to accommodate can also be motivated by hostility, where lawmakers adopt neutral language but are specifically interested in targeting the religious practices of certain faith traditions. In the latter situation, the problem arises not because legislators fail to consider the practices and interests of minority faith traditions, but rather because they pass legislation with a barely concealed (thinly veiled?) purpose of prohibiting practices associated with minority faith traditions.

Remember that in *Smith*, even as the U.S. Supreme Court held that the United States Constitution did not require government to provide religious claimants exemptions from neutral and generally applicable laws, it retained a role for the courts in striking down laws that single out religion. After *Smith*, in *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993), the Court held that a local ordinance banning the slaughter of animals violated the Free Exercise Clause because evidence indicated that the ordinance aimed specifically at obstructing the practices of the Santeria faith.

Conflict over the veil has spread across Europe, attracting special attention in France, a country with a strong tradition of *laïcité*, a term that denotes commitment to secularism in public life. Modern French *laïcité* derives from the 1905 law on the Separation of the Churches and State,^{*} which ended government funding of religious groups and declared all religious buildings to be the property of the state. This principle is understood to be embodied in Article 1 of the French Constitution of 1958.^{**}

The secular, *laïque* identity of the country has emerged as a defining feature of the French Republic. The principle of *laïcité* and neutrality of the state has been invoked in denials of religious accommodations, particularly in the context of education. For example, in *Koen* (1995), the Conseil d'État referenced *laïcité* in the course of refusing to accommodate a Jewish student denied admission to a post-secondary school program, a decision based in part on his religious objection to attending classes that conflicted with his observance of Sabbath on Saturdays.

In recent decades, many in France have come to see the veil worn by Muslim women as a threat to the nation's *laïque* identity. As explained by Susanna Mancini:

* “The Republic neither acknowledges, nor pays for nor subsidises any form of worship.” Article 2 of *Loi du 9 décembre 1905 concernant la separation des Eglises et de l'Etat*, the French law on the separation of Church and State (December 9, 1905).

** Article 1 of the Constitution of France, as adopted on October 4, 1958, provides: “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.”

The struggle against the headscarf started in France in 1989, when a handful of schoolgirls were suspended for wearing their headscarves in a state school in Creil, a suburb of Paris. The French Courts first opted for a soft approach according to which, in principle the right of pupils to wear religious symbols or clothing could not be the object of a general ban. They did, however, introduce the principle according to which such display could violate the rights of others or seriously jeopardized the carrying out of school activities, in which case it could be banned. The intervention of the French government progressively restricted the right to wear the headscarf in the public schools, introducing the notion according to which certain symbols may be deemed “by their nature, elements of proselytism,” and per se “so ostentatious that their meaning is precisely to separate certain pupils from the rules of the communal life of the school.” In July 2003, President Chirac set up an investigative committee, chaired by Bernard Stasi, the French State’s ombudsman, with the task of reflecting on the application of the principle of secularism. In December 2003 the commission issued a report, which eventually led to the introduction of a law that prohibits the display of religious symbols in state schools. It had been estimated that less than 1 percent of the Muslim students in France actually [wore] the veil. In particular, a total of 1,256 *foulards* were reported in France’s public schools at the start of the 2003–04 school year. Only 20 of these cases were judged “difficult” by school officials themselves.

The Stasi Commission report subjected the headscarf to a meticulous dissection process. It concluded that it threatened public order, as “wearing an ostensibly religious symbol . . . suffices to disrupt the tranquillity of the life of the school.” . . . The Stasi Commission referred to a number of objectively disruptive practices which have nothing to do with wearing the headscarf, but are all associated with Islam, such as “course and examination interruptions to pray or fast,” the refusal by schoolgirls to engage in sporting activities and the objections by pupils to “entire sections of courses in history or earth science.”*

* Susanna Mancini, *The Tempting of Europe, the Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in European Constitutionalism*, in CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 111-35 (Susanna Mancini and Michel Rosenfeld editors, Oxford University Press 2014).

In 2008, the European Court of Human Rights issued a decision involving the wearing of veils in France in *Dogru v. France*. The case arose from the expulsion of a young girl from a secondary school for refusing to remove her veil during physical education class. At the time of the expulsion, France had not yet passed any laws regulating religious symbols in schools, but the school based its expulsion on a combination of Education Code provisions, Conseil d'État opinions, and ministerial circulars concluding that while students had a right to express and manifest religious beliefs at school, this right could not interfere with teaching activities, attendance of classes, health, or safety.

The ECtHR found that the expulsion of the student was not a violation of Article 9 of the European Convention of Human Rights. Although the ban and expulsion were deemed a “‘restriction’ on the exercise [the student’s] right to freedom of religion,” the Court concluded that proscribing the veil pursued the legitimate aim of protecting the rights and freedoms of others and of protecting public order and was therefore necessary in a democratic society.

While the *Dogru* case was being litigated, France enacted Law no. 2004-228 (March 15, 2004), which stated: “In public [primary] schools, junior high schools and high schools, signs and dress that conspicuously show the religious affiliation of students are forbidden.”*

Over the next several years, French politicians began taking steps to pass a law that would ban the full-face veil, also known as the niqab or burqa, from public spaces. Before the law passed in 2010, the French Conseil Constitutionnel was asked to review two proposals banning the full-face veil. Both times, it advised that the law at issue should not be enacted because an absolute and general ban that explicitly targeted the full-face veil would be subject to strong constitutional and ECHR challenges. Following these recommendations, legislators opted to craft a law of general applicability—banning all face covering apparel, but not explicitly singling out Muslim clothing.

However, public statements, studies commissioned to evaluate how legally to ban the veil, and preliminary drafts of the law evidenced continuing interest in addressing the Islamic veil. For example, a May 2010 article in *Le Figaro* reported that “Nicolas Sarkozy and François Fillon both argued for a legal text ‘going as far as possible’ towards the banning of the full veil, which is ‘not welcome on the national territory.’” Yet in the legislative history of the 2010 law, its supporters were careful to highlight its general applicability and non-religious motivations. As the Garde des Sceaux, or the Keeper of the Seals, Mme Michèle Lliot-Marie explained to the National Assembly on July 6, 2010: “To show that the problem is not a religious problem, the draft law targets all forms of concealment of one’s face in public spaces. It is thus neither

* All translations of the quotations in French are by Scout Katovich, Yale Law School, J.D. Class of 2017.

a problem of security, nor a problem of religion. It is a problem of the conception of the Republic.”

Law No. 2010-1192

France (2010)

Article 1

No one may, in public places, wear clothing designed to conceal one’s face.

Article 2 . . .

The prohibition . . . shall not apply if the clothing is . . . justified for health or occupational reasons, or if it is worn in the context of sports, festivities or artistic or traditional events. . . .

* * *

On the day that the 2010 law came into force, a French woman of Pakistani origin filed a complaint against France arguing that the ban deprived her of the ability to wear the full-face veil in public in violation of her rights under the ECHR. Excerpted below is the decision by the ECtHR, which focused on the applicant’s claims under Articles 8 and 9, which protect rights to private life and religious freedom, respectively.

S.A.S. v. France

European Court of Human Rights (Grand Chamber)

ECHR 2014-III 341

. . . The European Court of Human Rights, sitting as a Grand Chamber composed of: Dean Spielmann, *President*, Josep Casadevall, Guido Raimondi, Ineta Ziemele, Mark Villiger, Boštjan M. Zupančič, Elisabeth Steiner, Khanlar Hajiyev, Mirjana Lazarova Trajkovska, Ledi Bianku, Ganna Yudkivska, Angelika Nußberger, Erik Møse, André Potocki, Paul Lemmens, Helena Jäderblom, Aleš Pejchal, *judges*, and Erik Fribergh, *Registrar*

11. In the applicant’s submission, she is a devout Muslim and she wears the burqa and niqab in accordance with her religious faith, culture and personal convictions. According to her explanation, the burqa is a full-body covering including a mesh over the face, and the niqab is a full-face veil leaving an opening only for the eyes. The applicant emphasised that neither her husband nor any other member of her family put pressure on her to dress in this manner.

12. . . . [S]he was thus content not to wear the niqab in public places at all times but wished to be able to wear it when she chose to do so. . . . There were certain times (for example, during religious events such as Ramadan) when she believed that she ought to wear it in public in order to express her religious, personal and cultural faith. . . .

25. The draft of a law prohibiting the concealment of one's face in public places was deposited in May 2010 The Bill contained an "explanatory memorandum," which reads as follows:

France is never as much itself, faithful to its history, its destiny, its image, than when it is united around the values of the Republic: liberty, equality, fraternity. . . . These are the values which have today been called into question by the development of the concealment of the face in public places, in particular by the wearing of the full veil. . . . [T]he wearing of the full veil is the sectarian manifestation of a rejection of the values of the Republic. . . .

The voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of 'living together' in French society.

The defence of public order is not confined to the preservation of tranquillity, public health or safety. It also makes it possible to proscribe conduct which directly runs counter to rules that are essential to the Republican social covenant, on which our society is founded. . . . [I]t is not only about the dignity of the individual who is confined in this manner, but also the dignity of others who share the same public space and who are thus treated as individuals from whom one must be protected by the refusal of any exchange, even if only visual. . . .

27. The Law ["prohibiting the concealment of one's face in public places"] was passed by the National Assembly on 13 July 2010 with 335 votes in favour, one vote against and three abstentions, and by the Senate on 14 September 2010, with 246 votes in favour and one abstention. After the Constitutional Council's decision of 7 October 2010 finding that the Law was compliant with the Constitution, it was enacted on 11 October 2010.* . . .

* The Conseil Constitutionnel found the law compliant with the French Constitution but expressed reservation to the extent the prohibition would restrict religious freedom in places of worship open to the public.

[The Court determined that the only alleged violations that were admissible and relevant for the decision were of Articles 8 and 9 of the Convention. Article 8^{**} protects the right to private life and Article 9^{***} protects freedom of thought, conscience, and religion. Both Articles also provide that the state shall not interfere with the exercise of these rights, unless such limitations are “prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”]

114. . . . The applicant took the view that the interference with the exercise of her freedom to manifest her religion and of her right to respect for her private life, as a result of the ban introduced by the Law of 11 October 2010, did not correspond to any of the aims listed in the second paragraphs of Articles 8 and 9 [referring to permissible limitations by the government]. The Government argued, for their part, that the Law pursued two legitimate aims: public safety and “respect for the minimum set of values of an open and democratic society.” The Court observes that the second paragraphs of Articles 8 and 9 do not refer expressly to the second of those aims or to the three values mentioned by the Government in that connection.

115. . . . [T]he Court accepts that, in adopting the impugned ban, the legislature sought to address questions of “public safety” within the meaning of the second paragraphs of Articles 8 and 9 of the Convention.

116. As regards the second of the aims invoked—to ensure “respect for the minimum set of values of an open and democratic society”—the Government referred to three values: respect for equality between men and women, respect for human dignity and respect for the minimum requirements of life in society. They submitted that this aim could be linked to the “protection of the rights and freedoms of others,” within the meaning of the second paragraphs of Articles 8 and 9 of the Convention. . . .

118. First, the Court is not convinced by the Government’s submission in so far as it concerns respect for equality between men and women.

119. . . . [A] State Party which, in the name of gender equality, prohibits anyone from forcing women to conceal their face pursues an aim which corresponds to the “protection of the rights and freedoms of others” within the meaning of the second paragraphs of Articles 8 and 9 of the Convention. The Court takes the view, however, that a State Party cannot invoke gender equality in order to ban a practice that is defended

^{**} Article 8 of the European Convention on Human Rights provides: “(1) Everyone has the right to respect for his private and family life, his home and his correspondence. . . .”

^{***} Article 9 of the European Convention on Human Rights provides: “(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. . . .”

by women—such as the applicant—in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms. . . .

Moreover, in so far as the Government thus sought to show that the wearing of the full-face veil by certain women shocked the majority of the French population because it infringed the principle of gender equality as generally accepted in France, the Court would refer to its reasoning as to the other two values that they have invoked.

120. Secondly, the Court takes the view that, however essential it may be, respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places. The Court is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy. It notes in this connection the variability of the notions of virtuousness and decency that are applied to the uncovering of the human body. Moreover, it does not have any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others.

121. Thirdly, the Court finds, by contrast, that under certain conditions the “respect for the minimum requirements of life in society” referred to by the Government—or of “living together,” as stated in the explanatory memorandum accompanying the Bill—can be linked to the legitimate aim of the “protection of the rights and freedoms of others.”

122. The Court takes into account the respondent State’s point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. That being said, in view of the flexibility of the notion of “living together” and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation. . . .

126. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one’s religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected. . . .

129. . . . The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. . . . As regards Article 9 of the Convention, the State should thus, in principle, be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is "necessary." That being said, in delimiting the extent of the margin of appreciation in a given case, the Court must also have regard to what is at stake therein. It may also, if appropriate, have regard to any consensus and common values emerging from the practices of the States parties to the Convention. . . .

139. As regards the question of necessity in relation to public safety, within the meaning of Articles 8 and 9, the Court understands that a State may find it essential to be able to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. . . . However, in view of its impact on the rights of women who wish to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety. The Government [has] not shown that the ban introduced by the Law of 11 October 2010 falls into such a context. . . . It cannot therefore be found that the blanket ban imposed by the Law of 11 October 2010 is necessary, in a democratic society, for public safety, within the meaning of Articles 8 and 9 of the Convention.

140. . . . [With regard to] the other aim that it has found legitimate: to ensure the observance of the minimum requirements of life in society as part of the "protection of the rights and freedoms of others." . . .

142. . . . [T]he Court finds that the impugned ban can be regarded as justified in its principle solely in so far as it seeks to guarantee the conditions of "living together."

143. It remains to be ascertained whether the ban is proportionate to that aim. . . .

151. . . . [W]hile it is true that the scope of the ban is broad, because all places accessible to the public are concerned (except for places of worship), the Law of 11 October 2010 does not affect the freedom to wear in public any garment or item of clothing—with or without a religious connotation—which does not have the effect of concealing the face. . . . It nevertheless finds it to be of some significance that the ban is not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face. . . .

153. . . . [B]y prohibiting everyone from wearing clothing designed to conceal the face in public places, the respondent State has to a certain extent restricted the reach of pluralism, since the ban prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public. However, for their part, the Government indicated that it was a question of responding to a practice that the State

deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of “living together.” From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society. It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.

154. In such circumstances, the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question. The Court has, moreover, already had occasion to observe that in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight. . . .

157. Consequently, having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case, the Court finds that the ban imposed by the Law of 11 October 2010 can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of “living together” as an element of the “protection of the rights and freedoms of others.”

[Judges Nussberger and Jäderblom jointly filed a partly dissenting opinion concluding that the ban violated the applicant’s rights under Articles 8 and 9 of the Convention. Questioning whether the ban in fact promoted pluralism and tolerance, the dissenters suggested that instead it represented “selective pluralism and restricted tolerance.” The opinion reasoned that the French legislature “has not sought to ensure tolerance between the vast majority and the small minority, but has prohibited what is seen as a cause of tension.”]

In *S.A.S.*, the ECtHR rejected “respect for equality between men and women” and “respect for human dignity” as legitimate aims of the prohibition on the full-face veil in public spaces. Even though “public safety” constituted a legitimate aim, the Court found that it did not justify the complete ban on the veil in public spaces. The Court ultimately held that the interest in “living together” justified the law, and it connected “living together” “to the legitimate aim of the ‘protection of the rights and freedoms of others.’” Whose rights and freedoms are being protected by the law? Is the “right of others to live in a space of socialisation which makes living together easier” a right that can be balanced against the right to religious freedom?

The Court stated that when “several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one’s religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.” When and how does restricting the exercise of religion ensure that everyone’s beliefs are respected?

On what basis did the Court conclude that banning the full-face veil in all public places is a proportionate means of pursuing the state’s interest in “living together”? After the Court stated that “in view of the flexibility of the notion of ‘living together’ and the resulting risk of abuse, [it] must engage in a careful examination of the necessity of the impugned limitation,” it explained that “the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.” Has the Court merged proportionality analysis and the margin of appreciation? Should it have addressed the two questions separately? For what reason does the margin of appreciation require the result in this case?

Consider the Court’s approach to the margin of appreciation in another religious freedom case not involving veiling. In *Dogan and Others v. Turkey* (2016), the ECtHR found that Turkey violated Articles 9 and 14 of the ECHR when the government’s Religious Affairs Department, which manages matters relating to Islam, failed to recognize or give financial assistance for places of worship of the relatively small Alevi branch of Islam. Turkey argued that its actions were “necessary in a democratic society.” Acknowledging that “individual interests must on occasion be subordinated to those of a group,” the Court nonetheless reasoned that “democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position.”

Turkey also urged the Court to defer to the national authorities, but the Court concluded: “The right enshrined in Article 9 would be highly theoretical and illusory if the degree of discretion granted to States allowed them to interpret the notion of religious denomination so restrictively as to deprive a non-traditional and minority form of a religion of legal protection.”

Did the Court apply the margin of appreciation differently in *Dogan* and in *S.A.S.*? Is application of the margin of appreciation in *S.A.S.* connected to the French principle of *laïcité*? Can other countries now adopt the same veil bans? Under what circumstances can nations decide to ban other minority religious manifestations understood to be at odds with the society’s way of “living together”?

While many have criticized France’s 2004 law prohibiting “signs and dress that conspicuously show the religious affiliation” in primary and secondary schools and its 2010 law prohibiting full-face veils in public spaces, some have emphasized distinctions

between the two bans. Patrick Weil considers how each of the laws relate to principles of *laïcité* and to the importance of living in a free and pluralistic society:

In 2004, the Parliament had enacted a law supported by school principals and teachers. It had as its general aim the protection of minor children against pressures. It was limited to public schools, leaving those girls who wished to keep wearing the veil with an alternative, usually that of a private school under contract with the state. The ban on the burqa is of a different nature. It is aimed at adults who pressure no one, in the freest of public space—the street. Its radical character offers believers no alternative. . . .

Unable to deal politically and socially with the presence of Muslims and of Islam in France, some French politicians have started doing with *laïcité* precisely what they reproach religious radicals for doing: trying to displace the borders between different spaces with the opposite purpose of reducing the place left to religious expression.*

In an article written before the Court’s decision in *S.A.S.*, Susanna Mancini explored suppositions informing the view that prohibitions on the veil protect “living together” in a democratic society.

The Tempting of Europe, the Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in European Constitutionalism

Susanna Mancini (2014)**

. . . It has emerged from the comparative analysis of the conflicts over the right to wear the Islamic veil . . . that these are often structured in terms of a sharp antagonism between Islam and the “West.” The primary argument for limiting the display of Muslim

* Patrick Weil, *Headscarf Versus Burqa: Two French Bans with Different Meanings*, in CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 195, 213-14 (Susanna Mancini and Michel Rosenfeld editors, Oxford University Press 2014).

** Excerpted from Susanna Mancini, *The Tempting of Europe, the Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in European Constitutionalism*, in CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 111-35 (Susanna Mancini and Michel Rosenfeld editors, Oxford University Press 2014).

symbols is that they represent cultural values that are at odds with shared democratic values. . . .

Religious freedom is a fundamental right in all European democracies, as well as in the European Convention system. Alongside political freedoms, religious freedom is essential to democracy. Taking this into account, one could argue that the exclusion of Muslim symbols shows analogies with constitutional clauses that are typical of militant democracies. . . .

The arguments submitted to justify the restrictions imposed on Islam and its symbols follow the same logic. The premises are that Islam is anti-democratic and that, if left free to manifest its character in the public sphere, it might constitute a threat to democracy. Traditional Muslim clothing thus symbolizes this threat, and therefore their *mere wearing* should be constrained or banned even in the absence of any effort by . . . those who wear them to factually implement their (supposedly) anti-democratic agenda. . . . Muslim clothing is viewed as an emblem of radical Islamist politics and the oppression of women. . . . Excluding Islamic symbols can thus be interpreted as a preventive way through which European democracies defend their democratic character. . . .

According to Schmitt, a democratic state is not based on equality, but on homogeneity. Carl Schmitt argued that all political communities are based on a constitutive distinction between insiders and outsiders, a polarity of friend and enemy. “Friend” and “enemy,” ultimately, have no content in themselves, they are oppositional positions capable of unifying the members of a group. . . . Pluralism (which Schmitt saw as the consequence of historical factors common to most industrialized states), poses a particularly pernicious threat to democracy. . . . When a state is threatened by pluralism, it can no longer rely on a *natural* tendency towards homogeneity and political unity. Therefore, it must react and actively pursue *artificial* unity and homogeneity; and the only way a people may reach unity is through identity. . . . To be sure, no European public sphere is, or has ever been, homogeneous. Homogeneity, unity and identity do not *really* exist: they are ultimately nothing more than a myth. In the Schmittian construction, unity is presupposed, it operates at a symbolic level, and it ends up by coinciding with identity. . . . Schmitt constructed the Jews as standing in sharp contrast to a Catholic skepticism regarding modern life and culture

Muslims in Europe are accused of challenging liberal values, supposedly rooted in the “Judeo-Christian” tradition, a post-World War II rather ambiguous notion meant to (verbally) overcome the legacy of the Holocaust. This apparent contradiction should not be misleading. Both accusations are grounded on a metaphysical construction of the “people” (the French people, the German people, the European people) which denies and ultimately erases diversity, dialectic and separation. Both accusations are meant to inflict the “stigmata of otherness” onto a scapegoat, upon which to build a new oppositional identity. Both accusations are ultimately based on a rejection of pluralism

and on the decision to actively fight it, as the French “burqa report” suggests, when it states that “the mission unanimously agreed that the practice of wearing the full veil is the antithesis of republican values. This shared finding should incite to action.” . . .

Today, Christianity has come to represent Europe’s liberal tradition, challenged by “Muslim” illiberal projects Under the pretense of removing an obstacle to democracy, the exclusion of Islam from the public sphere aims at pursuing the idealization of a non existing essentialist European identity, and at anchoring it in a metaphysical notion of secularized Christianity. It aims at constructing an artificial and exclusionary kind of unity, at the expense of universalism, pluralism, and fundamental rights. . . .

Questions over the legality of banning the veil persist. In Belgium, a receptionist who was dismissed because of her intention to wear an Islamic headscarf in violation of her employer’s dress policy brought a case challenging her dismissal. In *Achbita v. GAS Secure Solutions NV* (2016), the Belgian court had asked the Court of Justice of the European Union (CJEU) for its opinion on how the EU’s framework for equal treatment in employment would apply in these circumstances. In response, Advocate General Juliane Kokott issued an opinion concluding that an employer’s ban on the headscarf “does not constitute direct discrimination based on religion . . . if that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general.”

Many of the challenges in Europe to bans or restrictions on the Islamic veil have resulted in upholding these bans. A recent decision from Germany’s Federal Constitutional Court departed from this trend. In *North-Rhine Westphalia Headscarf Ban Case* (2015), teachers who are Muslims of German nationality challenged a state law that prohibited teachers from “publicly express[ing] views of a political, religious, ideological or similar nature which are likely . . . to endanger or disturb the political, religious and ideological peace at school.” The challenged law also provided that “presenting (*Darstellung*) Christian and occidental educational and cultural values accordingly do not contradict the prohibition.”

The laws at issue thus appeared to prohibit all religious expressions by teachers, but exempted those expressions that could be considered part of teaching Christian values. Sanctions were imposed on teachers after they refused to remove their Islamic headscarves or the hats worn as a replacement. The German Constitutional Court found these provisions to be unconstitutional and advanced a pluralistic vision of state neutrality towards religion. The Court reasoned: “it is precisely the task of ‘interdenominational’ (*bekennnisoffen*) schools in particular to convey to pupils the

idea of tolerance with regard to other religions and ideologies. It has to be possible to lead a life according to this ideal, even if this entails wearing clothes with a religious connotation, as—apart from the headscarf—the Jewish kipah, the nun’s habit, or symbols such as a cross worn visibly.”*

Conflicts over national identity and the Islamic veil have also crossed the Atlantic. In 2015, the Federal Court of Canada heard *Ishaq v. Minister of Citizenship and Immigration*, a case challenging the government policy requiring an individual to remove a face covering while taking the citizenship oath. This policy was introduced by the Minister of Citizenship and Immigration in 2011. Ishaq, a Muslim woman who had recently been granted citizenship, requested an order enjoining the immigration authorities from applying this policy to her case, thus seeking a classic accommodation from a policy, which on its face applied equally to all religions, and asked the court to declare that the policy infringed on the Canadian Charter of Rights and Freedoms.

Though the court declined to reach the Charter issues raised by the case, it struck down the policy on the grounds that it impermissibly constrained a citizenship judge’s scope of action in violation of regulations that require a judge to administer the citizenship oath with “the greatest possible freedom in the religious solemnization . . . thereof.” Prime Minister Justin Trudeau opposed the appeal of this judgment in his campaign, and, upon his election, the government formally withdrew its appeal to the Supreme Court of Canada.

RELIGIOUS EXEMPTIONS FROM EQUALITY LAWS

In conflicts over the veil, the accommodation for religious liberty claims can promote equality, given the minority status and political vulnerability of the claimants. Similarly, in the cases earlier in the Chapter, religious accommodation protected individuals from minority faith traditions not considered by lawmakers when they passed generally applicable laws. But religious accommodation does not always advance equality. Accommodating religion may entrench intra-group inequalities in religious communities, disempowering women and minorities, as Ayelet Shachar reminds us.** And accommodating religion may entrench inter-group inequalities when claimants assert religious objections to complying with laws that promote equality and

* Translation from draft of NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ, SUSANNE BAER, and SUSANNA MANCINI, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 117-26 (forthcoming 2016).

** AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS* (2001).

protect the rights of politically vulnerable groups. In the materials that follow, we focus on inter-group conflicts arising from religious objections to laws that promote equality.

Conflicts between religious accommodation and equality mandates can arise in a variety of circumstances. Religious objectors might be genuine outsiders who are unfamiliar with the equality norms the law protects. Or religious objectors might have long espoused majoritarian objections to an equality law's enactment and now seek faith-based exemptions from its application. In the United States, conflicts over racial equality in the aftermath of *Brown v. Board of Education* (1956) illustrate this dynamic. As William Eskridge explained, after "ferocious religion-based opposition" failed to block enactment of the Civil Rights Act of 1964, which prohibited race discrimination in employment, housing, and public accommodations, "a wave of legal clashes between civil rights for blacks and religious liberty of some religious whites" emerged.*

We begin with *Bob Jones University v. United States* (1983), a case arising from this conflict between religious liberty and racial equality in the late twentieth century. We then consider conflicts between religious liberty and laws promoting gender and sexual orientation equality today.

These cases present a number of puzzles. Does the fact that a law enforces equality matter in deciding whether to grant a religious accommodation? Does society have an interest in uniform enforcement of laws that vindicate its commitment to equality? Is the problem that exemptions from laws that vindicate equality may inflict material and dignitary harm on those the law seeks to protect? In these cases, who speaks as the minority and who speaks as the majority? **

Religious accommodation is commonly thought to promote pluralism. But when claims of religious liberty are asserted to block the enforcement of laws that have recently conferred equality rights on minorities and underrepresented groups, it cannot be assumed that religious accommodation promotes pluralism. In these circumstances, the question whether providing a religious exemption from a law of general application will tend to promote pluralism depends not only on the way in which government treats religious liberty claimants but also on the way the government treats those whom the challenged law protects.

* William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 *GEORGIA LAW REVIEW* 657, 675 (2011).

** See Douglas NeJaime and Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE LAW JOURNAL* 2516 (2015).

In *Bob Jones University v. United States* (1983), the U.S. Supreme Court addressed religious objections to racial equality when it considered the tax-exempt status of a university that banned interracial dating. Prior to 1971, Bob Jones University had a blanket policy of excluding black students. In 1971, the university began admitting married black students and, in 1975, began admitting unmarried black students. The university continued to maintain a policy of expelling students for interracial dating, advocating for interracial dating, or being affiliated with a group that advocates interracial dating.

Meanwhile, the Internal Revenue Service (IRS) issued guidance in 1970, in light of a ruling by the U.S. Court of Appeals for the D.C. Circuit, that it could no longer extend tax-exempt status to private schools that practice discrimination. The IRS based this decision on the understanding that the tax code's use of "charitable organizations" incorporated the common law principle that such organizations act in accordance with public policy and that racial discrimination was contrary to such public policy. The university then claimed that denying it tax-exempt status based on its interracial dating ban violated the Free Exercise Clause of the First Amendment.

Bob Jones University v. United States
Supreme Court of the United States
461 U.S. 574 (1983)

Chief Justice BURGER delivered the opinion of the Court. . . .

Bob Jones University is not affiliated with any religious denomination, but is dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs. It is both a religious and educational institution. Its teachers are required to be devout Christians, and all courses at the University are taught according to the Bible. . . . The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage. . . .

[A]n examination [of the Internal Revenue Code] reveals unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy. . . . [A] declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. . . .

Petitioners contend that, even if the Commissioner's policy is valid as to nonreligious private schools, that policy cannot constitutionally be applied to schools

that engage in racial discrimination on the basis of sincerely held religious beliefs. . . . This Court has long held the Free Exercise Clause of the First Amendment an absolute prohibition against governmental regulation of religious beliefs. As interpreted by this Court, moreover, the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief. However, “[n]ot all burdens on religion are unconstitutional.” . . .

On occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct. . . . Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.

The governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education²⁹—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, and no “less restrictive means,” are available to achieve the governmental interest.

[Justice Powell filed an opinion concurring in part and concurring in the judgment. He emphasized that it is for Congress and not the IRS “to decide which public policies are sufficiently ‘fundamental’ to require denial of tax exemptions.” Justice Rehnquist filed a dissenting opinion arguing that while Congress “could deny tax-exempt status to educational institutions that promote racial discrimination, . . . Congress simply has failed to take this action” given that the statute regulating tax-exempt status includes no requirement that the beneficiary conform to public policy.]

²⁹ We deal here only with religious *schools*—not with churches or other purely religious institutions; here, the governmental interest is in denying public support to racial discrimination in education. As noted earlier, racially discriminatory schools exert a pervasive influence on the entire educational process, outweighing any public benefit that they might otherwise provide.

Should Religious Groups Be Exempt from Civil Rights Law?

Martha Minow (2007)*

Should a private religious university lose its tax-exempt status if it bans interracial dating? Should a religious school be able fire a pregnant married teacher because her continued work would violate the church's view that mothers of young children should not work outside the home? Should a religious social service agency, such as Catholic Charities, be exempt from a state regulation banning discrimination in the delivery of social services on the basis of sexual orientation? Should religious organizations be exempt from civil rights laws?

Two mutually antagonistic answers emerge easily: 1) no one, not even religious organizations, should be exempt from civil rights laws; or 2) religious groups should be exempt from regulations that otherwise would coerce their members to violate their religious beliefs. History has given us a third answer: 3) religious groups largely receive no exemptions from laws prohibiting race discrimination, some exemptions from laws forbidding gender discrimination, and explicit and implicit exemptions from rules forbidding sexual orientation discrimination. Neither logic nor principle explains this pattern as well as an assessment of social movements and their accomplishments. The pattern of inconsistent treatment of race, gender, and sexual orientation reveals the different trajectories of social movements mobilized around each category, and around the contrasting sources—federal, state, or local—of the pertinent civil rights laws. Yet the pattern is disturbing to anyone who cares about consistent normative analysis, as well as to advocates of rights for women, and for gays and lesbians.

At the same time, there remain powerful arguments on the side of religious groups that do not comply with secular antidiscrimination norms. The justifications for constitutional commitment to free exercise of religion are legible to the secular world. Exemptions of some sort can be justified out of respect for the liberty of conscience at the core of the free exercise clause, acknowledgment of the contributions religious organizations have brought to individuals and society over time, and prudential avoidance of direct confrontation between the government and influential religious groups over controverted issues. Even advocates for antidiscrimination norms may find it wise to back off from direct governmental regulation of religious groups' employment practices in order to allow struggles over discrimination issues to proceed internally within particular religious communities. Changes would then be legitimate and meaningful if the religious group stands against discrimination in its employment practices and programs. Avoiding direct confrontation between the government and religious groups over antidiscrimination norms may also appeal to civil rights advocates who identify real risks of severe backlash in the broader community. . . .

* Excerpted from Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Law?*, 48 BOSTON COLLEGE LAW REVIEW 781 (2007).

Even those who disagree about the answer can agree upon the question: how can a pluralistic society commit to both equality and tolerance of religious differences? Do we best serve those commitments by ensuring extension and application of civil rights laws throughout the society, or by ensuring regard and protection for the diverse practices and beliefs of religious communities? . . .

Such conflicts reflect the crucial plurality of the good that we pursue. We rightly want to recognize the fundamental equality of each person, and the respect owed as a result. This respect includes individuals' religious and conscientious beliefs. We also should acknowledge the significance of organizations other than the government and the family, such as religions, fraternal associations, and political organizations, in which people explore and express their commitments, practice self-government, take care of one another, and contribute to the larger society. Democracy and its protection of individual rights thus are nourished by these elements of civil society even as associational, expressive, and religious freedoms depend upon the ongoing vigilance of constitutional democracy.

But plural goods can and do clash. Ensuring equal respect along lines of race, sex, and sexual orientation can conflict with protection of religious freedom. Conflicts arise for the Catholic nurse who does not want to assist in abortions and the Orthodox Jewish landlord who does not want to rent to a same-sex couple. . . .

The clash is even greater when it is not a religious individual but an entire religious group that seeks an exemption. Congregations, religious schools, and social service agencies not infrequently encounter a conflict with a civil rights law. The risk to governmental antidiscrimination purposes can be sharp and pronounced. One goal will have to give way. . . .

By 1983, when the U.S. Supreme Court decided *Bob Jones University*, norms of racial equality were sufficiently established that the Court had little problem asserting that the government interest in promoting race equality was compelling and that enforcing the antidiscrimination mandate without exception was the least restrictive means of promoting race equality, despite the law's burden on religious exercise. But as Minow suggests, courts are less certain about enforcing laws promoting gender and sexual orientation equality in the face of religious objections. In the decade since Minow wrote, a few courts have addressed the religious liberty claims of those who object to complying with laws that promote lesbian, gay, bisexual, and transgender (LGBT) equality.

For example, in 2008, Steve Preddy made a telephone reservation at a bed and breakfast in Cornwall, United Kingdom, for him and his partner, Martyn Hall. At the time, the Christian owners of the bed and breakfast, the Bulls, stated on their website: “out of a deep regard for marriage we prefer to let double accommodation to heterosexual married couples only.” Because Preddy booked by telephone, he did not see this statement, and his reservation was taken without any questions regarding his sexual orientation or marital status. When Preddy and Hall arrived, the Bulls refused to honor their booking on the basis of conscientious objection.

Preddy and Hall brought a civil action under the United Kingdom’s Equality Act (Sexual Orientation) Regulations 2007. The regulations make it unlawful, with certain exceptions, for “person (“A”) concerned with the provision to the public . . . of goods, facilities or services to discriminate against a person (“B”) who seeks to obtain or to use those goods, facilities or services by . . . refusing to provide B with goods, facilities or services,” on the basis of B’s sexual orientation. Equality Act (Sexual Orientation) Regulations 2007 § 4(1). The regulations state this “applies, in particular, to . . . accommodation in a hotel, boarding house or similar establishment.” *Id.* § 4(2). In defense, the Bulls invoked their conscience rights under Article 9 of the ECHR.

Bull v. Hall
Supreme Court of the United Kingdom
[2013] U.K.S.C. 73

Before Lord Neuberger, President; Lady Hale, Deputy President; Lord Kerr; Lord Hughes; Lord Toulson.

LADY HALE . . .

5. . . . [T]here are . . . competing human rights in play: on the one hand, the right of Mr and Mrs Bull (under article 9 of the [ECHR]) to manifest their religion without unjustified limitation by the state; and on the other hand, the right (under article 14) of Mr Preddy and Mr Hall to enjoy their right (under article 8) to respect for their private lives without unjustified discrimination on grounds of their sexual orientation. . . .

41. Under article 9 . . . , Mr and Mrs Bull have the right, not only to hold the religious beliefs which they hold, but also to manifest them in “worship, teaching, practice and observance.” . . . Under article 9(2), the freedom to manifest their religion can be subject only to “such limitations as are prescribed by law and are necessary in a democratic society . . . for the protection of the rights and freedoms of others.” . . .

45. The question, therefore, is whether it is “necessary in a democratic society,” in other words whether there is a “reasonable relationship of proportionality between the means employed and the aim sought to be achieved.” . . .

51. . . . Mr and Mrs Bull cannot get round the fact that United Kingdom law prohibits them from doing as they did. . . . Whether that could have been done at less cost to the religious rights of Mr and Mrs Bull by offering them a twin bedded room simply does not arise in this case. But I would find it very hard to accept that it could.

52. Sexual orientation is a core component of a person's identity which requires fulfilment through relationships with others of the same orientation. As Justice Sachs of the South African Constitutional Court movingly put it in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* [(1999)]:

While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined.

53. Heterosexuals have known this about themselves and been able to fulfil themselves in this way throughout history. Homosexuals have also known this about themselves but were long denied the possibility of fulfilling themselves through relationships with others. This was an affront to their dignity as human beings which our law has now (some would say belatedly) recognised. . . . But we should not underestimate the continuing legacy of those centuries of discrimination, persecution even, which is still going on in many parts of the world. It is no doubt for that reason that Strasbourg requires "very weighty reasons" to justify discrimination on grounds of sexual orientation. It is for that reason that we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.

54. There is no question of . . . replacing "legal oppression of one community (homosexual couples) with legal oppression of another (those sharing the defendants' beliefs)." If Mr Preddy and Mr Hall ran a hotel which denied a double room to Mr and Mrs Bull, whether on the ground of their Christian beliefs or on the ground of their sexual orientation, they would find themselves in the same situation that Mr and Mrs Bull find themselves today.

In *Eweida and Others v. the United Kingdom* (2013), the ECtHR considered four different employment-related accommodation claims. Eweida, a British Airways check-in clerk, and Chaplin, a nurse at a government hospital, were each prohibited from wearing a cross at work. Ladele, a government registrar, refused to register same-sex

civil partnerships, and McFarlane, a counsellor, refused to provide “psycho-sexual” counselling to same-sex couples. All lost their claims for religious accommodation at the national level. Only Eweida prevailed in her claim for religious accommodation before the ECtHR.

We focus here on the ECtHR’s evaluation of Ladele’s religious refusal to register same-sex civil partnerships. Ladele’s refusal was based on her Christian “belie[f] that same-sex civil partnerships are contrary to God’s law.” After two gay colleagues complained that Ladele’s refusal to register the partnerships was discriminatory under Islington Borough’s equality and diversity policy, the borough disciplined and then fired Ladele. The policy stated: “‘Dignity for all’ should be the experience of Islington staff, residents and service users, regardless of the age, gender, disability, faith, race, sexuality, nationality, income or health status.” It specifically prohibited “processes, attitudes and behaviour that amount to discrimination,” and required all employees “to promote these values at all times and to work within the policy.”

Eweida and Others v. the United Kingdom
European Court of Human Rights (Fourth Section)
Nos. 48420/10, 51671/10 and 36516/10 (January 15, 2013)

. . . The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of: David Thór Björgvinsson, *President*, Nicolas Bratza, Lech Garlicki, Päivi Hirvelä, Zdravka Kalaydjieva, Nebojša Vučinić, Vincent A. De Gaetano, *judges*, and Lawrence Early, *Section Registrar*

80. Religious freedom is primarily a matter of individual thought and conscience. This aspect of the right . . . is absolute and unqualified. However, as further set out in Article 9 § 1 [of the ECHR], freedom of religion also encompasses the freedom to manifest one’s belief, alone and in private but also to practice in community with others and in public. . . . Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion . . . in Article 9 § 2. This second paragraph provides that any limitation placed on a person’s freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein. . . .

82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a “manifestation” of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1. In order to

count as a “manifestation” within the meaning of Article 9, the act in question must be intimately linked to the religion or belief.

83. . . . Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate. . . .

105. The Court of Appeal held in [Ms. Ladele’s] case that the aim pursued by the local authority was to provide a service which was not merely effective in terms of practicality and efficiency, but also one which complied with the overarching policy of being “an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others.” The Court recalls that in its case-law under Article 14 it has held that differences in treatment based on sexual orientation require particularly serious reasons by way of justification. It has also held that same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship, although since practice in this regard is still evolving across Europe, the Contracting States enjoy a wide margin of appreciation as to the way in which this is achieved within the domestic legal order. Against this background, it is evident that the aim pursued by the local authority was legitimate.

106. It remains to be determined whether the means used to pursue this aim were proportionate. The Court takes into account that the consequences for the applicant were serious: given the strength of her religious conviction, she considered that she had no choice but to face disciplinary action rather than be designated a civil partnership registrar and, ultimately, she lost her job. Furthermore, it cannot be said that, when she entered into her contract of employment, the applicant specifically waived her right to manifest her religious belief by objecting to participating in the creation of civil partnerships, since this requirement was introduced by her employer at a later date. On the other hand, however, the local authority’s policy aimed to secure the rights of others which are also protected under the Convention. The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights. In all the circumstances, the Court does not consider that the national authorities, that is the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant’s discrimination claim, exceeded the margin of appreciation available to them. It cannot, therefore, be said that there has been a violation of Article 14 taken in conjunction with Article 9 in respect of [Ladele].

[Judges Bratza and Björgvinsson jointly filed a partly dissenting opinion explaining that they would have rejected the claims of all the applicants.

Judges Vučinić and De Gaetano jointly filed a partly dissenting opinion, explaining that they would have ruled that Ladele’s rights were violated and framing her case as “not so much one of freedom of religious belief as one of freedom of conscience.” Concluding that the means used by the Borough were “totally disproportionate,” the dissent reasoned that Ladele “did not publicly express her beliefs to service users[,] . . . never attempted to impose her beliefs on others, nor was she in any way engaged, openly or surreptitiously, in subverting the rights of others.”]

Do the governmental interests at stake in *Eweida* differ from those asserted in earlier cases, including *S.A.S.*? In *S.A.S.*, the ECtHR upheld the veil ban, reasoning that allowing public displays of the veil would “breach[] the right of others to live in a space of socialisation which makes living together easier.” What government interest does the antidiscrimination law challenged in *Eweida* serve? How, if at all, does it relate to the interest that prevailed in *S.A.S.*?

Ladele asserted claims under both Article 9 and Article 14. On what basis can Ladele claim that her employer’s failure to accommodate constituted discrimination against her? Does every law that treats equally members of a religiously diverse polity discriminate against them—or are additional indicia of subordination required? Is Ladele a vulnerable minority, and if so, in what sense? Responding perhaps to Ladele’s assertion that the government discriminated against her by failing to treat her differently, the Court emphasized that the government had an interest in securing equality of treatment for gays and lesbians—an interest confirmed by the Court’s Article 14 case law. Similarly, in *Bull*, the UK Supreme Court explained that the Bulls’ Article 9 rights conflicted with the same-sex couple’s Article 14 right to be free from “unjustified discrimination on grounds of their sexual orientation.”

Does it matter that Ladele is a government actor? Note that after France enacted same-sex marriage, the Conseil Constitutionnel rejected the claims of government officials who sought rights to assert conscience objections as a basis for refusing to conduct a same-sex marriage in 2013.* Would a private employee have a more compelling claim to accommodation than a government actor? In *Eweida*, the ECtHR

* Based on constitutional protections for religious liberty, *religious officials*, as opposed to secular government actors, are permitted to refuse to celebrate a same-sex marriage. *See, e.g.*, In the Matter of Section 53 of the Supreme Court Act, R.S.C. 1985, c. S-26, [2004] 3 S.C.R. 698, 722.

also rejected the religious liberty claim of a private counselor who refused to provide “psycho-sexual” therapy to same-sex couples.

As countries have liberalized laws relating to same-sex relationships, claims similar to Ladele’s have multiplied. After the U.S. Supreme Court required states to recognize same-sex marriage in *Obergefell v. Hodges* (2015), a county clerk in Kentucky refused to issue or authorize others to issue marriage licenses to same-sex couples. Kim Davis argued in U.S. district court that “she cannot have her name on a [same-sex marriage] license because her name equates to approval.”* Rejecting Davis’s accommodation claim, Judge David Bunning reasoned that her refusal “promotes her own religious convictions at the expenses of others.”** In language similar to the ECtHR in *Eweida*, Bunning observed: “[The] Free Exercise Clause ‘embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.’ Therefore, ‘[c]onduct remains subject to regulation for the protection of society.’”

In some cases, government officials object to conducting same-sex marriages. In others, citizens refuse to provide goods or services to same-sex couples on the ground that it would involve them in facilitating or condoning what they believe to be the wrongful conduct of others in marrying. These claimants, like the Bulls, object to complying with laws they assert would make them complicit in what they deem to be the sinful conduct of same-sex couples. We now consider the special problems posed by complicity-based conscience claims.

Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism

Douglas NeJaime and Reva Siegel (forthcoming 2017)***

. . . The religious liberty claims we examine seek to exempt a person or institution from a legal obligation to another citizen—for instance, from duties imposed by healthcare or antidiscrimination law. For this reason, conscience claims asserted in conflicts over reproductive rights and LGBT equality are prone to inflict targeted harms

* Defendant Kim Davis’s Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 6, 1, *Miller v. Davis*, No. 15-cv-44-DLB (E.D. Ky. July 30, 2015).

** *Miller v. Davis*, 123 F. Supp. 3d 924, 937 (E.D. Ky. August 12, 2015).

*** Excerpted from Douglas NeJaime and Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* (Susanna Mancini and Michel Rosenfeld editors, Cambridge University Press, forthcoming 2017).

on other citizens and so raise concerns less commonly presented by traditional claims for religious exemption—by, for example, the claim to engage in ritual observance. When a person of faith seeks an exemption from legal duties in the belief that citizens the law protects are sinning, granting the religious exemption can inflict material and dignitary harms on those who do not share the claimant’s beliefs. . . . We support recognition of religious exemptions from laws of general application where the exemptions do not (1) obstruct the achievement of major social goals or (2) inflict targeted material or dignitary harms on other citizens. We believe the accommodation of religious liberty claims should be structured to shield other citizens from material and dignitary harm; where this is not feasible, accommodation is not appropriate. We understand our position to affirm the role that a well-designed system of conscience exemptions can play in promoting pluralism in a heterogeneous society. . . .

Many religious liberty claims do not ask one group of citizens to bear the costs of another’s religious exercise. . . . [In the constitutional free exercise cases in the United States], religious minorities sought exemptions based on unconventional beliefs or practices generally not considered by lawmakers when they adopted the challenged laws. The costs of accommodating their claims were minimal and widely shared. For example, if the government grants an exemption from drug laws to members of the Native American Church who use peyote in ritual ceremonies, the burden of the accommodation does not fall on an identified group of citizens. . . .

Accommodation of . . . conscience claims [concerning healthcare and marriage] can impose material and dignitary harms on those the law has only recently come to protect. Material harms include restrictions on access to goods and services and information about them. Dignitary harms may be inflicted when refusals to serve or to interact create stigmatizing social meaning, a dynamic classically illustrated by regimes of racial segregation. . . .

Concerns about third-party harm lead us to focus on a special kind of conscience claim—complicity-based conscience claims. Here we are not referring to the conscience claims of those directly participating in the objected-to conduct—for example, those who refuse to perform abortions or to officiate at a marriage. Rather, we are focusing on the conscience objections of those who assert they are being asked indirectly to participate in objected-to conduct. They object to complying with laws requiring healthcare professionals to serve patients, or requiring businesses not to discriminate, on the grounds that compliance enables *others* to engage in sin or sanctions their wrongdoing. . . . In *Bull v. Hall*, innkeepers in the U.K. objected to complying with antidiscrimination law by boarding a same-sex couple and thereby “facilitat[ing] what they regard as sin.” Similarly, business owners in the wedding industry engaged in baking cakes, providing flowers, or hosting events object to antidiscrimination obligations that they contend force them to “participate” in or “facilitate” same-sex weddings.

Why draw special attention to complicity claims?

Complicity claims are bona fide faith claims. For example, Catholic principles of “cooperation” and “scandal” warn the faithful against complicity in the sins of others.⁷⁰ Evangelical Protestants also assert religious claims based on complicity. The structure of these religious exemption claims is relevant—not to the claims’ sincerity or religious significance, but instead to the claims’ potential to harm others. Because complicity claims single out other citizens as sinners, their accommodation has the potential to inflict material and dignitary harm on those the objector claims are sinning. Other aspects of the claims increase the likelihood of third-party harm. Complicity claims expand the universe of potential objectors, from those directly involved to those who consider themselves indirectly involved in the objected-to conduct. Where complicity claims become entangled in society-wide conflicts, the number of potential claimants multiplies. The universe of objectors is especially likely to expand in regions where majorities still oppose recently legalized conduct. . . .

Just as importantly, the logic of complicity offers objectors a ground on which to object to efforts to mediate the impact of their objection on third parties. For example, a healthcare provider with conscience objections to performing particular healthcare services (e.g., abortion, sterilization, assisted reproductive technologies) might refer patients to alternate providers. But if that objector raises a complicity-based objection to referring the patient, she will deprive the patient of information about alternate services. As we have seen, in the U.S., some healthcare refusal laws expressly sanction these complicity-based objections, by authorizing refusals to refer or counsel patients who are denied services.

Unconstrained, complicity claims undermine the very logic of a system of religious accommodation. In the U.S., Catholic and evangelical Protestant organizations even object to seeking an accommodation from laws requiring coverage of contraception in health insurance benefits, on the ground that registering their objection to complying with the law would make them complicit in employees receiving contraceptives through an alternate route. . . . [T]he accommodation of complicity

⁷⁰ Catholic doctrine on “cooperation” and “scandal” admonishes Catholics to avoid “complicity in the sins of others.” . . . The Catechism of the Catholic Church explains:

Sin is a personal act. Moreover, we have a responsibility for the sins committed by others *when we cooperate in them*:

- by participating directly and voluntarily in them;
- by ordering, advising, praising, or approving them;
- by not disclosing or not hindering them when we have an obligation to do so;
- by protecting evil-doers.

CATECHISM OF THE CATHOLIC CHURCH pt. 3, ¶ 1868.

claims can inflict dignitary harm as well. Complicity claims focus on citizens who do not share the objector's beliefs. By their terms, complicity claims call out other citizens as sinners. In the culture-war context in which complicity claims are arising, the social meaning of conscience objections is readily intelligible to those whose conduct is condemned. For example, a gay customer reported being told by a bakery owner, "[We] don't do same-sex weddings because [we] are Christians and being gay is an abomination." But even when not explicitly communicated, the status-based judgment entailed in the refusal is clear to the recipient. The conscience objection demeans those who act lawfully but in ways that depart from traditional morality. The objection's power to denigrate is amplified because it reiterates longstanding judgments of conventional morality.

One might challenge complicity claims on the grounds that the claimant is not directly involved in prohibited religious conduct and therefore the burden on religious exercise is not substantial. But rather than ask government to distinguish among faith claims in this way, we invite government to focus on the question of whether accommodating the claims will inflict harm on citizens who do not share the claimants' convictions. . . .

Pluralism is often invoked as a basis on which to grant widespread religious exemptions. But exemptions can both serve and undermine pluralist ends. . . . [C]onscience exemptions of a genuinely pluralist kind endeavor to mediate the impact of accommodation on third parties, providing for the welfare of a normatively heterogeneous citizenry. An accommodation regime's pluralism is measured, not only by its treatment of objectors, but also by its attention to protecting other citizens who do not share the objectors' beliefs.

To this point we have considered religious accommodation challenges to laws enforcing antidiscrimination requirements. But there are religious accommodation challenges to equality mandates of other kinds. A common form of such a challenge is to laws concerning women's reproductive healthcare.

In the United States, many have brought challenges under the Religious Freedom Restoration Act, discussed earlier in the Chapter, to the contraceptive coverage requirements of the Affordable Care Act (ACA)—a fiercely debated healthcare law that opponents have continued to challenge long after its passage. *Burwell v. Hobby Lobby Stores* (2014) is the most prominent of these challenges. Understanding the case requires some background about the ACA.

ACA regulations require employers who offer health insurance benefits to their employees to include insurance coverage for contraception. The regulations explain that

giving women control over whether and when to bear children promotes women's equality in the workforce and women's health. Without inclusion of contraception in health insurance, women have significant out-of-pocket healthcare expenses that men do not:

This [coverage] disparity places women in the workforce at a disadvantage compared to their male co-workers. Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force.*

The government adopted regulations that exempt religious institutions such as churches from the contraceptive coverage requirement. (Employees of objecting churches receive no contraceptive coverage in insurance.) The regulations also offer a religious accommodation to religiously-affiliated nonprofit organizations—such as religiously-affiliated colleges and universities, healthcare facilities, and social service providers. These organizations are not exempt from the law; instead, the government provides an accommodation that requires the organization to provide notice of its religious objection to the government, so that the government can arrange with a third-party to have insurance coverage for contraception provided to the employees of the objecting employer.

Critics of the ACA were unsatisfied and sought to expand the accommodation even further. *For-profit* corporations, which were not included in the ACA's religious accommodation framework, argued in *Hobby Lobby* that the contraceptive coverage requirements violated RFRA. The owners of *Hobby Lobby* objected to providing their employees insurance that covered forms of contraception the employers believed on religious grounds were "abortifacients."

The challenged forms of contraception generally operate before ovulation has occurred, yet in rare cases, might operate between ovulation and implantation of a fertilized egg in the uterus. Because they operate before implantation of the fertilized egg in the uterus, the point at which pregnancy begins according to medical science and federal law, they are defined and regulated as contraception. The *Hobby Lobby* plaintiffs objected to providing insurance coverage of these forms of contraception on the ground that they believed that life begins at conception.

* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725-01 (February 15, 2012).

The owners of Hobby Lobby asserted that providing employees with “insurance coverage for items that risk killing an embryo makes them complicit in abortion.”* The Court recognized their claim under RFRA, issuing a judgment that would govern religious objections to any form of contraception or healthcare covered under the ACA or to any other practice (*e.g.*, discrimination) regulated by federal law.

In *Hobby Lobby*, the Court interpreted and applied RFRA in new and expansive ways. It concluded that closely held for-profit corporations can assert religious conscience claims under RFRA. (In contrast to *Hobby Lobby*, the ECtHR has repeatedly held that profit-making corporate bodies may not invoke conscience rights under Article 9.) The Court accepted Hobby Lobby’s complicity-based conscience claims as sincerely held, and, considering the financial penalties for non-compliance with the insurance requirements of the ACA, the Court found that Hobby Lobby’s religious exercise was substantially burdened within the meaning of RFRA. Brushing aside the government’s argument that RFRA codified the relatively deferential standard of review in pre-*Smith* free exercise cases, discussed above, the Court instead held that the statute’s language of strict scrutiny should be strictly applied.

Applying this strict standard of review, the Court found that the ACA’s application to for-profit corporations with religious objections violated RFRA because the statute did not employ the least restrictive means of pursuing the government’s compelling interest in women’s health. Justice Anthony Kennedy wrote separately to emphasize that the government had a way of providing contraceptive insurance to employees while accommodating their employers’ religious objections: if the government wanted those employees who worked at for-profit corporations with religious objections to contraception to receive contraceptive coverage, the government could extend the accommodation provided to objecting nonprofit organizations to objecting for-profit corporations, providing employees of both kinds of organizations insurance coverage by alternative means. By deciding that the government had less restrictive alternatives available, the majority emphasized both the importance of accommodation and the interests of third parties.

While at Justice Kennedy’s urging the majority cabined its holding to protect individuals who might be harmed by religious accommodation, the decision nonetheless invited expansive religious liberty claims without indicating clear limits on their accommodation. A dissent written by Justice Ruth Bader Ginsburg, and joined by Justices Stephen Breyer, Elena Kagan, and Sonia Sotomayor, worried that the deference the Court gave to religious claimants asserting claims under RFRA might lead to many more situations in which religious accommodation affects the rights of others who do not share the objector’s beliefs.

* Brief for Respondents at 9, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356).

Burwell v. Hobby Lobby Stores
Supreme Court of the United States
134 S. Ct. 2751 (2014)

JUSTICE ALITO delivered the opinion of the Court. . . .

[The U.S. Department of Health and Human Services (HHS)] has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all [U.S. Food and Drug Administration (FDA)]-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations [such as Hobby Lobby] have similar religious objections. . . .

As this description of our reasoning shows, our holding is very specific. We do not hold . . . that for-profit corporations and other commercial enterprises can “opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.” Nor do we hold . . . that such corporations have free rein to take steps that impose “disadvantages . . . on others” or that require “the general public [to] pick up the tab.” And we certainly do not hold or suggest that “RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby.” The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing. . . .

In opposing the requirement to provide coverage for the contraceptives to which they object, the [claimants] argued that “it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs.” . . . [They] have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that . . . may result in the destruction of an embryo. . . . [The claimants] and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our “narrow function . . . in this context is to determine” whether the line drawn reflects “an honest conviction,” and there is no dispute that it does. . . .

The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none. Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to "face minimal logistical and administrative obstacles," because their employers' insurers would be responsible for providing information and coverage. . . .

Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases)

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal. . . .

Because of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos. Recognizing exemptions from the contraceptive mandate is very different. ACA does not create a large national pool of tax revenue for use in purchasing healthcare coverage. Rather, individual employers like the plaintiffs purchase insurance for their own employees. And . . . the employers' contributions do not necessarily funnel into "undifferentiated funds." . . . Recognizing a religious accommodation under RFRA for particular coverage requirements, therefore, does not threaten the viability of ACA's comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would. . . .

The contraceptive mandate, as applied to closely held corporations, violates [the Religious Freedom Restoration Act]. . . .

Justice KENNEDY, concurring. . . .

The Government must demonstrate that the application of a substantial burden to a person's exercise of religion "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

As to RFRA's first requirement, the Department of Health and Human Services (HHS) makes the case that the mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female

employees, coverage that is significantly more costly than for a male employee. . . . It is important to confirm that a premise of the Court’s opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.

But the Government has not made the second showing required by RFRA, that the means it uses to regulate is the least restrictive way to further its interest. As the Court’s opinion explains, the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage. . . .

Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. . . .

Justice GINSBURG, [with whom Justices BREYER, KAGAN, and SOTOMAYOR join,] dissenting.*

No doubt the [owners of Hobby Lobby] and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs. Working for Hobby Lobby . . . , in other words, should not deprive employees of the preventive care available to workers at the shop next door, at least in the absence of directions from the Legislature or Administration to do so.

Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. See, e.g., *Newman v. Piggie Park Enterprises, Inc.*, (D.S.C. 1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration) . . . ; *In re Minnesota ex rel. McClure* (Minn. 1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an “individua[l] living with but not married to a person of the opposite sex,” “a young, single woman working without her father’s consent or a married woman working without her husband’s consent,” and any person “antagonistic to the Bible,” including “fornicators and homosexuals”) . . . ; *Elane Photography, LLC v. Willock*, (N.M. 2013) (for-profit photography business owned by

* Justices Breyer and Kagan joined all of the dissent with the exception of a section not excerpted here that rejected the majority’s conclusion that for-profit corporations qualify as “person[s]” entitled to religious exemptions under RFRA.

a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners). Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn't the Court disarmed from making such a judgment given its recognition that "courts must not presume to determine . . . the plausibility of a religious claim"?

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? . . .

There is an overriding interest, I believe, in keeping the courts "out of the business of evaluating the relative merits of differing religious claims," or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be "perceived as favoring one religion over another," the very "risk the Establishment Clause was designed to preclude." The Court, I fear, has ventured into a minefield, by its immoderate reading of RFRA. . . .

[Justices BREYER and KAGAN filed a dissenting opinion agreeing "with Justice GINSBURG that the plaintiffs' challenge to the contraceptive coverage requirement fails on the merits" and therefore that they "need not . . . decide whether either for-profit corporations or their owners may bring claims under [RFRA]."]

Complicity claims of the kind recognized in *Hobby Lobby* proliferated in the decision's wake. Complicity claims pose a particular challenge in designing a workable system of accommodation, as litigation over the ACA continues to illustrate. Both religiously-affiliated nonprofit organizations and for-profit employers have challenged the system of accommodation that the Court extended to for-profit corporations in *Hobby Lobby*. To obtain an accommodation, employers who had religious objections to complying with the contraceptive insurance coverage requirement were to communicate that objection by sending a form to a third-party administrator, and that third-party administrator would then separately arrange for contraceptive coverage for the employees. After a religiously-affiliated college challenged this process on the grounds that it would make the college complicit in the provision of contraception, the Court in *Wheaton College v. Burwell* (2014) suggested that the government could change the regulations to allow objecting organizations merely to notify the government by letter of their religious objection, and the government adapted its regulations accordingly.

After these regulations appeared, religiously-affiliated nonprofit organizations objected to this procedure for requesting accommodations as well. In *Zubik v. Burwell* (2016), religiously-affiliated charities, schools, and hospitals with faith-based objections to contraception argued that notifying the government that they had an objection to including coverage of contraception in health insurance for their employees and students would make the organizations complicit because notice of their objection would “trigger” the provision of insurance covering contraception by other parties. In May of 2016, the U.S. Supreme Court (per curiam) remanded a set of four such cases to the lower courts to afford “an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’”

While *Hobby Lobby* authorized expansive religious accommodations without providing legislators and judges clear guidance about when and how such accommodations should be limited, the Constitutional Court of Colombia, as illustrated below, spoke more clearly in imposing limits on accommodation in order to protect the rights of others.

In 2006, the Constitutional Court of Colombia found that women’s right to dignity protected by both the Colombian Constitution and international human rights instruments gave women a right to make decisions about abortion under limited circumstances.* Subsequently, when a woman sought to act on her newly recognized right, the physician demanded a court order before performing an abortion. The woman then brought a *tutela* action before a judge who recused himself due to his conscientious objection to abortion. After the judge’s superior court remanded the case and ordered him to decide, he denied the woman’s request on the basis of his objection. The woman won the case on appeal and was allowed to end her pregnancy.

The Constitutional Court of Colombia then decided to take the case to clarify the bounds of conscientious objection in the medical and judicial contexts. As excerpted below, the Court imposed limits on conscientious objection with attention to the ways that religious accommodation could impair the rights of groups historically subject to discrimination, as the conclusion of its opinion makes clear.

* Colombian Constitutional Court Decision C-355 of 2006, Clara Inés Vargas Hernández, J. (Jaime Araujo Rentería, J., Manuel José Cepeda Espinosa, J., concurring; Rodrigo Escobar Gil, J. and Marco Gerardo Monroy Cabra, J. dissenting).

Decision T-388/2009
Colombian Constitutional Court (2009)*

. . . Writing for the Court: Honorable Justice Humberto Antonio Sierra Porto . . .

4.4—Conclusions about the Sexual and Reproductive Rights of Women: . . .

vi) Departments, districts and municipalities are obligated to ensure that sufficient abortion services are available through the public network, with the purpose of guaranteeing pregnant women effective access to voluntary abortion services in conditions of quality and safety.

vii) No service provider entity—whether public or private, religious or secular—can refuse to terminate the pregnancy of a woman who finds herself under one of the circumstances outlined by decision C-355 of 2006

viii) It is categorically prohibited to impose obstacles, requirements or barriers to the practice of abortion, under the circumstances in which it is permitted, in addition to those already established by case C-355. . . .

5. Conscientious Objection: Direction and Implications in a Social Democratic, Participatory and Pluralistic Legal State, Like Colombia . . .

5.1. Conscientious Objection as a Fundamental Right and its Relationship to the Legal Order . . .

[C]onscientious objection assumes an incompatibility between a legal norm and a moral norm. . . . The central idea is that individuals breach a legal duty for moral reasons and seek to preserve their own moral integrity, which does not support the proposition that other people must “*adhere to the beliefs or actions of the objector.*” . . .

The problem arises when an individual’s moral convictions are externalized with the purpose of evading a legal duty and, as a consequence, interferes with the rights of other individuals. . . . The right to conscientious objection may, therefore, trigger or unleash consequences for third persons. It is therefore impossible to characterize conscientious objection as a right that affects solely those who exercise it. . . .

* Translation excerpted from *Conscientious Objection and Abortion: A Global Perspective on the Colombian Experience*, O’NEILL INSTITUTE FOR NATIONAL AND GLOBAL HEALTH LAW (Georgetown University 2014).

This case dealt with sufficiently important interests that justified restricting freedom of conscience, which, if permitted under the circumstances, would violate women's fundamental constitutional rights to health, personal integrity and life in conditions of quality and dignity. It would also violate their sexual and reproductive rights and cause them irreversible harm. . . .

If there is only one healthcare professional who can perform voluntary termination of pregnancy—[in] the circumstances that it is permitted under—then they should perform the termination, regardless of whether the physician is affiliated with a hospital that is private or public, religious or secular. . . . [U]nder these conditions the failure to provide a voluntary termination of pregnancy causes direct and irreversible harm to the pregnant woman and infringes upon her fundamental constitutional rights. . . .

[L]imits also exist with respect to who can exercise the right to conscientious objection; the Court has clearly stated that conscientious objection only applies to personnel that are directly involved in performing the medical procedure necessary to terminate the pregnancy. . . .

5.2. Conscientious Objection as an Individual Right and Not an Institutional or Collective Right . . .

Legal persons cannot experience intimate and deeply-rooted convictions. . . .

5.4. . . .

i) Conscientious objection is a fundamental constitutional right that . . . must guarantee protection and encouragement of cultural diversity . . . and therefore cannot be exercised in an absolute manner.

ii) The exercise of fundamental constitutional right to conscientious objection . . . can only be limited in the event that in its practice it interferes with the rights of third persons.

iii) Only medical personnel whose duties involve direct participation in the procedure leading to the termination of pregnancy can conscientiously object; *per contra* this is an option that does not exist for administrative personnel, medical personnel that only perform preparatory tasks and medical personnel who provide care during the patient's recovery phase.

iv) Physicians who conscientiously object must explain their objection in writing and indicate the reasons why they are unable perform the termination of pregnancy.

v) [T]he allowed prima facie exercise of conscientious objection by healthcare professionals who act as direct service providers could be restricted when its exercise imposes a disproportionate burden on women who decide to terminate their pregnancy under any of the circumstances established by this decision.

vi) With regards to the manifestation of intimate and inalienable moral, philosophical or religious convictions, conscientious objection is a right [that] does not extend to legal persons.

vii) Individuals who voluntarily serve as judicial authorities cannot conscientiously object . . . to avoid complying with a regulation that has been adopted in accordance with constitutional tenants Claiming conscientious objection is thusly inadmissible under these circumstances, as it would translate into an unjustified hindrance in the administration of justice and linked to a serious, arbitrary and disproportionate restriction on fundamental constitutional rights, even more, where many of these rights developed out of struggles led by sectors of the society that have historically been discriminated against and whose successes have generally not been well-received by many sectors of society that, shielded by their conscientious objections, try to project their private convictions in the public sphere, using a domineering and exclusionary rationale that is entirely contrary to the mandate of protecting and stimulating cultural diversity as specially established by the Constitution (articles 1 and 7).^{*} . . .

* * *

Responding to government actors resisting its 2009 decision, the Constitutional Court of Colombia issued another judgment in 2012 reiterating the limits on conscientious objection. It explained that conscientious objection (CO) “to Voluntary Interruption of Pregnancy (VIP) could be exercised . . . specifically (i) by natural persons . . . (ii) only if it is possible to immediately refer the woman to another physician

* The Constitution of Colombia provides:

Article 1: “Colombia is a social state under the rule of law, organized in the form of a unitary republic, decentralized, with autonomy of its territorial units, democratic, participatory, and pluralistic, based on the respect of human dignity, the work and solidarity of the individuals who belong to it, and the prevalence of the general interest.”

Article 7: “The State recognizes and protects the ethnic and cultural diversity of the Colombian Nation.”

willing to practice the VIP . . . [and] (iii) CO can only be exercised by the health personnel directly involved in providing the service. . . .” The Court emphasized that “CO to VIP is a conduct protected by the fundamental right of freedom of conscience but at the same time it has precise limits established with the objective of not infringing on equally important rights.”*

Healthcare Refusal Laws

As the Colombian decisions illustrate, where law has come to recognize women’s dignity and equality rights to make decisions about childbearing, contraception, and abortion, healthcare providers have asserted conscience objections to providing the care. As courts and legislatures expand women’s rights to reproductive healthcare, legislators often provide for accommodation of conscience objections. These laws vary in the procedures and practices covered, as well as the individuals and institutions authorized to claim conscience protections.

The United States provides more extensive protection for conscience in the healthcare context than any other jurisdiction. When the Court recognized that women have a right to abortion in *Roe v. Wade* (1973), federal and state laws were enacted that authorized doctors and nurses with religious or moral objections to refuse to perform abortions or sterilizations.** The coverage of healthcare refusal laws in the United States has expanded dramatically in recent decades. These more recently enacted laws are not limited to abortion and sterilization, but instead cover a wider range of healthcare services, including contraception. And these laws use concepts of complicity to authorize conscience objections, not only by the doctors and nurses directly involved in the objected-to procedure, but also by others indirectly involved who object on grounds of conscience to being made complicit in the procedure.

For instance, a Mississippi law enacted in 2004 allows healthcare providers to assert conscience objections to providing “any phase of patient medical care, treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health care providers or healthcare institutions.”*** And the Mississippi law

* Decision T-627/2012 (translation by Violeta Canaves, Yale Law School, LL.M. Class of 2015).

** Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401(b)-(c), 87 Stat. 91, 95; MINN. STAT. ANN. § 145.414 (1974); OHIO REV. CODE ANN. § 4731.91 (1974).

*** MISS. CODE ANN. § 41-107-3(a) (West 2014).

expansively defines “health care provider” to include “any individual who may be asked to participate in any way in a health care service, including, but not limited to: a physician, physician’s assistant, nurse, nurses’ aide, medical assistant, hospital employee, clinic employee, nursing home employee, pharmacist, pharmacy employee, researcher, medical or nursing school faculty, student or employee, counselor, social worker or any professional, paraprofessional, or any other person who furnishes, or assists in the furnishing of, a health care procedure.”*

Healthcare refusal laws vary in the requirements and limitations they impose in the interest of protecting patients. Mississippi’s law may be unusual in detail, but it resembles most American healthcare refusal laws in failing to provide that patients who have been refused services to receive care. Like many American laws, it authorizes healthcare providers to conscientiously refuse to counsel or refer patients who have been denied services. Women denied medical care in the course of miscarriage or delivery have invoked other bodies of federal and state law to challenge refusals to treat, counsel, or refer patients.

But in other jurisdictions, laws endeavour to protect conscience while also providing for the patient’s welfare. Many statutes prohibit conscientious objection where accommodation would endanger the physical or mental health of a patient. For example, the 1978 Italian statute legalizing abortion states, “Conscientious objection may not be invoked by medical practitioners or other health personnel if, under the particular circumstances, their personal intervention is essential in order to save the life of a woman in imminent danger.”

Some laws require objectors to identify themselves in advance and require that objecting providers supply patients with information on alternative providers. Polish law, for example, requires that objecting doctors inform their supervisor of the refusal in writing, refer the patient to a willing provider, and register the refusal in the patient’s medical records.

Some courts have addressed the circumstances under which conscience objections can be asserted and, in doing so, have emphasized the importance of patient access to care. In *Greater Glasgow Health Board v. Doogan* (2014), two Scottish midwives serving as Labour Ward Co-ordinators objected under the conscience clause of the Abortion Act of 1967 to performing a range of supervisory and administrative duties related to abortions performed on their ward. In treating the case as a “pure question of statutory construction,” the Supreme Court of the United Kingdom, in an opinion written by Lady Brenda Hale (Deputy President) and joined by Lords Nicholas Wilson, Robert Reed, Anthony Hughes, and Patrick Hodge, addressed what specific acts could be objected to, and what constitutes “participation” in those acts.

* MISS. CODE ANN. § 41-107-3(b) (West 2014).

The Court adopted a “narrow” construction of participation, restricted to “actually taking part” in a “hands-on capacity,” or “actually performing the tasks involved in the course of treatment.” The Court reiterated the House of Lords’ conclusion that “such an interpretation would not cover the doctors forming the opinions . . . [that particular women were eligible for abortion under the law] and signing the certificates to that effect,” since “[t]hese certificates have to be given before the ‘treatment for the termination of pregnancy’ begins.” The Court observed, “It is . . . hard to see them as part of the treatment process. They are a necessary precondition to it. It follows that they are not covered by the conscience clause in section 4(1).” Finally, the Court emphasized the importance of patient access, noting that “it is a feature of conscience clauses generally within the health care profession that the conscientious objector be under an obligation to refer the case to a professional who does not share that objection. This is a necessary corollary of the professional’s duty of care towards the patient.”

Where the British court interpreted legislation authorizing medical professionals to refuse treatment with attention to limitations on conscientious objection designed to protect patients, a Uruguayan court invalidated limitations of this kind as impermissibly restricting healthcare providers’ rights to refuse treatment. In 2012, Uruguay enacted a law that waived criminal penalties for abortion in the first twelve weeks of gestation, in the first fourteen weeks where the pregnancy was the result of rape, and entirely if the mother’s health is endangered or the embryo unviable. Shortly thereafter, the Uruguayan government issued a decree that regulated the procedure of abortion and determined the parameters for conscientious objection. The government provided that only personnel who are directly involved in the procedure may object, and only then if they communicate their decision to their health facility in order to find a replacement. Several doctors challenged these regulations, and in 2015, the Supreme Administrative Court of Uruguay decided to annul these portions of the decree as impermissibly restricting the right to conscientious objection.*

The decision concluded that the right of healthcare providers to object “derives from individual rights, whether freedom of conscience or the right to human dignity” protected by international instruments and inferred from the Uruguayan constitution. The Court did not discuss how widespread refusals could affect the exercise of rights protected by the 2012 abortion law, in which “[t]he State guarantees the right to a responsible and conscious parenthood, recognizes the social value of motherhood, protects human life, and promotes the full exercise of the population’s sexual and reproductive rights. . . .”** A human rights report evaluating implementation of the 2012 abortion law found that, especially in the interior of Uruguay, there are not enough

* Alonso Justo y otros contra Poder Ejecutivo (2015).

** Law 18,987, Article 1 (2012) (translation by Violeta Canaves, Yale Law School, LL.M. Class of 2015).

health professionals available to perform abortions. In several cities every health professional has declared conscientious objections. Hence, women have to travel to another city or even other departments to exercise their rights.*

Justifications for conscientious objection assume a paradigm of an individual resisting the state. But in the healthcare context it is not uncommon for conscience objections to become entangled in society-wide conflict over changes in law. Objections are asserted not only by the lone individual against the state but also by large numbers of individuals and institutions. In some regions, accommodation can result in widespread restrictions on access to the objected-to services. (In the United States, one in six hospital beds is in a facility governed by the Ethical and Religious Directives for Catholic Health Care, promulgated by the U.S. Conference of Catholic Bishops. In some states, more than forty percent of all hospital beds are in a Catholic facility.)

A series of cases emerged from Poland, in which women legally entitled to abortion services faced delay and obstruction by physicians and government authorities that far exceeded the rights explicitly provided by conscience legislation. In the most recent case, *P. and S. v. Poland* (2012), a fourteen-year-old girl was legally entitled to obtain an abortion because her pregnancy resulted from criminal rape. But the girl and her mother were denied abortion services at three different hospitals. During those encounters, doctors invoked conscience objections, provided distorted information about abortion services, and failed to refer the girl to willing providers. After finally obtaining an abortion in a hospital hundreds of miles from her home, the girl and her mother filed a complaint before the ECtHR. Observing a “striking discordance between the theoretical right to such an abortion . . . and the reality of its practical implementation,” the ECtHR found violations of Article 3 (right to be free from inhuman and degrading treatment), Article 5 (right to liberty), and Article 8 (right to respect for private and family life) of the ECHR. The Court specifically noted that the providers failed to comply with the legal requirements imposed on conscientious objectors, such as documenting the refusal in writing and referring the patient to a willing provider.

As we saw with the discussion of Uruguay, widescale invocation of conscientious objection can produce problems with patient access to services. In *International Planned Parenthood Federation—European Network (IPPF EN) v. Italy* (2013), the European Committee of Social Rights explained that the level of gynecologists claiming objector status under Italian law had risen dramatically from 57.8% in 2005 to 70.7% in 2011; that number was as high as 85.2% in certain areas. Noting what the Italian Senate and Chamber of Deputies described as a “state of emergency,” the Committee found that Italy had violated its residents’ right to health under Article 11 §1 of the European Social Charter, and urged “adequate measures . . .

* Asegurer y Avanzar Sobre lo Logrado: estado de situación de la salud y los derechos sexuales y reproductivos en uruguay (monitoreo 2010-2014).

to ensure the availability of non-objecting medical practitioners and other health personnel when and where they are required to provide abortion services.”

In issuing its decision, the Committee drew attention to the ways in which the practice of conscientious objection produced a system in which women faced multiple forms of discrimination:

(i) discrimination on the grounds of territorial and/or socio-economic status between women who have relatively unimpeded access to lawful abortion facilities and those who do not; (ii) discrimination on the grounds of gender and/or health status between women seeking access to lawful termination procedures and men and women seeking access to other lawful forms of medical procedures which are not provided on a similar restricted basis. The Committee considers that these different alleged grounds of discrimination are closely linked together and constitute a claim of ‘overlapping,’ ‘intersectional’ or ‘multiple’ discrimination, whereby certain categories of women in Italy are allegedly subject to less favorable treatment in the form of impeded access to lawful abortion facilities as a result of the combined effect of their gender, health status, territorial location and socio-economic status

Other authorities have concluded that laws authorizing conscientious objection without providing for patient access to healthcare can discriminate against women. Article 12(1) of the Convention on the Elimination of Discrimination against Women (CEDAW), adopted by the United Nations General Assembly and ratified by 185 countries, provides:

States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health-care services, including those related to family planning.

In 1999, the Committee charged with reviewing CEDAW compliance adopted General Recommendation 24 which states in relevant part:

Measures to eliminate discrimination against women are considered to be inappropriate if a health-care system lacks services to prevent, detect and treat illnesses specific to women. It is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on

conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.*

In the United States, some states have responded to *Obergefell v. Hodges* (2015), the Supreme Court decision recognizing same-sex couples' right to marry, by enacting religious exemptions statutes modeled on those in the healthcare context. Mississippi already had the most expansive healthcare refusal law in the country. In 2016, it enacted the most expansive religious exemptions statute aimed at LGBT people—the Protecting Freedom of Conscience from Government Discrimination Act.

Mississippi House Bill No. 1523 (2016)

. . . Section 2. The sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that:

- (a) Marriage is or should be recognized as the union of one man and one woman;
- (b) Sexual relations are properly reserved to such a marriage; and
- (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.

Section 3. . . .

(4) The state government shall not take any discriminatory action against a person . . . on the basis that the person declines to participate in the provision of treatments, counseling, or surgeries related to sex reassignment or gender identity transitioning or declines to participate in the provision of psychological, counseling, or fertility services based upon a sincerely held religious belief or moral conviction described in Section 2 of this act. . . .

(5) The state government shall not take any discriminatory action against a person . . . on the basis that the person has provided or declined to provide the following services,

* Committee on the Elimination of Discrimination against Women, General Recommendation 24, para 11, Women and Health (Twentieth session, 1999), U.N. Doc. A/54/38 at 5 (1999), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 271 (2003).

accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or recognition of any marriage, based upon . . . a sincerely held religious belief or moral conviction described in Section 2 of this act:

(a) Photography, poetry, videography, disc-jockey services, wedding planning, printing, publishing or similar marriage-related goods or services; or

(b) Floral arrangements, dress making, cake or pastry artistry, assembly-hall or other wedding-venue rentals, limousine or other car-service rentals, jewelry sales and services, or similar marriage-related services, accommodations, facilities or goods.

(6) The state government shall not take any discriminatory action against a person . . . on the basis that the person establishes sex-specific standards or policies concerning employee or student dress or grooming, or concerning access to restrooms, spas, baths, showers, dressing rooms, locker rooms, or other intimate facilities or settings, based upon . . . a sincerely held religious belief or moral conviction described in Section 2 of this act. . . .

(8) (a) Any person employed or acting on behalf of the state government who has authority to authorize or license marriages, including, but not limited to, clerks, registers of deeds or their deputies, may seek recusal from authorizing or licensing lawful marriages based upon . . . a sincerely held religious belief or moral conviction described in Section 2 of this act. . . .

(b) Any person employed or acting on behalf of the state government who has authority to perform or solemnize marriages, including, but not limited to, judges, magistrates, justices of the peace or their deputies, may seek recusal from performing or solemnizing lawful marriages based upon . . . a sincerely held religious belief or moral conviction described in Section 2 of this act. . . .

* * *

The law authorizes refusal to serve by many actors in many contexts but only addresses the impact of a refusal on third parties in one context. When a state official or employee refuses to perform, solemnize, license, or authorize a same-sex couple's marriage, that individual as well as the government "shall take all necessary steps to ensure that the [performance, solemnization, authorization, or licensing] . . . is not impeded or delayed." Note that the concern is solely with material harm. Would a couple directed to another employee know of the state-sanctioned objection? In other contexts,

the statute authorizes refusals without shielding persons denied services from the meanings the refusal communicates or its material effects.

The Mississippi law protects those engaging in conscience-based refusals from “any discriminatory action.” (In striking contrast, state law does not prohibit discrimination on the basis of sexual orientation.) In what ways is the claim to religious accommodation an equality-based claim? In what sense are the conscientious objectors in this context facing discrimination? Do they exhibit the indicia of subordination that have concerned courts that have granted religious exemptions to vindicate equality? Are those the law protects a minority? And what is their status relative to LGBT individuals?

In June of 2016, a federal district court preliminarily enjoined enforcement of House Bill No. 1523 under both the Fourteenth Amendment’s Equal Protection Clause and the First Amendment’s Establishment Clause.* Focusing on how the law authorizes refusals that produce material and dignitary harms, the court reasoned that the law gives “an absolute right to refuse service to LGBT citizens without regard for the impact on their employer, coworkers, or those being denied service.” “A religious accommodation which does no harm to others is much more likely to survive a legal challenge than one which does.”

When do religious accommodations promote pluralism—and when do they sanction and promote the objectors’ commitments? Can religious accommodation be designed in such a way as to shield from harm those who do not share the objectors’ commitments? Are these questions of institutional design specially within legislative competence? What responsibilities do courts have in the process?

Are there special considerations or principles that govern claims for religious exemption from judgments or laws that secure the equality of other members of the polity? Or are all the cases in this Chapter best analysed under a common framework?

* Barber v. Bryant, No. 3:16-CV-417-CWR-LRA, 2016 WL 3562647 (S.D. Miss. June 30, 2016).

BLASPHEMY AND
RELIGIOUS HATE SPEECH

DISCUSSION LEADERS

ROBERT POST AND MARTA CARTABIA

V. BLASPHEMY AND RELIGIOUS HATE SPEECH

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In English common law, speech was restricted by four forms of libel: seditious libel, which protected the dignity of the sovereign; blasphemy, which protected the dignity of God; defamation, which protected the dignity of other persons; and obscenity, which prohibited the profane. In modern usage, the law of blasphemy can also be used to protect the dignity of religion and religious groups.

Contrary to popular belief, blasphemy laws are widely maintained. A 2012 analysis by the Pew Research Center's Forum on Religion and Public Life studied the laws of 198 countries and found that 32 (16%) have anti-blasphemy laws, 20 (10%) have laws penalizing apostasy, and 87 (44%) have laws against the defamation of religion, including hate speech against members of religious groups.

In this Chapter, we shall explore a typology of blasphemy laws and raise a number of theoretical questions about its relationship to freedom of speech. We first examine blasphemy laws in the context of efforts to uphold an official state religion or the religious beliefs of a hegemonic group. We call this "assimilationist law" because it requires all members of society to maintain fidelity to a dominant set of religious precepts. Emile Durkheim hypothesizes that this kind of law is a means of maintaining social solidarity. An example is the Roman Theodosian Code. This kind of blasphemy law persists to the modern day. The price of such solidarity is severe encroachments on freedom of speech.

Modern blasphemy statutes do not tend to follow the model of assimilationist law, but of pluralist law. Pluralist law respects the equality of groups within society. Modern blasphemy law is thus structurally analogous both to group libel (by restricting defamation against religious groups) and to antidiscrimination law (by restricting conduct that stigmatizes or subordinates religious groups). Understood in this way, the regulation of blasphemy is analogous to the regulation of hate speech.

Yet, as the United Kingdom's Racial and Religious Hatred Act 2006 illustrates, the law reflects a lingering sense that censorship of hate speech addressed to racial groups is fundamentally different from censorship of blasphemy that offends religious groups. There is the inarticulate conviction that censorship of the latter is somehow more like the direct suppression of ideas.

In the United States, blasphemy law is strictly forbidden by the First Amendment. This is because judges in the United States construe the First Amendment to create a form of law that is individualist, rather than either pluralist or assimilationist. We discuss the implications of individualist law in the context of *Cantwell v. Connecticut*. We conclude by examining a recent effort by the Arab Council of Ministers of Justice to reshape the international law of blasphemy by punishing defamation of religion.

Cultural Heterogeneity and Law

Robert C. Post (1988)*

. . . We can begin by noting the outlines of a rather crude triptych. Consider the options available to a legal order in a society consisting of heterogeneous groups. The law can place the authority of legal sanctions behind the cultural perspectives of a dominant group; or it can foster a regime in which diverse groups can escape from such domination and maintain their distinctive values; or it can ignore group values and perspectives altogether and recognize only the claims of individuals. I shall call these three options, respectively, assimilationism, pluralism, and individualism. Most legal orders, and certainly . . . [the United States,] contain elements of each of these three options, and are, for example, individualist with respect to one issue, but assimilationist with respect to another.

Assimilationist law places the force of the state behind the cultural perspective of a particular, dominant group. If a society is relatively homogeneous, so that the values of this group are representative of the society as a whole, assimilationist law can be said to be expressive of common community norms. But if the society is heterogeneous, assimilationist law can instead be understood as an attempt, which may be more or less hegemonic in character, to extend the values of a dominant group to the larger society. An example of an assimilationist law is the federal anti-bigamy statute, which was upheld in *Reynolds v. United States* [(1878)] on the grounds, inter alia, that “polygamy has always been odious among the northern and western nations of Europe.” Another example is the requirement that school children salute the flag, which was upheld in *Minersville School District v. Gobotis* [(1940)] on the grounds that a state can enforce “the traditions of a people” and hence “create that continuity of a treasured common life which constitutes a civilization.”

In each of these examples law was used to support the values of a dominant culture, notwithstanding the dissenting values of marginal or subordinate groups. From the perspective of these latter groups, assimilationist law can often appear based in “cultural chauvinism, social hypocrisy, and disdain for diversity.” Assimilationist values, however, have deep roots in American history. With respect to newly arrived immigrants, for example, our “most prevalent ideology” has been the concept of “Anglo-conformity,” which “demanded the complete renunciation of the immigrant’s ancestral culture in favor of the behavior and values of the Anglo-Saxon core group.” Assimilationist values in this country are probably best

* Excerpted from Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIFORNIA LAW REVIEW 297 (1988).

exemplified by the “Americanization” movement that flourished during the early years of the 20th century.

Opposed to assimilationist values are those of pluralism, which embrace, rather than reject, group heterogeneity. The concept of pluralism is now in rather bad repute among many legal scholars, for it has come to be associated with a vision of politics as a “struggle among self-interested groups for scarce social resources” in which any concept of the “common good” is “incoherent, potentially totalitarian, or both.” But pluralism has a prior and deeper meaning, one in which the affirmative value of diversity is explicitly acknowledged and celebrated. In 1909, for example, William James used the term in this sense in his Hibbert Lectures, entitled *A Pluralistic Universe*. Fifteen years later James’ literary executor, Horace Kallen, coined the term “cultural pluralism” to express the importance of “manyness, variety, differentiation,” as opposed to what Kallen viewed as the dead uniformity of Americanization. For Kallen, “[d]emocracy involves, not the elimination of differences, but the perfection and conservation of differences. It aims, through Union, not at uniformity, but at variety It involves a give and take between radically different types, and a mutual respect and mutual cooperation based on mutual understanding.”

The values of pluralism, like those of assimilationism, also have deep roots in American history. They reach back beyond Walt Whitman’s chants in praise of the United States as “the modern composite nation,” the “Nation of many nations,” to the very structure of our federalism, which seeks to the extent possible to preserve the heterogeneity inherent in local and regional differentiation.

If assimilationist law attempts to unify society around the cultural values of a single dominant group, pluralist law attempts to create ground rules by which diverse and potentially competitive groups can retain their distinct identities and yet continue to coexist. These ground rules can range from the requirement of state neutrality respecting conflicting religions, to the enforcement of norms of mutual respect, as exemplified by the group libel statute upheld in *Beauharnais v. Illinois* [(1952)]. That statute imposed criminal penalties on any expression that exposed “citizens of any race, color, creed or religion to contempt, derision, or obloquy.” In *Beauharnais* the Court stressed that the need to foster “the manifold adjustments required for free, ordered life in a metropolitan, polyglot community” justified the legal provision of “[s]uch group-protection on behalf of the individual.”

Pluralist law rests on two premises: that diversity is to be safeguarded, and that diversity inheres in the various perspectives of differing groups. “In a multi-ethnic society,” the historian John Higham has written, “the assimilationist stresses a unifying ideology, whereas the pluralist guards distinctive memory.” The pluralist

guards his distinctive memory because for him “[i]ndividuals can realize themselves, and become whole, only through the group that nourishes their being.” Hence pluralism “stresses the rights of the ethnic group over the rights of the individual.” As Justice Black dryly noted in his dissent in *Beauharnais*, the Court had in effect held that the value of providing group protection was more important than that of safeguarding an “individual’s choice” to speak.

This focus on group rights, which is intrinsic to pluralist law, has always been controversial in America because it appears “to predetermine the individual’s fate by his ethnic group membership.” Americans have traditionally attached great importance to the image of the independent individual capable of transcending his or her particular social or ethnic background; “we strongly assert the value of our self-reliance and autonomy.” Thus if pluralist law protects the ability of groups to maintain their distinctive identities, law based on the value of individualism focuses instead on the protection of individuals vis-à-vis groups. If pluralism celebrates the diversity of cultures, individualism acclaims instead the diversity of persons.

The distinction between the two forms of law is illustrated by the case of *Wisconsin v. Yoder* [(1972)], where the Supreme Court held that the free exercise clause of the First Amendment prohibited the State of Wisconsin from requiring that Amish children attend public or private schools until the age of sixteen. In his opinion for the Court, Chief Justice Burger noted that such a requirement would pose the “very real threat of undermining the Amish community and religious practice as they exist today,” and would require the Amish to “either abandon belief and be assimilated into society at large, or . . . to migrate to some other and more tolerant region.” Burger thus construed the First Amendment as protecting the identity of the Amish community and as shielding that community from forced assimilation into the dominant culture.

Justice Douglas argued in dissent, however, that the Constitution safeguarded instead the rights of individual Amish children to choose whether or not to become part of the Amish community. Douglas viewed religion as “an individual experience,” and hence interpreted the First Amendment as guaranteeing the rights of children “to break from the Amish tradition.”

It is the future of the student, not the future of the parents, that is imperiled by today’s decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student’s judgment, not his parents’, that is essential if we are to give full meaning

to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.

For Burger the “amazing world of diversity” to be protected inhered in the continuing traditions of the Amish community; for Douglas that diversity was constituted instead by the decisions of individuals to embrace or reject those traditions. Burger’s opinion rests on the values of pluralism; Douglas’ on the values of individualism.

The contrast between individualism and assimilationism can appear equally stark. The latter upholds the cultural values of the dominant group; the former protects the rights of individuals to dissent from those values. In *Gobitis* the Supreme Court supported the values of assimilationism by upholding the right of a majority to require dissenters to swear allegiance to the flag, and to the cultural perspective for which it stood. But three years later the Court dramatically reversed itself, and in *West Virginia State Board of Education v. Barnette* [(1943)] issued the classic defense of “intellectual individualism”: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion” *Barnette* rested squarely on the individual’s “right to differ as to things that touch the heart of the existing order,” a right that seems deeply incompatible with assimilationist law.

We are thus in a position to draw rough distinctions between three different kinds of law: assimilationist, pluralist, and individualist. Each postulates a different kind of relationship between cultural heterogeneity and the legal order. Assimilationist law strives toward social uniformity by imposing the values of a dominant cultural group; pluralist law safeguards diversity by enabling competing groups to maintain their distinct perspectives; individualist law rejects group values altogether in favor of the autonomous choices of individuals.

It is tempting to view these three kinds of law as sharply distinct and mutually exclusive. But they are not. . . .

BLASPHEMY LAW AS ASSIMILATIONIST LAW: THE PROTECTION OF GOD

States traditionally suppressed blasphemy in order to safeguard the respect properly due to God. Samuel Johnson defined blasphemy as “an offering of some indignity unto God himself.” English law, for example, made blasphemy a crime based upon “the plain principle that the public importance of the Christian religion is so great that no one is allowed to deny its truth.” In 1841, the English Commissioners on Criminal Law reported “that the common law of England

punishes as an offence any general denial of the truth of Christianity, without reference to the language or temper in which such denial is conveyed.” While blasphemy law in the United Kingdom and many other jurisdictions have since changed, some states still seek to use law to enforce the respect due to God. Pakistan, for example, prescribes the death penalty for anyone who “by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet.”

Blasphemy laws of this kind are an example of assimilationist law. They uphold the religious beliefs of a dominant group. One question is how a state’s interest in safeguarding the respect due to God and God’s prophets can be reconciled with the freedom of speech necessary to serve the function of democratic legitimation. There is an obvious and immediate contradiction between keeping public discourse open to all opinions and excluding from public discourse those who would deny what a particular religion regards as sacred.

The Elementary Forms of the Religious Life Émile Durkheim (1915)*

. . . [W]e have seen that this reality, which mythologies have represented under so many different forms, but which is the universal and eternal objective cause of these sensations *sui generis* out of which religious experience is made, is society. We have shown what moral forces it develops and how it awakens this sentiment of a refuge, of a shield and of a guardian support which attaches the believer to his cult. It is that which raises him outside himself; it is even that which made him. For that which makes a man is the totality of the intellectual property which constitutes civilization, and civilization is the work of society. Thus is explained the preponderating role of the cult in all religions, whichever they may be. This is because society cannot make its influence felt unless it is in action, and it is not in action unless the individuals who compose it are assembled together and act in common. It is by common action that it takes consciousness of itself and realizes its position; it is before all else an active co-operation. The collective ideas and sentiments are even possible only owing to these exterior movements which symbolize them, as we have established. Then it is action which dominates the religious life, because of the mere fact that it is society which is its source. . . .

* Excerpted from ÉMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE: A STUDY IN RELIGIOUS SOCIOLOGY* (Joseph Ward Swain translator, 2012) (1915).

[N]early all the great social institutions have been born in religion. Now in order that these principal aspects of the collective life may have commenced by being only varied aspects of the religious life, it is obviously necessary that the religious life be the eminent form and, as it were, the concentrated expression of the whole collective life. If religion has given birth to all that is essential in society, it is because the idea of society is the soul of religion. Religious forces are therefore human forces, moral forces. . . .

[T]he collective ideal which religion expresses is far from being due to a vague innate power of the individual, but it is rather at the school of collective life that the individual has learned to idealize. It is in assimilating the ideals elaborated by society that he has become capable of conceiving the ideal. It is society which, by leading him within its sphere of action, has made him acquire the need of raising himself above the world of experience and has at the same time furnished him with the means of conceiving another. For society has constructed this new world in constructing itself, since it is society which this expresses. Thus both with the individual and in the group, the faculty of idealizing has nothing mysterious about it. It is not a sort of luxury which a man could get along without, but a condition of his very existence. He could not be a social being, that is to say, he could not be a man, if he had not acquired it. It is true that in incarnating themselves in individuals, collective ideals tend to individualize themselves. Each understands them after his own fashion and marks them with his own stamp; he suppresses certain elements and adds others. Thus the personal ideal disengages itself from the social ideal in proportion as the individual personality develops itself and becomes an autonomous source of action. But if we wish to understand this aptitude, so singular in appearance, of living outside of reality, it is enough to connect it with the social conditions upon which it depends.

Therefore it is necessary to avoid seeing in this theory of religion a simple restatement of historical materialism: that would be misunderstanding our thought to an extreme degree. In showing that religion is something essentially social, we do not mean to say that it confines itself to translating into another language the material forms of society and its immediate vital necessities. It is true that we take it as evident that social life depends upon its material foundation and bears its mark, just as the mental life of an individual depends upon his nervous system and in fact his whole organism. But collective consciousness is something more than a mere epiphenomenon of its morphological basis, just as individual consciousness is something more than a simple efflorescence of the nervous system. . . .

Thus there is something eternal in religion which is destined to survive all the particular symbols in which religious thought has successively enveloped itself. There can be no society which does not feel the need of upholding and reaffirming

at regular intervals the collective sentiments and the collective ideas which make its unity and its personality. Now this moral remaking cannot be achieved except by the means of reunions, assemblies and meetings where the individuals, being closely united to one another, reaffirm in common their common sentiments; hence come ceremonies which do not differ from regular religious ceremonies, either in their object, the results which they produce, or the processes employed to attain these results. What essential difference is there between an assembly of Christians celebrating the principal dates of the life of Christ, or of Jews remembering the exodus from Egypt or the promulgation of the decalogue, and a reunion of citizens commemorating the promulgation of a new moral or legal system or some great event in the national life? . . .

We have said that there is something eternal in religion: it is the cult and the faith. Men cannot celebrate ceremonies for which they see no reason, nor can they accept a faith which they in no way understand. To spread itself or merely to maintain itself, it must be justified, that is to say, a theory must be made of it. . . .

The Theodosian Code
Book XVI (438 C.E.)*

. . . TITLE 5: . . .

5. . . . All heresies are forbidden by both divine and imperial laws and shall forever cease. If any profane man by his punishable teachings should weaken the concept of God, he shall have the right to know such noxious doctrines only for himself but shall not reveal them to others to their hurt. . . .

6. . . . No place for celebrating their mysteries, no opportunity for exercising the madness of their excessively obstinate minds shall be available to the heretics. . . . Those persons . . . who are not devoted to the [Nicene faith] . . . shall cease to assume, with studied deceit, the alien name of true religion, and they shall be branded upon the disclosure of their crimes. They shall be removed and completely barred from the threshold of all churches, since We forbid all heretics to hold unlawful assemblies within the towns. If factions should attempt to do anything, We order that their madness shall be banished and that they shall be driven away from the very walls of the cities, in order that Catholic churches throughout the whole world may be restored to all orthodox bishops who hold the Nicene faith. . . .

* Excerpted from CLYDE PHARR, *THE THEodosian CODE AND NOVELS AND THE SIRMONTIAN CONSTITUTIONS: A TRANSLATION WITH COMMENTARY, GLOSSARY, AND BIBLIOGRAPHY* (Princeton University Press 1952). The sections for this excerpt date from 341 to 385 C.E.

TITLE 10: . . .

2. . . . Superstition shall cease; the madness of sacrifices shall be abolished. For if any man in violation of the law of the sainted Emperor, Our father, and in violation of this command of Our Clemency, should dare to perform sacrifices, he shall suffer the infliction of a suitable punishment and the effect of an immediate sentence. . . .

9. . . . No mortal shall assume the audacity of performing sacrifices, so that by the inspection of the liver and the presage of the entrails of the sacrificial victims, he may obtain the hope of a vain promise, or, what is worse, he may learn the future by an accursed consultation. The torture of a very bitter punishment shall threaten those persons who, in violation of Our prohibition, attempt to explore the truth of present or future events. . . .

Taylor's Case
Court of King's Bench, England
86 Eng. Rep. 189 (1676)

An information exhibited against [a yeoman named John Taylor]* in the Crown-Office, for uttering of divers blasphemous expressions, horrible to hear, . . . that Jesus Christ was a bastard, a whoremaster, religion was a cheat; and that he neither feared God, the devil, or man.

Being upon his trial, he acknowledged the speaking of the words, except the word bastard; and for the rest, he pretended to mean them in another sense than they ordinarily bear, . . . whoremaster, i.e. that Christ was master of the whore of Babylon, and such kind of evasions for the rest. But all the words being proved by several witnesses, he was found guilty.

And [Lord Chief Justice Matthew] Hale said, that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable in this Court. For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.

* According to some historical accounts, Taylor may have been a member of the Sweet Singers of Israel, a group known for its unconventional expressions of Christian liberty.

Wherefore they gave judgment upon him, . . . to stand in the pillory in three several places, and to pay one thousand marks fine, and to find sureties for his good behaviour during life.

People v. Ruggles
Supreme Court of New York
8 Johns. 290 (1811)

KENT, Ch. J. delivered the opinion of the Court.

The offence charged is, that the defendant below did “wickedly, maliciously, and blasphemously utter, in the presence and hearing of divers good and christian people, these false, feigned, scandalous, malicious, wicked and blasphemous words, to wit, “*Jesus Christ* was a bastard, and his mother must be a whore;” and the single question is, whether this be a public offence by the law of the land. After conviction, we must intend that these words were uttered in a wanton manner, and, as they evidently import, with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion. The language was blasphemous not only in a popular, but in a legal sense; for blasphemy, according to the most precise definitions, consists in maliciously reviling God, or religion, and this was reviling christianity through its author. The jury have passed upon the intent or *quo animo*, and if those words spoken, in any case, will amount to a misdemeanor, the indictment is good.

Such words, uttered with such a disposition, were an offence at common law. In *Taylor’s* case, the defendant was convicted upon information of speaking similar words, and the court of *K. B.* said, that christianity was parcel of the law, and to cast contumelious reproaches upon it, tended to weaken the foundation of moral obligation, and the efficacy of oaths. And in the case of *Rex v. Woolston* [(1729)], on a like conviction, the court said they would not suffer it to be debated whether defaming christianity in general was not an offence at common law, for that whatever strikes at the root of christianity, tends manifestly to the dissolution of civil government. But the court were careful to say, that they did not intend to include disputes between learned men upon particular controverted points. The same doctrine was laid down in the late case of *The King v. Williams*, for the publication of Paine’s *Age of Reason*, which was tried before Lord Kenyon, in July, 1797. The authorities show that blasphemy against God, and contumelious reproaches and profane ridicule of Christ or the Holy Scriptures, (which are equally treated as blasphemy), are offences punishable at common law, whether uttered by words or writings. The consequences may be less extensively pernicious in the one case than in the other, but in both instances, the reviling is

still an offence, because it tends to corrupt the morals of the people, and to destroy good order. Such offences have always been considered independent of any religious establishment or the rights of the church. They are treated as affecting the essential interests of civil society.

And why should not the language contained in the indictment be still an offence with us? There is nothing in our manners or institutions which has prevented the application or the necessity of this part of the common law. We stand equally in need, now as formerly, of all that moral discipline, and of those principles of virtue, which help to bind society together. The people of this state, in common with the people of this country, profess the general doctrines of christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order. Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. It would go to confound all distinction between things sacred and profane; for, to use the words of one of the greatest oracles of human wisdom, “profane scoffing doth by little and little deface the reverence for religion;” and who adds, in another place, “two principal causes have I ever known of atheism—curious controversies and profane scoffing.” Things which corrupt moral sentiment, as obscene actions, prints and writings, and even gross instances of seduction, have, upon the same principle, been held indictable; and shall we form an exception in these particulars to the rest of the civilized world? No government among any of the polished nations of antiquity, and none of the institutions of modern Europe, a single and monitory case excepted, ever hazarded such a bold experiment upon the solidity of the public morals, as to permit with impunity, and under the sanction of their tribunals, the general religion of the community to be openly insulted and defamed. The very idea of jurisprudence with the ancient lawgivers and philosophers, embraced the religion of the country.

The free, equal, and undisturbed, enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of Mahomet or of the grand Lama; and for this plain reason, that the case assumes that we are a christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worship of those impostors. Besides, the offence is *crimen malitiæ*, and the

imputation of malice could not be inferred from any invectives upon superstitions equally false and unknown. We are not to be restrained from animadversion upon offences against public decency . . . merely because there may be savage tribes, and perhaps semibarbarous nations, whose sense of shame would not be affected by what we should consider the most audacious outrages upon decorum. It is sufficient that the common law checks upon words and actions, dangerous to the public welfare, apply to our case, and are suited to the condition of this and every other people whose manners are refined, and whose morals have been elevated and inspired with a more enlarged benevolence, by means of the christian religion.

Though the constitution has discarded religious establishments, it does not forbid judicial cognisance of those offences against religion and morality which have no reference to any such establishment, or to any particular form of government, but are punishable because they strike at the root of moral obligation, and weaken the security of the social ties. The object of the 38th article of the constitution, was, to “guard against spiritual oppression and intolerance,” by declaring that “the free exercise and enjoyment of religious profession and worship, without discrimination or preference, should for ever thereafter be allowed within this state, to all mankind.” This declaration, (noble and magnanimous as it is, when duly understood,) never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation from all consideration and notice of the law. It will be fully satisfied by a free and universal toleration, without any of the tests, disabilities, or discriminations, incident to a religious establishment. To construe it as breaking down the common law barriers against licentious, wanton, and impious attacks upon christianity itself, would be an enormous perversion of its meaning. The *proviso* guards the article from such dangerous latitude of construction, when it declares, that “*the liberty of conscience hereby granted*, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of this state.” The preamble and this proviso are a species of commentary upon the meaning of the article, and they sufficiently show that the framers of the constitution intended only to banish test oaths, disabilities and the burdens, and sometimes the oppressions, of church establishments; and to secure to the people of this state, freedom from coercion, and an equality of right, on the subject of religion. This was no doubt the consummation of their wishes. It was all that reasonable minds could require, and it had long been a favorite object, on both sides of the Atlantic, with some of the most enlightened friends to the rights of mankind, whose indignation had been refused by infringements of the liberty of conscience, and whose zeal was inflamed in the pursuit of its enjoyment. That this was the meaning of the constitution is further confirmed by a paragraph in a preceding article, which specially provides that “such parts of the common law

as might be construed to establish or maintain any particular denomination of christians, or their ministers,” were thereby abrogated.

The legislative exposition of the constitution is conformable to this view of it. Christianity, in its enlarged sense, as a religion revealed and taught in the Bible, is not unknown to our law. The *statute for preventing immorality* consecrates the first day of the week, as holy time, and considers the violation of it as immoral. This was only the continuation, in substance, of a law of the colony which declared, that the profanation of the Lord’s day was “the great scandal of the christian faith.” The act *concerning oaths* recognises the common law mode of administering an oath, “by laying the hand on and kissing the gospels.” Surely, then, we are bound to conclude, that wicked and malicious words, writings and actions which go to vilify those gospels, continue, as at common law, to be an offence against the public peace and safety. They are inconsistent with the reverence due to the administration of an oath, and among their other evil consequences, they tend to lessen, in the public mind, its religious sanction. . . .

[T]he judgment below must be affirmed. . . .

In *Zaheeruddin v. State* (1993), the Supreme Court of Pakistan upheld the constitutionality of Pakistan’s anti-blasphemy law. At issue was a challenge by members of the Ahmadi minority group, who had been charged with blasphemy for declaring themselves to be Muslim and displaying the “Kalima,” or Islamic creed, on their persons and buildings.

Zaheeruddin v. State
Supreme Court of Pakistan
26 SCMR 1718 (1993)*

Present: Shafiur Rahman, Abdul Qadeer Chaudhry, Muhammad Afzal Lone, Saleem Akhtar and Wali Muhammad Khan, JJ . . .

ABDUL QADEER CHAUDHRY, J. [with Muhammad Afzal Lone and Wall Muhammad Khan, JJ. agreeing] . . .

* The Supreme Court Monthly Review presents opinions in order of their authors’ seniority on the Supreme Court of Pakistan, but for the sake of clarity, this excerpt places the majority opinion first.

It was for the first time in the Constitutional history of Pakistan, that the Objectives Resolution, which henceforth formed part of every Constitution as a preamble, was adopted and incorporated in the Constitution, in 1985, and made its effective part. . . .

This was the stage, when the chosen representatives of people, for the first time accepted the sovereignty of Allah, as the operative part of the Constitution, to be binding on them and vowed that they will exercise only the delegated powers, within the limits fixed by Allah. The power of judicial review of the superior Courts also got enhanced. . . .

It is thus clear that the Constitution has adopted the Injunctions of Islam as contained in Qur'an and Sunnah of the Holy Prophet as the real and the effective law. In that view of the matter, the Injunctions of Islam as contained in Qur'an and Sunnah of the Holy Prophet are now the positive law. The Article 2A, made effective and operative the sovereignty of Almighty Allah and it is because of that Article that the legal provisions and principles of law, as embodied in the Objectives Resolution, have become effective and operative. Therefore, every man-made law must now conform to the Injunctions of Islam as contained in Qur'an and Sunnah of the Holy Prophet Therefore, even the Fundamental Rights as given in the Constitution must not violate the norms of Islam.

It was also argued that the phrase glory of Islam as used in Article 19 of the Constitution cannot be availed with regard to the rights conferred in Article 20. * Article 19 which guarantees freedom of speech, expression and press makes it subject to reasonable restrictions imposed by law in the interest of glory of Islam etc., and decency or morality. The restrictions given therein cannot, undoubtedly, be imported into any other fundamental right. Anything, in any fundamental right, which violates the Injunctions of Islam thus must be repugnant. It must be noted here that the Injunctions of Islam, as contained in Qur'an and the Sunnah, guarantee the rights of the minorities also in such a satisfactory way that no other

* The Constitution of Pakistan provides:

Article 19: "Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, [commission of] or incitement to an offence."

Article 20: "Subject to law, public order and morality,—(a) every citizen shall have the right to profess, practice and propagate his religion; and (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions."

legal order can offer anything equal. It may further be added that no law can violate them. . . .

It is the cardinal faith of every Muslim to believe in every Prophet and praise him. Therefore, if anything is said against the Prophet, it will injure the feelings of a Muslim and may even incite him to the breach of peace, depending on the intensity of the attack. . . . [T]he Ahmadis like other minorities are free to profess their religion in this country and no one can take away that right of theirs, either by legislation or by executive orders. They must, however, honour the Constitution and the law and should neither desecrate or defile the pious personage of any other religion including Islam, nor should they use their exclusive epithets, descriptions and titles and also avoid using the exclusive names like mosque and practice like ‘Azan,’ so that the feelings of the Muslim community are not injured and the people are not misled or deceived, as regards the faith.

SHAFIUR RAHMAN, J. [writing in the minority] . . .

[C]ause (3) of Article 260 of the Constitution* [and Article 20 are] of importance. . . . So far as the five appeals arising out of criminal trial are concerned . . . three of them have originated in the complaint of Nazir Ahmad Taunsvi directly concerned with the Khatm-e-Nabuwat movement who made a grievance of the fact that certain persons were roaming about in the Bazar with the badges of ‘Kalma Tayyabba’ exhibited on their chest. They were known to be Quadiani. Some of them on being questioned said that they were Muslim. This act of theirs of wearing a badge of the ‘Kalma Tayyabba’ was taken to be their posing as Muslim. This conviction is defective because in view of the discussion and findings already recorded for an Ahmadi to wear a badge having ‘Kalma Tayyabba’ inscribed on it does not per se amount to outraging the feelings of Muslims nor does it amount to his posing as a Muslim. . . .

* Article 260(3) of the Constitution of Pakistan provides: “In the Constitution and all enactments and other legal instruments, unless there is anything repugnant in the subject or context

- (a) ‘Muslim’ means a person on who believes in the unity and oneness of Almighty Allah, in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon him), the last of the prophets, and does not believe in, or recognize as a prophet or religious reformer, any person who claimed or claims to be a prophet, in any sense of the word or of any description whatsoever, after Muhammad (peace be upon him); and
- (b) ‘non-Muslim’ means a person who is not a Muslim and includes a person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi community, a person of the Quadiani Group or the Lahori Group who call themselves ‘Ahmadis’ or by any other name, or a Bahai, and a person belonging to any of the Scheduled Castes.”

[Justice Saleem Akhtar also wrote in the minority and emphasized respect for religious minorities' practices within the bounds of "public order and morality."]

İ.A. v. Turkey
European Court of Human Rights (Second Section)
[2005] ECHR 590

. . . The European Court of Human Rights (Second Section), sitting as a Chamber composed of: Mr J-P. COSTA, *President*, Mr A.B. BAKA, Mr I. Cabral Barreto, Mr R. TÜRMEŒ, Mr K. JUNGWIERT, Mr M. UGREKHELIDZE, Mrs A. MULARONI, *judges*, and Mrs S. DOLLÉ, *Section Registrar*

5. . . . [The applicant] is the proprietor and managing director of Berfin, a publishing house which in November 1993 published a novel by Abdullah Rıza Ergüven entitled "*Yasak Tümceler*" ("The forbidden phrases"). The book conveyed the author's views on philosophical and theological issues in a novelistic style. Two thousand copies of it were printed in a single run.

6. In an indictment of 18 April 1994, the Istanbul public prosecutor ("the public prosecutor") charged the applicant under the third and fourth paragraphs of Article 175 of the Criminal Code with blasphemy against "God, the Religion, the Prophet and the Holy Book" through the publication of the book in question.

7. The public prosecutor's indictment was based on an expert report drawn up at the request of the press section of the Istanbul public prosecutor's office by Professor Salih Tuğ, dean of the theology faculty of Marmara University at the material time. . . .

8. In his report the expert quoted numerous passages from the book under review, in particular: . . .

[J]ust think about it, . . . all beliefs and all religions are essentially no more than performances. The actors played their roles without knowing what it was all about. Everyone has been led blindly along that path. The imaginary god, to whom people have become symbolically attached, has never appeared on stage. He has always been made to speak through the curtain. The people have been taken over by pathological imaginary projections. They have been brainwashed by fanciful stories . . .

[T]his divests the imams of all thought and capacity to think and reduces them to the state of a pile of grass . . . [regarding the story of the Prophet Abraham's sacrifice] it is clear that we are being duped here . . . is God a sadist? . . . so the God of Abraham is just as murderous as the God of Muhammad

17. The third and fourth paragraphs of Article 175 of the Criminal Code provide:

It shall be an offence punishable by six months to one year's imprisonment and a fine of 5,000 to 25,000 Turkish liras [approximately \$4,500 to \$23,000 in 2016 U.S. dollars] to blaspheme against God, one of the religions, one of the prophets, one of the sects or one of the holy books . . . or to vilify or insult another on account of his religious beliefs or fulfilment of religious duties

The penalty for the offence set out in the third paragraph of this Article shall be doubled where it has been committed by means of a publication.

18. Section 16(4) of the Press Act (Law no. 5680) provides:

With regard to offences committed through the medium of publications other than periodicals, criminal responsibility shall be incurred by the author [or] translator . . . of the publication which constitutes the offence, and by the publisher. . . .

20. The Government submitted that the applicant's conviction had met a pressing social need in that the book in issue had contained an abusive attack on religion, in particular Islam, and had offended and insulted religious feelings. They argued in that connection that the criticism of Islam in the book had fallen short of the level of responsibility to be expected of criticism in a country where the majority of the population were Muslim.

21. The Court observes that the book in question conveyed the author's views on philosophical and theological issues in a novelistic style. It notes that the domestic courts found that the book contained expressions intended to blaspheme against and vilify religion.

22. The Court notes that it was common ground between the parties that the applicant's conviction constituted interference with his right to freedom of

expression under Article 10 § 1.* Furthermore, it was not disputed that the interference was prescribed by law and pursued the legitimate aims of preventing disorder and protecting morals and the rights of others, within the meaning of Article 10 § 2. The Court endorses that assessment. The dispute in the instant case relates to the question whether the interference was “necessary in a democratic society.”

23. The Court reiterates the fundamental principles underlying its judgments relating to Article 10 as set out, for example, in *Handyside v. the United Kingdom* [(1976)], and in *Fressoz and Roire v. France* [(1999)]. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.

24. As paragraph 2 of Article 10 recognises, the exercise of that freedom carries with it duties and responsibilities. Among them, in the context of religious beliefs, may legitimately be included a duty to avoid expressions that are gratuitously offensive to others and profane. This being so, as a matter of principle it may be considered necessary to punish improper attacks on objects of religious veneration.

25. In examining whether restrictions to the rights and freedoms guaranteed by the Convention can be considered “necessary in a democratic society,” the Court has frequently held that the Contracting States enjoy a certain but not unlimited margin of appreciation. The fact that there is no uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions means that the Contracting States have a wider margin of appreciation when regulating freedom of expression in connection with matters liable to offend intimate personal convictions within the sphere of morals or religion.

* Article 10 of the European Convention on Human Rights provides:

- “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the prevention of disorder or crime, for the protection of . . . morals, [and] for the protection of the reputation or rights of others”

26. A State may therefore legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with respect for the freedom of thought, conscience and religion of others. It is, however, for the Court to give a final ruling on the restriction's compatibility with the Convention and it will do so by assessing in the circumstances of a particular case, inter alia, whether the interference corresponded to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued."

27. The issue before the Court therefore involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his views on religious doctrine on the one hand and the right of others to respect for their freedom of thought, conscience and religion on the other hand.

28. Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society." Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.

29. However, the present case concerns not only comments that offend or shock, or a "provocative" opinion, but also an abusive attack on the Prophet of Islam. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through the following passages: "Some of these words were, moreover, inspired in a surge of exultation, in Aisha's arms. . . . God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal."

30. The Court therefore considers that the measure taken in respect of the statements in issue was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. In that respect it finds that the measure may reasonably be held to have met a "pressing social need."

31. The Court concludes that the authorities cannot be said to have overstepped their margin of appreciation in that respect and that the reasons given by the domestic courts to justify taking such a measure against the applicant were relevant and sufficient.

32. As to the proportionality of the impugned measure, the Court is mindful of the fact that the domestic courts did not decide to seize the book, and accordingly considers that the insignificant fine imposed was proportionate to the aims pursued.

There has therefore been no violation of Article 10 of the Convention. . . .

JOINT DISSENTING OPINION OF JUDGES COSTA, CABRAL BARRETO AND JUNGWIERT . . .

4. . . . [T]he author attacks Muhammad on two counts by claiming that he broke his fast through sexual intercourse and that he did not forbid sexual relations with a dead person or a live animal. We do not have any difficulty accepting that these accusations, particularly the second one, may cause deep offence to devout Muslims, whose convictions are eminently deserving of respect. Admittedly, according to Islam, Muhammad is not God but a man who is God's prophet; however, the position he occupies in a religion of which he was the founder makes him "sacred" in a sense, like Abraham or Moses in the Jewish religion, for example.

5. However, we do not believe that these undoubtedly insulting and regrettable statements can be taken in isolation as a basis for condemning an entire book and imposing criminal sanctions on its publisher. Moreover, nobody is ever obliged to buy or read a novel, and those who do so are entitled to seek redress in the courts for anything they consider blasphemous and repugnant to their faith—in other words, a breach of their rights under both Article 9* and Article 10, paragraph 2, of the Convention. But it is quite a different matter for the prosecuting authorities to institute criminal proceedings against a publisher of their own motion in the name of "God, the Religion, the Prophet and the Holy Book"; a democratic society is not a theocratic society.

6. Another point made in the reasoning of the majority in this case is that, all things considered, the penalty imposed on the applicant was light, since his two-year prison sentence was ultimately commuted to a modest fine. However, while

* Article 9 of the European Convention on Human Rights provides:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

this argument is significant, it is not decisive in our view. Freedom of the press relates to matters of principle, and any criminal conviction has what is known as a “chilling effect” liable to discourage publishers from producing books that are not strictly conformist or “politically (or religiously) correct.” Such a risk of self-censorship is very dangerous for this freedom, which is essential in a democracy, to say nothing of the implicit encouragement of blacklisting or “fatwas.”

7. The Court’s case-law does, admittedly, seem consistent with the approach taken in the judgment. In *Otto-Preminger-Institut v. Austria* [(1995)] and *Wingrove v. the United Kingdom* [(1996)] it held that there had been no violation of Article 10 of the Convention, on account of excessive attacks on the religious feelings of the population and/or blasphemy (in both cases the “victims” were not the Muslim population but the Christian population).

8. However, we are not persuaded by these precedents. Firstly, a film or video is likely to have much more of an impact than a novel with limited distribution, a factor that should be sufficient for a distinction to be drawn between these three cases. Secondly, *Otto-Preminger-Institut* and *Wingrove* were the subject of much controversy at the time (and the European Commission of Human Rights, for its part, had expressed the opinion by a large majority that there had been a violation of Article 10 in both cases). Lastly, the time has perhaps come to “revisit” this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press.

9. For all these reasons, and to our regret, we have differed from our colleagues in finding that Article 10 was breached in the present case.

BLASPHEMY LAW AS PLURALIST LAW

Protecting Religious Groups

Laws suppressing blasphemy traditionally protected the official religious beliefs of a state, which of course reflected the views of the dominant group within a society. Between the nineteenth and twentieth centuries, it became difficult to imagine using the law to enforce the truth of particular points of religious doctrine, so that, for example, British blasphemy law evolved from protecting sacred truths into protecting the sensibility of religious Anglicans, who practiced the state sanctioned religion in Great Britain. As a commitment to the equality of all

religious groups began to take hold, contemporary blasphemy laws again evolved to protect the religious sensibility of all religious groups. This shift is illustrated by the 1995 ruling, Judgment No. 440, of the Italian Constitutional Court.

Regina v. Ramsay and Foote
House of Lords, United Kingdom
15 Cox C.C. 231 (1883)

Lord Coleridge, L.C.J. to the jury.—

The two prisoners, [William James Ramsay and George William Foote,]* are indicted for the publication of blasphemous libels, and two questions arise: First, are these things in themselves blasphemous libels? Secondly, if they are so, is the publication of them traced home to the defendants? Both are questions entirely for you, and when you have heard what I have to say as to the law on the subject it will be for you to pronounce a general verdict of guilty or not guilty. Treating the second question first, . . . you must in this case have evidence to connect the two defendants with the publication of the libel as well as with the publication of the paper. The defendants have not indeed contested their liability for the publication; they have not disputed that they both were actively engaged in the publication, not only of the paper in which the libels appeared, but of the libels themselves. They have both rested their defence on the other ground that these were not blasphemous libels. . . .

The other and more important question . . . [thus] remains. Are these passages within the meaning of the law blasphemous libels? Now that is a matter entirely for you. You have the responsibility of judging, looking at and reading these passages, whether they are blasphemous libels. My duty is to explain to you what is the law on the subject, after which it is for you absolutely to determine the question. Now, according to the old law, or the *dicta* of the judges in old times, these passages would undoubtedly be blasphemous libels, because they asperse the truth of Christianity. But, as I said in the former trial, and now repeat, I think that these old cases can no longer be taken to be a statement of the law at the present day. It is no longer true in the sense in which it was true when these *dicta* were uttered, that “Christianity is part of the law of the land.” Nonconformists and Jews were then under penal laws, and were hardly allowed civil rights. But now, so far as I know the law, a Jew might be Lord Chancellor. . . . Therefore, to asperse the

* Ramsay was the publisher and Foote the editor of a newspaper called the *Freethinker*. According to its website, the newspaper launched in 1881 and has continued without a break until May 2014, when it became an Internet-only publication.

truth of Christianity cannot per se be sufficient to sustain a criminal prosecution for blasphemy. . . . It is my duty to lay down the law on the subject as I find it laid down in the best books of authority, and in “Starkie on Libel,” it is there laid down as, I believe, correctly:

There are no questions of more intense and awful interest than those which concern the relations between the Creator and the beings of His creation When learned and acute men enter upon those discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. . . . It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or wilful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. . . .

[W]hatever the older cases may have been, the fact remains that Parliament has altered the law as to religion. It is no longer the law that none but believers in Christianity can hold office in the State. Nonconformists are tolerated just as much as members of the Church of England. The state of things is no longer the same as when these judgments were pronounced, which, however, have been strained, I think, beyond what they will justly warrant. . . .

The defendant Foote has admitted that these publications were intended to be attacks on Christianity and on the Hebrew Scriptures, and he has cited a number of passages from approved writers which he says are to the same effect, and that may be so, and I think that some of them are not only similar in matter, but in style and manner; and he urged that, as these never were prosecuted, the law cannot be, as supposed, on the part of the prosecution, for it could not be that the offence consisted only in the style or taste of the publications, and that what was blasphemy in a penny paper was not so in more costly publications. . . . But no one can fail to see the difference between the works of the writers who have been quoted and the language used in the publications now before us; and I am obliged to say that it is a difference not only in degree, but in kind and nature. There is a grave and earnest tone, a reverent—perhaps I might even say a religious—spirit about the very attacks on Christianity itself which we find in the authors referred to, which shows that

what they aimed at was not insult to the opinions of the majority of mankind nor to Christianity itself; but real, quiet, earnest pursuit of truth. . . . Therefore, as to many of these authors whose writings have been quoted by the defendant, I think that they are within the protection of the law as laid down [But the defendants' case] is before us, and we have to deal with it according to law. If these libels—now before you—are in your opinion permissible attacks upon religious belief, then find the defendants not guilty. But if they are such as do not come within the most liberal view of the law as I have laid it down to you, then your duty is to find the defendants guilty. Take these publications in your hands, and say whether in your judgment the defendants are or are not guilty of publishing blasphemous libels.

The jurors, after some hours' deliberation, were unable to agree, and were discharged.

Whitehouse v. Gay News Ltd.
House of Lords, United Kingdom
68 Cr. App. R. 381 (1979)

[Before Lord Diplock, Viscount Dilhorne, Lord Edmund-Davies, Lord Russell of Killowen and Lord Scarman. This was a seriatim opinion with multiple judges writing. Only Lord Scarman's opinion is reproduced here.] . . .

The appellants, Gay News Ltd. and Denis Lemon, were convicted on July 11, 1977, at the Central Criminal Court . . . by majority verdicts (10 to two) on one count of blasphemous libel. It was a private prosecution instituted by Mrs Mary Whitehouse. On July 12, Lemon was sentenced to nine months' imprisonment suspended for 18 months, fined £500 and ordered to pay one-fifth of the prosecution costs and also ordered to contribute a maximum of £434 towards his legal aid costs. Gay News Ltd. was fined £1,000 . . . and ordered to pay four-fifths of the prosecution's costs. . . .

[T]he Court certified under section 33 (2) of the Criminal Appeal Act 1968, that a point of law of general public importance was involved in the decision to dismiss the appeals, *i.e.* the question was the learned trial judge correct first in ruling and then in directing the jury that in order to secure the conviction of the appellants for publishing a blasphemous libel (1) it was sufficient if the jury took the view that the publication complained of vilified Christ in His life and crucifixion and (2) it was not necessary for the Crown to establish any further intention on the part of the appellants beyond an intention to publish that which in the jury's view was a blasphemous libel? . . .

Lord Scarman:

My Lords, I do not subscribe to the view that the common law offence of blasphemous libel serves no useful purpose in the modern law. On the contrary, I think there is a case for legislation extending it to protect the religious beliefs and feelings of non-Christians. The offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the kingdom. In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings, and practices of all but also to protect them from scurrility, vilification, ridicule, and contempt. . . .

When nearly a century earlier Lord Macaulay protested in Parliament against the way the blasphemy laws were then administered, he added: "If I were a judge in India, I should have no scruple about punishing a Christian who should pollute a mosque." . . .

When Macaulay became a legislator in India, he saw to it that the law protected the religious feelings of all. In those days India was a plural society: today the United Kingdom is also.

I have permitted myself these general observations at the outset of my opinion because, my Lords, they determine my approach to this appeal. I will not lend my voice to a view of the law relating to blasphemous libel which would render it a dead letter, or diminish its efficacy to protect religious feeling from outrage and insult. My criticism of the common law offence of blasphemy is not that it exists but that it is not sufficiently comprehensive. It is shackled by the chains of history. . . .

In the present day reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods not scandalous. Whether it is possible that in the future irreligious attacks, designed to undermine fundamental institutions of our society, may come to be criminal in themselves, as constituting a public danger, is a matter that does not arise. The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times, and is a question of fact. I desire to say nothing that would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right may be, but only to say that, experience having proved dangers once thought real to be now negligible, and dangers once very possibly imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion,

as known to the law, which prevents us from varying their application to the particular circumstances of our time in accordance with that experience. . . .

The appellants, Gay News Ltd., publish a newspaper for homosexuals called Gay News. The appellant, Mr. Lemon, is its editor. An issue of the paper, published in 1976, contained a poem entitled “The Love that Dares to speak its Name” written by Professor James Kirkup. The poem was printed with an illustration of the crucifixion featuring the body of Christ in the embrace of a Roman centurion. The appellants were indicted for the offence of blasphemous libel. They were tried in July 1977 at the Central Criminal Court before Judge King-Hamilton and a jury. . . . Upon appeal, the Court of Appeal upheld the convictions. . . .

In *Ramsay and Foote*, Lord Coleridge finally dispelled any further possibility of a mere denial of the truth of the Christian religion being treated as a blasphemous libel. The “attack” on Christianity or the Scriptures must be, he directed the jury, “calculated to outrage the feelings of the general body of the community.”

Since *Ramsay and Foote*’s case, . . . the modern law has been settled and in 1917 received the accolade of this House’s approval. . . . The words must constitute . . . an interference with our religious feelings, creating a sense of insult and outrage “by wanton and unnecessary profanity.”

This is an appropriate moment to mention two points made on behalf of the appellants, albeit in the context of the intention to be proved. It was said that to constitute a blasphemous libel the words must contain an *attack* upon religion and must tend to provoke a breach of the peace, and that the accused must so intend. The plausibility of the first point derives from the undoubted fact that, as a matter of history, most of the reported cases are of attacks upon the doctrines, practice, or beliefs of the Christian religion. . . . [I]t has been clear, however, that the attack is irrelevant: what does matter is the manner in which “the feelings of the general body of the community” have been treated. If the words are an outrage upon such feelings, the opinion or argument they are used to advance or destroy is of no moment. In the present case, had the argument for acceptance and welcome of homosexuals within the loving fold of the Christian faith been advanced “in a sober and temperate style,” there could have been no criminal offence committed. But the jury (with every justification) rejected this view of the poem and drawing.

The trial judge and the Court of Appeal effectively dealt with the second point. I would only add that it is a jejune exercise to speculate whether an outraged Christian would feel provoked by the words and illustration in this case to commit a breach of peace. I hope, and happen to believe, that most, true to their Christian

principles, would not allow themselves to be so provoked. The true test is whether the words are calculated to outrage and insult the Christian's religious feelings: and in the modern law the phrase "a tendency to cause a breach of peace" is really a reference to that test. The use of the phrase is no more than a minor contribution to the discussion of the subject. It does remind us that we are in the field where the law seeks to safeguard public order and tranquillity.

What, then, is the "*mens rea*" required by law to constitute the crime? . . . It would be intolerable if by allowing an author or publisher to plead the excellence of his motives and the right of free speech he could evade the penalties of the law even though his words were blasphemous in the sense of constituting an outrage upon the religious feelings of his fellow citizens. This is no way forward for a successful plural society. Accordingly, the test of obscenity by concentrating attention on the words complained of is, in my judgment, equally valuable as a test of blasphemy. The character of the words published matter; but not the motive of the author or publisher.

Judgment No. 440
Constitutional Court of Italy (1995)

[Before Prof. Vincenzo CAIANIELLO, Presidente, Avv. Mauro FERRI, Prof. Luigi MENGONI, Prof. Enzo CHELI, Dott. Renato GRANATA, Prof. Giuliano VASSALLI, Prof. Francesco GUIZZI, Prof. Cesare MIRABELLI, Prof. Fernando SANTOSUOSSO, Avv. Massimo VARI, Dott. Cesare RUPERTO, Dott. Riccardo CHIEPPA, Prof. Gustavo ZAGREBELSKY.]

[Author: ZAGREBELSKY] . . .

2.1. Article 724, first paragraph, of the Criminal Code* makes it a crime to . . . "blaspheme in public, with invectives or offensive language, against the Divinity, Symbols or Persons venerated in the Religion of the State." . . .

3.1. An analysis of the constitutionality of the crime of blasphemy . . . in reference to the principle of the non-discriminatory equality of religion (Article 3 of the Constitution) and the principle of the equal freedom of all religious

* The Criminal Code was adopted in 1930, during the fascist regime, a year after the *Lateran Pacts*, an agreement between the Holy See and the Kingdom of Italy. The Code remains in force. The Constitution was approved in 1948.

denominations before the law (Article 8 . . .)^{*} calls for a reconstruction of the legal interest protected by the provision at issue, starting with the original idea behind the 1930 criminal legislation.

The first element of this reconstruction is found in the reference to the religion of the State/the Catholic religion . . . , which is explained by the fact that, under the political views of the time, religious collective Catholic sentiment was considered to be a factor of the nation's moral unity. The State, as the expression and guarantor of said unity, understandably had "its" religion as well as an interest in nurturing and defending it. The second element—which must be taken together with the first, and does not eliminate it—is found in having adopted the most reductive definition of the crime of blasphemy . . . as an act of public misconduct.

3.2. Following the adoption of the new constitutional principles of the freedom and equality of citizens and the secularity of the State, the crime of blasphemy has been subject to reconsideration, the fundamental points of which are found in various pronouncements of this Court. Judgment no. 79 of 1958 effected the first shift in the legal interest to be protected. . . . [T]he Catholic religion was no longer the religion of the State as a political organization, but rather that of the State as society: it held that the special protection afforded to the "religion of the State," was justified by "the relevance the Catholic religion has had and continues to have for the ancient and uninterrupted tradition of the Italian people, nearly the entirety of which consistently subscribes to it. . . ."

Later . . . the case law of this Court went further, and held that the object of legal protection was no longer Catholicism as the religion of "nearly the entirety" of Italians, but rather "religious sentiment," a basic element of religious freedom, which the Constitution acknowledge as a right to all people. Thus, by reference to the concept of religious sentiment, the Court opened a perspective that impacts the position of the government toward all religions and their respective adherents, and, therefore, extends beyond the Catholic religion alone. Nevertheless, . . . the Court

^{*} The Constitution of the Italian Republic provides:

Article 3: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country."

Article 8: "All religious denominations are equally free before the law. Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives."

retained the legislative provision's express limitation to offences exclusively against the Catholic religion, once again on the grounds of "the scale of social reactions . . . of the majority of the Italian population." However, the Court noted that, "for complete fulfillment of the constitutional principle of religious freedom, the legislator should revise the provision, for purposes of extending the criminal protection against violations of religious sentiment to individuals who adhere to faiths other than Catholicism."

Finally, Judgment no. 925 of 1988 . . . declared challenges to the constitutionality of the applicable blasphemy law to be unfounded, but on the basis of other principles, setting aside the numerical majority argument, which had theretofore supplied its reason for denying that the provision violated the equality principle The Court's abandonment of the quantitative criterion . . . means that, where religion is concerned, since numbers are irrelevant, the same protection of the conscience of any person who identifies as part of a religious faith applies, regardless of the religious faith to which that person subscribes. . . .

It goes on to say that the provision "may still find some foundation in the sociologically relevant observation that the kind of behavior forbidden by the questioned provision concerns a public misconduct that has, for a long time now, become a bad habit for many people," adding, moreover, that, "the obligation to arrive at a revision of the provision of the criminal code" was a duty that fell to the legislator. . . .

3.3. Two essential points . . . must be considered fundamental for a reconsideration of the constitutionality of Article 724, first paragraph, of the Criminal Code . . . : the irrelevance of the numerical criterion in making constitutional evaluations in the name of religious equality and the placement of the provision against blasphemy within the category of crimes that pertain to religion. . . .

[E]quality before the law without religious discrimination (Article 3) and the equal freedom of all religious denominations (Article 8 . . .) are relevant. They now necessitate a declaration that the provision criminalizing blasphemy is unconstitutional, inasmuch as it discriminates by providing legal protection of an individual's religious sentiment according to that person's professed faith. . . . [T]he legislator's persistent inertia forbids this Court to prolong said discrimination any further, given the preeminence of the constitutional principle of religious equality over other interests

3.4. The declaration that Article 724, first paragraph, of the Criminal Code is unconstitutional must, nevertheless, be limited exclusively to the part in which it amounts to an effective violation of the equality principle. The crime found at

Article 724, first paragraph, of the Criminal Code is divisible into two parts: the first concerns blasphemy against the Divinity, indicated by an abstract term and without further specifications, and including both the verbal expressions and the representative signs of the Divinity itself, the contents of which are left to be determined according to the views of the various religions. The second concerns blasphemy against the Symbols or the Persons venerated in the religion of the State. Blasphemy against the Divinity, as opposed to blasphemy against Symbols and Persons, as legal scholarship and case law have acknowledged, may be criminalized without an ascription of the Divinity to any particular religion, thus avoiding unconstitutionality. . . . The other part of the provision under Article 724, on the other hand, involves blasphemy against Symbols and Persons with exclusive reference to the Catholic religion, consequently violating the equality principle. . . .

The legislator's choice to criminalize blasphemy, once cured of its reference to a single religious denomination, does not contradict constitutional principles in and of itself, since it provides non-discriminatory protection of an interest that is common to all the religions that today characterize our national community, in which a variety of different faiths, cultures, and traditions must coexist.

ON THESE GROUNDS THE CONSTITUTIONAL COURT *Declares* Article 724, first paragraph, of the Criminal Code, limited to the words "Symbols, or Persons venerated in the religion of the State," to be unconstitutional. . . .

Until the first half of the nineteenth century, British law criminalized blasphemy in order to safeguard foundational religious truth. Maintaining the purity of Christian doctrine ensured the favor of God and hence the prosperity of the country. But once the protection of blasphemy has extended to protect equally the sensibilities of many religious groups, we must inquire into the object of blasphemy's protection. It can no longer be religious "truth." It can no longer even be the single dominant religious sensibility of the nation. Is it the protection of religious "groups" from "insult" and offense? If so, how does a religious group differ, conceptually and practically, from a racial or ethnic group? Is the concept of "insulting" a religious group the same as that of insulting a racial group?

Ramji Lal Modi v. The State of U.P.

Supreme Court of India

1957 AIR 620 (1957)

Bench: Das, Sudhi Ranjan (CJ); Imam, Syed Jaffer; Das, S.K.; Menon, P. Govinda; Sarkar, A.K. . . .

The petitioner is the editor, printer and publisher of a monthly magazine called Gaurakshak. The magazine is devoted to cow protection. In July or August, 1954, a Hindi Daily newspaper named ‘Amrit Patrika’ of Allahabad printed and published an article or a cartoon about a donkey on which an agitation was started by the muslims of Uttar Pradesh. The editor and printer and publisher of ‘Amrit Patrika’ were prosecuted by the State, but they have been eventually acquitted by the High Court of Allahabad. In the meantime, in its issue for the month of Kartik Samvat 2009, corresponding to November, 1952, an article was published in the petitioner’s magazine ‘Gaurakshak.’ On December 12, 1952, the State Government ordered the prosecution of the petitioner on the basis of the said article. . . . The learned Sessions Judge . . . convicted him under [section 295A of the Indian Penal Code, which outlaws “[d]eliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs”] and sentenced him to 18 months rigorous imprisonment and a fine of Rs. 2,000 [approximately \$500 in 2016 U.S. dollars]

Learned counsel appearing in support of this petition urges that section 295A of the Indian Penal Code is ultra vires and void inasmuch as it interferes with the petitioner’s right to freedom of speech and expression guaranteed to him as a citizen of India by [Article 19] of our Constitution^{*} Learned counsel says that

^{*}The Constitution of India provides:

Article 19: “. . . All citizens shall have the right—(a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; [and] (g) to practise any profession, or to carry on any occupation, trade or business. . . .”

Article 25: “(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. . . .”

the interest of public order is the only thing in [Article 19] which may possibly be relied upon by the State as affording a justification for its claim for the validity of the impugned section. A law interfering with the freedom of speech and expression and imposing a punishment for its breach may, says counsel, be “in the interests of public order” only if the likelihood of public disorder is made an ingredient of the offence and the prevention of public disorder is a matter of proximate and not remote consideration. Learned counsel points out that insulting the religion or the religious beliefs of a class of citizens of India may not lead to public disorder in all cases although it may do so in some case. Therefore, where a law purports, as the impugned section does, to authorise the imposition of restriction on the exercise of the fundamental right to freedom of speech and expression in language wide enough to cover restrictions both within and without the limitation of constitutionally permissible legislative action affecting such right, the court should not uphold it even in so far as it may be applied within the constitutionally permissible limits as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out it must, according to learned counsel, be held to be wholly unconstitutional and void. . . .

The impugned section [of the penal code] . . . was a law enacted for the purpose of securing the public safety and the maintenance of public order. ‘Public order’ was said to be an expression of wide connotation and to signify that state of tranquillity which prevailed among the members of a political society as a result of the internal regulation enforced by the Government which they had established. ‘Public safety’ used in that section was taken as part of the wider concept of ‘public order.’ . . . Some breach of public safety or public order may conceivably undermine the security of or tend to overthrow the State, but equally conceivably many breaches of public safety or public order may not have that tendency. Therefore, [it is argued that] a law which imposes restrictions on the freedom of speech and expression for preventing a breach of public safety or public order which may not undermine the security of the State or tend to overthrow the State cannot claim the protection of [Article 19] was challenged as it embraced both species of activities referred to above and as the section was not severable, the whole section was held to be bad. . . .

A reference to [Articles] 25 and 26 of the Constitution, which guarantee the right to freedom of religion, will show that the argument is utterly untenable. The right to freedom of religion assured by those Articles is expressly made subject to public order, morality and health. Therefore, it cannot be predicated that freedom

Article 26: “Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—(a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.”

of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order. These two Articles in terms contemplate that restrictions may be imposed on the rights guaranteed by them in the interests of public order. . . .

Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the [challenged section of the penal code]. It only punishes the aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. The calculated tendency of this aggravated form of insult is clearly to disrupt the public order and the section, which penalises such activities, is well within the protection of [Article 19] as being a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression guaranteed by [Article 19]. . . . For the reasons stated above, the impugned section falls well within the protection of [Article 19] and this application must, therefore, be dismissed. . . .

Hate Speech

Robert Post (2009)*

. . . All legal attempts to suppress hatred, whether of racial groups or of the King, must face a profound conceptual difficulty. They must distinguish hatred from ordinary dislike or disagreement. Even those who believe that hatred should be punished because it is ‘extreme’ would readily concede that disagreement, even disagreement that stems from dislike, ought to be protected because it is the lifeblood of politics. What Habermas calls communicative action cannot proceed at all without contestation and disagreement. But when does normal dislike become punishable hatred? To appreciate the difficulty, consider the 1792 conviction of Thomas Paine for seditious libel on the ground that the *Rights of Man* brought ‘into hatred and contempt’ the ‘present Sovereign Lord the King and the Parliament of this kingdom, and the constitution, laws, and government thereof.’ We now regard *The Rights of Man* as an example of normal disagreement, not hatred.

How can we distinguish critique that is too extreme, that ought to be condemned as hatred, from mere disagreement? The problem arises just as much in

* Excerpted from Robert Post, *Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY* (Ivan Hare and James Weinstein editors, Oxford University Press 2009).

the context of contemporary hate speech regulation as it does in the context of seditious libel. Is speech attacking Islamic fundamentalism for its homophobia and suppression of women hate speech or critique? Is it hate speech or critique to attack the Catholic Church for its pedophilic priests or for its position on abortion? Are the criticisms of African Americans by William Julius Wilson or Shelby Steele or Louis Farrakhan hate speech or critique? . . .

Moderns are rightly embarrassed by the notion that simple disagreement can be taken as conclusive evidence of extremism or hatred. We tend to regard the capacity to deny each other's 'self-evident truths' as constitutive of dialogue, which alone can justify the validity of ideas. Laws that punish the bare assertion of some propositional truth, like those who punish Holocaust denial or the assertion of racial inferiority, are rare and always problematic. Almost all regulations of hate speech therefore define hate speech *both* in terms of expressions of dislike or abhorrence *and* in terms of some additional element that is thought to identify the unique presence of extreme hate and hence to justify legal intervention. Although hate speech regulations come in innumerable varieties, this additional element comes in roughly two distinct kinds: sometimes it emphasizes the manner of speech and sometimes it emphasizes the likelihood of causing contingent harm like violence or discrimination.

In the first variation, hate speech legislation conceives itself as punishing speech not merely because of its content, but because of its style of presentation. Hate speech is defined as speech that is formulated in a way that insults, offends, or degrades. The distinction between content and style is apparent in the history of English blasphemy law, which for centuries prohibited expression that offered 'some indignity unto God himself.' As with seditious libel, British law originally defined blasphemous speech on the basis of its substantive content. It punished 'as an offence any general denial of the truth of Christianity, without reference to the language or temper in which such denial is conveyed.' About the middle of the 19th century, however, British blasphemy law began to evolve.

In 1883, Lord Coleridge explained that whatever the 'old cases' may have said 'the mere denial of the truth of Christianity is not enough to constitute the offence of blasphemy.' He defined the crime of blasphemous libel instead as the publication of communications 'calculated and intended to insult the feelings and the deeper religious convictions of the great majority of the persons amongst whom we live.' The point of blasphemy regulation was thus altered so that the law would prevent 'outrages to the general feeling of propriety among the persons amongst whom we live.' 'If the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy.' This was essentially the status of the crime of blasphemous libel until its recent repeal. The crime prohibited 'any contemptuous, reviling, scurrilous or

ludicrous matter relating to God, Jesus Christ, or the Bible,' but provided that opinions hostile to Christianity may be expressed in a 'decent and moderate' manner.

Much hate speech regulation follows an analogous logic. It permits statements about race, nationality, and religion, so long as such speech maintains a 'decent and moderate' manner. It penalizes speech that inflicts 'outrages to the general feeling of propriety among the persons amongst whom we live.' The question, therefore, is how law can distinguish between, on the one hand, speech which respects 'the decencies of controversy,' and, on the other hand, speech which is outrageous and therefore hate inducing. If this distinction is not determined by the substantive content of the speech, how can it be drawn? I suggest that the distinction can be maintained only by reference to ambient social norms which allow us to distinguish speech that is outrageous from speech that is respectful. . . .

It is by reference to norms that a well-socialized person in any culture can tell whether any given communication is 'extreme,' meaning that the communication violates essential standards of civility and hence is vulnerable to legal sanction. The law commonly enforces social norms of this kind, as for example when it prohibits defamation, invasions of privacy, intentional infliction of emotional distress, flag burning, and so on.

We should note five aspects of these norms. First, norms are not merely subjective; they are instead 'intersubjective,' because they refer to attitudes and standards that persons have a right to expect from others. So, for example, when Charles Taylor refers to 'dignity' as rooted in 'our sense of ourselves as commanding (attitudinal) respect,' he means, first, that dignity depends upon communal norms that define respect as between persons in a given community, and second, that the right to dignity is not merely subjective, but involves claims that members of a community place upon other members of the community by virtue of the shared norms of the community.

Second, norms are not merely instilled during processes of primary socialization in the family, but are also continuously reinforced through forms of social interaction that sociologists like Erving Goffman have demonstrated pervade every aspect of ordinary social life. When these forms of social interaction are disrupted, so are the identities of well-socialized members of a culture. If others act in ways that persistently violate the norms that define my dignity, I find myself threatened, demeaned, perhaps even deranged. The health of our personality, therefore, depends in no small degree upon the observance of community norms.

Third, the totality of a culture's norms defines 'its distinctive shape, its unique identity.' There is thus a reciprocity between individual identity and the cultural identity of a community. Fourth, norms are shared and yet evolve over time. Norms are like a language that conveys meaning because of common expectations but that nevertheless changes over time. Fifth, precisely because norms evolve, they are intrinsically contestable. There are constant struggles over the developing meaning of shared standards and expectations. As a consequence, cultures tend to establish institutions that offer authoritative interpretations of norms: schools are one such institution; another is the law.

To quickly summarize this line of thought, I suggest that 'community' identifies a particular way in which social organization is created, which is by internalizing norms into the identities of persons. Because some such internalization must occur for a person to have a 'self,' community is a primary form of social organization. Healthy human beings always inhabit a community, which they value as they value themselves. But because norms are always in a historical process of evolution, the norms that define community are always threatened, always slipping away, which is why societies have institutions, like schools and the law, to enforce and stabilize norms. Hate speech regulation, like the regulation in preceding centuries of seditious libel, blasphemy, contempt of court, or defamation, exemplifies the aspiration of law to enforce norms that it regards as especially important for community and personal identity. . . .

If suppressing speech in order to protect sacred truths is flatly inconsistent with freedom of speech insofar as it excludes from public discourse those who would dispute these truths, suppressing speech in order to protect the sensibility of religious groups is also inconsistent with freedom of speech insofar as it excludes from public discourse those whose convictions are offensive to religious groups. In the United States, this principle is embodied in the First Amendment, which precludes the state from imposing the norms of any one particular community onto the common space of public discourse. In this common, public space, the Constitution holds that "one man's vulgarity" is "another's lyric."

In most jurisdictions around the world, however, hate speech is subject to legal control. The suppression of speech that is deeply offensive to religious groups is sociologically and theoretically analogous to the suppression of speech that is deeply offensive to racial groups. But whereas it is plain that law must ultimately define the distinction between permissible speech and forbidden racist speech on the basis of civility norms adopted by the state itself, there is a tendency in the context of blasphemy to define these norms simply in terms of the beliefs of the

relevant religious group. This tendency is clear in *Otto-Preminger-Institut v. Austria*, excerpted below.

Otto-Preminger-Institut v. Austria
European Court of Human Rights (Chamber)
[1994] ECHR 26

. . . The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges: Mr R. RYSSDAL, President, Mr F. GÖLCÜKLÜ, Mr F. MATSCHER, Mr B. WALSH, Mr R. MACDONALD, Mrs E. PALM, Mr R. PEKKANEN, Mr J. MAKARCZYK, Mr D. GOTCHEV, and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*

[The Otto-Preminger Institute, a nonprofit organization in Austria, had announced a series of six showings of a satirical film with a religious subject matter, *Das Liebeskonzil (Council in Heaven)*. As described in the announcement for the film, it was a “satirical tragedy set in Heaven.” “Trivial imagery and absurdities of the Christian creed are targeted in a caricatural mode and the relationship between religious beliefs and worldly mechanisms of oppression is investigated.” The opinion describes the film as portraying God

as an apparently senile old man prostrating himself before the devil with whom he exchanges a deep kiss and calling the Devil his friend. . . . Other scenes show the Virgin Mary permitting an obscene story to be read to her and the manifestation of a degree of erotic tension between the Virgin Mary and the Devil. The adult Jesus Christ is portrayed as a low grade mental defective and in one scene is shown lasciviously attempting to fondle and kiss his mother’s breasts, which she is shown as permitting. God, the Virgin Mary, and Christ are shown in the film applauding the Devil.

Before the first showing, the Austrian Public Prosecutor instituted criminal proceedings against the manager of the applicant association, and by judicial order the film was seized and subsequently forfeited. In the European Court of Human Rights, the Otto-Preminger Institute argued that the seizure and forfeiture of the film were in breach of Austria’s obligations under Article 10 of the Convention. The Court held, 6-3, that there had been no violation of Article 10 of the Convention as regards either the seizure or the forfeiture of the film.

Before the Court, all agreed that the seizure and forfeiture of the film constituted “interferences” with the Institute’s freedom of expression under Article 10. Therefore, the question was whether these “interferences” met the requirements of paragraph 2, specifically whether they pursued an aim that was legitimate under that provision and whether they were “necessary in a democratic society” for the achievement of that aim.]

46. The Government maintained that the seizure and forfeiture of the film were aimed at “the protection of the rights of others,” particularly the right of respect for one’s religious feelings, and “the prevention of disorder.”

47. . . . [F]reedom of thought, conscience and religion, which is safeguarded under Article 9 of the Convention, is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life.

Those who choose to exercise the freedom to manifest their religion . . . cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State . . . [to] ensure the peaceful enjoyment of the right guaranteed . . . to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedoms to hold and express them. . . .

[A] State may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with respect for the freedom of thought, conscience and religion of others. The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 in the present case must be in harmony with the logic of the Convention.

48. The measures complained of were based on section 188 of the Austrian Penal Code, which is intended to suppress behaviour directed against objects of religious veneration that is likely to cause “justified indignation.” It follows that their purpose was to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons. . . . [T]he Court accepts

that the impugned measures pursued a legitimate aim under Article 10(2), namely “the protection of the rights of others.” . . .

49. . . . Subject to paragraph 2 of Article 10, [freedom of expression] . . . is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society.”

However, as is borne out by the wording itself of Article 10(2), whoever exercises the rights and freedoms enshrined in the first paragraph of that Article undertakes “duties and responsibilities.” Amongst them—in the context of religious opinions and beliefs—may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.

This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any “formality,” “condition,” “restriction” or “penalty” imposed be proportionate to the legitimate aim pursued.

50. As in the case of “morals” [(a concept linked to “the rights of others”)] it is not possible to discern throughout Europe a uniform conception of the significance of religion in society. . . . [Even] within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.

The authorities’ margin of appreciation, however, is not unlimited. . . . The necessity for any restriction must be convincingly established. . . .

52. The Government defended the seizure of the film in view of its character as an attack on the Christian religion, especially Roman Catholicism. They maintained that the placing of the original play in the setting of its author’s trial in 1895 actually served to reinforce the anti-religious nature of the film, which ended with a violent and abusive denunciation of what was presented as Catholic morality. . . .

54. . . . [A]lthough access to the cinema to see the film itself was subject to payment of an admission fee and an age-limit, the film was widely advertised. There was insufficient public knowledge of the subject-matter and basic contents of the film to give a clear indication of its nature; for these reasons, the proposed screening of the film must be considered to have been an expression sufficiently “public” to cause offence. . . .

56. The Austrian courts . . . held it to be an abusive attack on the Roman Catholic religion according to the conception of the Tyrolean public. Their judgments show that they had due regard to the freedom of artistic expression, which is guaranteed under Article 10 of the Convention, . . . [but] did not consider that its merit as a work of art or as a contribution to public debate in Austrian society outweighed those features which made it essentially offensive to the general public within their jurisdiction. . . . The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect.

No violation of Article 10 can therefore be found. . . .

JOINT DISSENTING OPINION OF JUDGES PALM, PEKKANEN, and MAKARCZYK: . . .

2. The Court is here faced with the necessity of balancing two apparently conflicting Convention rights against each other[—the right to freedom of religion (Article 9) and the right to freedom of expression (Article 10)]. . . .

3. As the majority correctly state, . . . freedom of expression is a fundamental feature of a “democratic society”; it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but particularly to those that shock, offend or disturb the State or any sector of the population. There is no point in guaranteeing this freedom only as long as it is used in accordance with accepted opinion. . . . [T]he State’s margin of appreciation in this field cannot be a wide one. . . .

6. The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right

to freedom of religion, which in effect includes a right to express views critical of the religious opinions of other.

Nevertheless, it must be accepted that it may be “legitimate” for the purpose of Article 10 to protect the religious feelings of certain members of society against criticism and abuse to some extent; tolerance works both ways and the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group be allowed. Consequently, it must also be accepted that it may be “necessary in a democratic society” to set limits to the public expression of such criticism or abuse. To this extent, but no further, we can agree with the majority.

7. The duty and the responsibility of a person seeking to avail himself or his freedom of expression should be to limit, as far as he can reasonably be expected to, the offence that his statement may cause to others. Only if he fails to take necessary action, or if such action is shown to be insufficient, may the State step in. Even if the need for repressive action is demonstrated, the measures concerned must be “proportionate to the legitimate aim pursued” The need for repressive action amounting to complete prevention of the exercise of freedom of expression can only be accepted if the behaviour concerned reaches so high a level of abuse, and comes so close to a denial of the freedom of religion of others, as to forfeit for itself the right to be tolerated by society. . . .

9. . . . [As regards the need for any State action at all in this case,] the film was to have been shown to a paying audience in an “art cinema” which catered for a relatively small public with a taste for experimental films. It is therefore unlikely that the audience would have included persons not specifically interested in the film.

This audience, moreover, had sufficient opportunity of being warned beforehand about the nature of the film. Unlike the majority, we consider that the announcement put out by the applicant association was intended to provide information about the critical way in which the film dealt with the Roman Catholic religion; in fact, it did so sufficiently clearly to enable the religiously sensitive to make an informed decision to stay away. . . .

10. Finally, . . . the announcement put out by the applicant association carried a notice [to the effect that children under 17 would not be admitted]. . .

11. We do not deny that the showing of the film might have offended the religious feelings of certain segments of the population in Tyrol. However, . . . we are, on balance, of the opinion that the seizure and forfeiture of the film in question were not proportionate to the legitimate aim pursued.

Gur Aryeh v. Second Television and Radio Authority

Supreme Court of Israel

H CJ 1514/01 (2001)

. . . Before President A. Barak, Vice President S. Levin, Justice D. Dorner . . .

President A. Barak

The television network seeks to broadcast a film documenting the life and worldview of the petitioners, who are observant Jews. They fill an active role in the film, which includes interviews with them. The film was filmed on the weekdays. The television network would like to show the film on Shabbat. The petitioners object to this. They claim violation of religious feelings and religious freedom. Whose side is the law on—that is the question before us

4. . . . [The law] must weigh the relevant values and principles, and it must properly balance them. On the one hand, there is the right of the respondent to freedom of expression. That is the freedom of expression of the respondent—which serves as a spokesperson and a stage simultaneously. . . .

5. On the other hand, there are the feelings of the petitioners. I accept that the very knowledge that the film in which the petitioners are participants will be broadcast on Shabbat—thereby turning the petitioners, in their own eyes, to parties to the desecration of Shabbat—can violate the religious feelings of the petitioners. Preventing this violation is in the public interest. Indeed a society whose values are Jewish and democratic protects the feelings of the public in general and religious feelings in particular. Indeed the coarse violation of religious feelings gnaws at the value of tolerance, which is one of the values which binds and unifies society in Israel. . . .

6. What is the proper balance between the need to protect the freedom of expression of the respondents on the one hand and the need to protect the religious feelings of the petitioners on the other? This question was discussed at length in the case law of the Supreme Court. It was determined that the (vertical) ‘balancing formula’ is this: freedom of expression prevails, unless the violation of religious feelings is nearly certain and their violation is real and severe. It is necessary that the violation go beyond the tolerable threshold of Israeli society. . . .

7. What is the result of the proper balancing in the petition before us? In opposition to the violation of the freedom of expression of the respondents is there a near certainty of a real and severe violation of the religious feelings of the petitioners? There is no debate that the violation of the religious feelings of the petitioners is nearly certain. It has been proven to us that such violation is

certain. . . . But is the condition as to the intensity of the violation met? The answer to this question is negative. . . . [O]n Shabbat, the operation of the Knesset and the government are broadcast, and in the framework of these, observant members of Knesset and ministers who are interviewed on weekdays are viewed; so too, on Shabbat entertainment, political, and cultural programs, in which observant Jews take an active part, are viewed. If all of these are prohibited from being viewed, chances are great that all television will be shut down on Shabbat followed by the radio. All this is not consistent with the 'level of tolerability' of the violation of religious feelings in Israel, as it has been accepted here for many years. Indeed, the possibility of a certain violation of religious feelings is the price that every person, be his religion what it may be, is required to pay for life in democratic society, in which secular and religious and members of different religions live side by side one next to the other. . . .

The result is that the petition is denied. We have noted before us the declaration of the respondents that a caption will be added to the broadcast stating that the filming took place on a weekday. . . .

[Vice President Levin concurred. Justice D. Dorner dissented, writing that she agreed that a violation of the petitioners' feelings did not justify granting the petition but, in her opinion, the broadcast also violated their right to freedom of religion.]

Rahul Agrawal v. The State of Madhya Pradesh
Madhya Pradesh High Court, India
CRR-1709-2014 (October 19, 2015)

[C. V. Sirpurkar, Judge, delivered the following judgment]

1. This criminal revision filed on behalf of the accused/applicant Rahul Agrawal is directed against order dated 28.05.2014 passed by the Court of Chief Judicial Magistrate, Katni, in Criminal Case No. 6478/2006, whereby the accused was discharged of offences under Sections 295 [injuring or defiling a place of worship with intent to insult religion] and 427 [committing mischief causing damage to the amount of fifty rupees] of the [Indian Penal Code (IPC)] but a charge

of offences punishable under Sections 294 and 298* of the IPC was framed against him.

2. . . . [F]irst informant Anoop Singhai . . . is a follower of Jain Religion. He regularly visits Parshwanath Digamber Jain Mandir (Glass Temple), for offering prayers. Accused/applicant Rahul Agrawal is [a] tenant of [the] Parswanath Digamber Jain Mandir and runs a shop in the tenanted premises Digamber Jain Mandir is situated on the first floor above the tenanted shop. The applicant has been causing damage to the roof and wall of the tenanted shop. In this regard a case has been instituted in the Court and applicant Rahul Agrawal has been enjoined by the Court from causing damage to the shop.

3. It was further alleged . . . [that] Anoop Singhai had gone to Parswanath Digamber Jain Mandir to offer prayers. At that time, he suddenly heard [the] noise of hammer blows emanating from the shop of the applicant. Due to vibration caused by the blows, the idol of Lord Parswanath, which was duly installed after following religious precepts, was displaced. . . . [When asked to stop,] applicant Rahul Agrawal . . . stated that he would not stop the demolition regardless of whether the temple is destroyed or falls down. He charged [at] the first informant and his companions with hammer in his hand. The first informant and his companions ran away from the spot to save their [lives]. . .

8. Learned senior counsel for the applicant has tried to counter the aforesaid argument by inviting attention of the Court to the case of *Harshendra Kumar D. Vs. Rebtalata Koley*, [(2011)] wherein the Supreme Court has observed that: . . .

Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to the appellant's resignation from the post of Director of the Company. Had these

* The Indian Penal Code provides:

Section 294: "Obscene acts and songs.—Whoever, to the annoyance of others—(a) does any obscene act in any public place, or (b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both."

Section 298: "Uttering, words, etc., with deliberate intent to wound the religious feelings of any person.—Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places, any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company.

9. Having perused the copy of charge sheet and the documents filed therewith by the applicant in this criminal revision and having considered the rival contentions, this Court is of the view that this criminal revision must fail[] for the reasons hereinafter stated.

10. First of all, the Court has to consider whether the documents filed by the accused may be considered for the purpose of framing of charge? . . .

20. As such, all that Court . . . had to consider at the stage of framing of charge was whether ingredients constituting offence punishable under Sections 294 and 298 of the IPC were made out from the charge sheet and the documents filed therewith. It is clear from the first information report and the statement of witnesses namely Rajendra Kumar Jain, Surendra Kumar Jain and Manoj Kumar Jain that the applicant/accused had uttered . . . words at or near a public place in the presence of and addressed to members of the Jain community. . . . On the basis of language used and the circumstances in which it was used, it may be presumed for the purpose of charge that those hearing utterances must have been annoyed. It may also be presumed in the circumstances that the later part of the statement was made with deliberate intention to wound religious feelings to a particular community in the presence of members of that community; as such, the ingredients constituting offences punishable under Sections 294 and 298 of the IPC exist for the purpose of framing charge.

21. That being so, in the opinion of this Court, the impugned order framing charge under Sections 294 and 298 of the IPC, does not suffer from any illegality, irregularity or impropriety. Thus, no interference in revisional jurisdiction of the High Court is called for.

22. Consequently, this criminal revision deserves to be and is accordingly dismissed.

**Resolution 1510 (2006):
Freedom of expression and respect for religious beliefs
Parliamentary Assembly of the Council of Europe**

. . . 7. Blasphemy has a long history. The Assembly recalls that laws punishing blasphemy and criticism of religious practices and dogmas have often had a negative impact on scientific and social progress. The situation started changing with the Enlightenment, and progressed further towards secularisation. Modern democratic societies tend to be secular and more concerned with individual freedoms. The recent debate about the Danish cartoons raised the question of these two perceptions.

8. In a democratic society, religious communities are allowed to defend themselves against criticism or ridicule in accordance with human rights legislation and norms. States should support information and education about religion so as to develop better awareness of religions as well as a critical mind in its citizens in accordance with Assembly Recommendation 1720 (2005) on education and religion. States should also develop and vigorously implement sound strategies including adequate legislative and judicial measures to combat religious discrimination and intolerance.

9. The Assembly also recalls that the culture of critical dispute and artistic freedom has a long tradition in Europe and is considered as positive and even necessary for individual and social progress. Only totalitarian systems of power fear them. Critical dispute, satire, humour and artistic expression should, therefore, enjoy a wider degree of freedom of expression and recourse to exaggeration should not be seen as provocation.

10. Human rights and fundamental freedoms are universally recognised, in particular under the Universal Declaration of Human Rights and international covenants of the United Nations. The application of these rights is not, however, universally coherent. The Assembly should fight against any lowering of these standards. The Assembly welcomes the United Nations Secretary-General's initiative on an alliance of civilisations which aims to mobilise concerted action at the institutional and civil society levels to overcome prejudice, misperceptions and polarisation. A true dialogue can only occur when there is genuine respect for and understanding of other cultures and societies. Values such as respect for human rights, democracy, rule of law and accountability are the product of mankind's collective wisdom, conscience and progress. The task is to identify the roots of these values within different cultures.

11. Whenever it is necessary to balance human rights which are in conflict with each other in a particular case, national courts and national legislators have a

margin of appreciation. In this regard, the European Court of Human Rights has held that, whereas there is little scope for restrictions on political speech or on the debate of questions of public interest, a wider margin of appreciation is generally available when regulating freedom of expression in relation to matters liable to offend intimate personal moral convictions or religion. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place.

12. The Assembly is of the opinion that freedom of expression as protected under Article 10 of the European Convention on Human Rights should not be further restricted to meet increasing sensitivities of certain religious groups. At the same time, the Assembly emphasises that hate speech against any religious group is not compatible with the fundamental rights and freedoms guaranteed by the European Convention on Human Rights and the case law of the European Court of Human Rights. . . .

18. The Assembly resolves to revert to this issue on the basis of a report on legislation relating to blasphemy, religious insults and hate speech against persons on grounds of their religion, after taking stock of the different approaches in Europe, including the application of the European Convention on Human Rights, the reports and recommendations of the European Commission against Racism and Intolerance (ECRI) and of the European Commission for Democracy through Law (Venice Commission) and the reports of the Council of Europe Commissioner for Human Rights.

**Report on the Relationship Between Freedom of Expression and
Freedom of Religion**
Venice Commission (2008)*

[The first part of the report documented the process of its development, and the second part documented existing international standards on hate speech, including Articles 9, 10, and 14 of the European Convention on Human Rights, as well as Article 1 of Protocol 12 to that Convention, Additional Protocol to the Convention on Cybercrime, Article 20(2) of the United Nations International

* Excerpted from the Report on the Relationship Between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, adopted by the Venice Commission at its 76th Plenary Session (October 17-18, 2008).

Covenant on Civil and Political Rights, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Recommendation No. R(97)20 on “Hate Speech” of the Committee of Ministers of the Council of Europe, and general policy recommendation No. 7 of the Council of Europe’s European Commission against Racism and Intolerance.] . . .

III. National legislation on blasphemy, religious insults and inciting religious hatred

22. The Venice Commission has collected the criminal law provisions of Council of Europe member states relating to blasphemy, religious insults and incitement to religious hatred. . . . The Commission has also sought more specific and detailed information about the legislation and legal practice in a selected number of member States (Albania, Austria, Belgium, Denmark, France, Greece, Ireland, the Netherlands, Poland, Romania, Turkey and the United Kingdom) The Commission’s analysis set out hereinafter is based on this information.

23. Most States penalise the disturbance of religious practice (for instance, the interruption of religious ceremonies).

24. Blasphemy is an offence in only a minority of member States (Austria, Denmark, Finland, Greece, Italy, Liechtenstein, the Netherlands, San Marino). It must be noted in this context that there is no single definition of “blasphemy.” In the Merriam-Webster, blasphemy is defined as: 1: the act of insulting or showing contempt or lack of reverence for God b: the act of claiming the attributes of deity; 2: irreverence toward something considered sacred or inviolable. According to the report of the Committee on Culture, Science and Education on Blasphemy, religious insults and hate speech against persons on grounds of their religion, blasphemy can be defined as the offence of insulting or showing contempt or lack of reverence for god and, by extension, toward anything considered sacred. The Irish Law Reform Commission suggested a legal definition of “blasphemy” as “Matter the sole effect of which is likely to cause outrage to a substantial number of adherents of any religion by virtue of its insulting content concerning matters held sacred by that religion.”

25. The penalty incurred for blasphemy is generally a term of imprisonment (mostly, up to three, four or six months; up to two years in Greece for malicious blasphemy) or a fine.

26. The offence of blasphemy is, nowadays, rarely prosecuted in European states.

27. Religious insult is a criminal offence in approximately half the member States (Andorra, Cyprus, Croatia, the Czech Republic, Denmark, Spain, Finland, Germany, Greece, Iceland, Italy, Lithuania, Norway, the Netherlands, Poland,

Portugal, Russian Federation, Slovak Republic, Switzerland, Turkey and Ukraine), while insult as such is generally considered as a criminal or administrative offence in all countries.

28. While there is no general definition of “religious insult,” the relevant European provisions appear to cover the different concepts (often at the same time) of “insult based on belonging to a particular religion” and “insult to religious feelings.”

29. The penalty incurred is generally a term of imprisonment, varying significantly amongst member States and ranging from a few months (four or six) to one, two, three and even five years (in Ukraine). A pecuniary fine is always an alternative to imprisonment.

30. Negationism, in the sense of public denial of historical facts or genocide with a racial aim, is an offence in a few countries (Austria, Belgium, France, Switzerland). In other countries such as Germany, certain activity amounting to negationism may come within the definition of the offence of incitement to hatred.

31. Discrimination of various kinds, including on religious grounds, is prohibited at constitutional level in all Council of Europe member states. Some States, in addition, have specific laws or provisions against discrimination.

32. In some countries, the commission of *any* crime with an ethnic, racial, religious or similar motive constitutes a general aggravating circumstance (for example France, Georgia, Italy, Luxembourg, Sweden, Spain and Ukraine). In some countries, certain specific crimes (e.g. murder) are aggravated by a racial or similar motive (e.g. Belgium, France, Georgia, and Portugal).

33. Practically all Council of Europe member States (with the exception of Andorra and San Marino) provide for an offence of incitement to hatred. In some of these countries (e.g. Austria, Cyprus, Greece, Italy and Portugal), however, the law punishes incitement to *acts likely to create discrimination or violence*, not to mere hatred. In some States (e.g. Lithuania), the law penalises both (incitement to violence carrying more severe penalties).

34. In most member States, the treatment of incitement to *religious* hatred is a subset of incitement to general hatred, the term “hatred” generally covering racial, national and religious hatred in the same manner, but at times also hatred on the ground of sex or sexual orientation, political convictions, language, social status, physical or mental disability. In Georgia, Malta, in Slovakia and in “the former Yugoslav Republic of Macedonia,” however, religion is not specifically foreseen as a ground for hatred.

35. In several States (e.g. Armenia, Bosnia and Herzegovina, Latvia, Montenegro, Serbia, Slovenia, Ukraine), the fact that the incitement to hatred has been committed through, or has actually provoked violence, constitutes an aggravating circumstance.

36. In the majority of member States (with the exception of Albania, Estonia, Malta, Moldova, Montenegro, the Netherlands, Poland, Serbia, Slovenia and Ukraine, and the United Kingdom but with the exception of one's private dwelling), the incitement to hatred must occur in public. In Armenia and France, the fact that the incitement is committed in public represents an aggravating circumstance.

37. In Austria and Germany, the incitement to hatred must disturb the public order in order for it to become an offence. In Turkey, it must clearly and directly endanger the public.

38. Some States provide for specific, more stringent or severe provisions relating to incitement to hatred through the mass media (for example Armenia, Azerbaijan, Czech Republic and Romania).

39. The intention to stir up hatred is generally not a necessary element of the offence, but it is so in Cyprus, Ireland, Malta, Portugal, Ukraine and England and Wales. In some member States, recklessness is taken into account too. In Ireland, for example, it is a defence for the accused to prove not to have intended to stir up hatred or not to have intended or been aware that the words, behaviour or material concerned might be threatening, abusive or insulting. In Italy, the words, behaviour or material in question must stir up, or be intended to stir up, or *be likely to* stir up hatred. In Norway, the offence of incitement to hatred may be committed willingly or through gross negligence.

40. The maximum prison sentence incurred for incitement to hatred varies significantly (from one year to ten years) among member states: one year (Belgium, France, the Netherlands); eighteen months (Malta); two years (Austria, Cyprus, Czech Republic, Denmark, Georgia, Iceland, Ireland, Lithuania, Slovenia, Sweden); three years (Azerbaijan, Bulgaria, Croatia, Estonia, Hungary, Italy, Latvia, Moldova, Norway, Poland, Slovakia, Spain, Turkey); four years (Armenia); five years (BiH, Germany, Monaco, Montenegro, Portugal, Serbia, "the former Yugoslav Republic of Macedonia," Ukraine); ten years (Albania). In all countries, a prison term is alternative to or cumulative with a pecuniary fine. . . .

Maintenance of Religious Harmony Act
Singapore (1990)*

... 8. ... Restraining orders against officials or members of religious group or institution

(1) The Minister [of Home Affairs] may make a restraining order against any priest, monk, pastor, imam, elder, office-bearer or any other person who is in a position of authority in any religious group or institution or any member thereof for the purposes specified in subsection (2) where the Minister is satisfied that that person has committed or is attempting to commit any of the following acts: (a) causing feelings of enmity, hatred, ill-will or hostility between different religious groups; (b) carrying out activities to promote a political cause, or a cause of any political party while, or under the guise of, propagating or practising any religious belief; (c) carrying out subversive activities under the guise of propagating or practising any religious belief; or (d) exciting disaffection against the President or the Government while, or under the guise of, propagating or practising any religious belief.

(2) An order made under subsection (1) may be made against the person named therein for the following purposes: (a) restraining him from addressing orally or in writing any congregation, parish or group of worshippers or members of any religious group or institution on any subject, topic or theme as may be specified in the order without the prior permission of the Minister; (b) restraining him from printing, publishing, editing, distributing or in any way assisting or contributing to any publication produced by any religious group without the prior permission of the Minister; (c) restraining him from holding office in an editorial board or a committee of a publication of any religious group without the prior permission of the Minister.

(3) Any order made under this section shall be for such period, not exceeding 2 years, as may be specified therein.

(4) Before making an order under this section, the Minister shall give the person against whom the order is proposed to be made

* Excerpted from The Statutes of the Republic of Singapore, Maintenance of Religious Harmony Act (Chapter 167A), enacted as Act 26 of 1990, revised in 2001.

and the head or governing body or committee of management of the religious group or institution which is to be named in the proposed order, notice of his intention to make the order together with the grounds and allegations of fact in support thereof and of their right to make written representations to the Minister.

(5) The Minister shall have regard to such representations in making the order.

(6) All written representations under subsection (4) must be made within 14 days of the date of the notice of the Minister's intention to make an order under this section.

9. Restraining orders against other persons

(1) Where the Minister is satisfied that—(a) any person is inciting, instigating or encouraging any religious group or religious institution or any person mentioned in subsection (1) of section 8 to commit any of the acts specified in that subsection; (b) any person, other than persons mentioned in subsection (1) of section 8, has committed or is attempting to commit any of the acts specified in paragraph (a) of that subsection, he may make a restraining order against him. . . .

16. Penalty for breach of restraining order

(1) Any person who contravenes any provision of an order made under this Part shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 2 years or to both and, in the case of a second or subsequent offence, to a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 3 years or to both. . . .

Control, Co-Optation and Co-Operation: Managing Religious Harmony in Singapore's Multi-Ethnic, Quasi-Secular State

Li-Ann Thio (2006)*

. . . What norms, institutions and ethos best secure the pacific co-existence of distinct religious and ethnic groups within a society which is committed to democratic pluralism? . . .

[I]n non-homogenous nations like Singapore and Yugoslavia, preserving social cohesion is central to state survivability . . . The official state policy towards managing the multi-cultural composition of Singapore is that it will never be a melting pot, as the different ethnic groups want to preserve their distinct traits in terms of customs, culture, language, and in some cases where ethnicity and religion are closely correlated, faith. Singapore's strategy to "create the Singapore tribe" has been, some argue artificially, to construct a unifying national identity, through an emphasis on a common citizenship and through promulgating a set of "shared values." Furthermore, there has been an attempt to manage ethnic relations by recognizing a "common area" where all ethnic groups interacted, with English as the common language in a setting with equal opportunities for all. Outside this, each community has a "separate area" wherein to retain and speak its own language and express its cultural identity . . . Although ethnic and religious tensions persist, the relative peace (or absence of overt religious disharmony) that Singapore has enjoyed since Independence has earned it the title of being the "Switzerland of the East." . . .

Today, all major world religions are represented in Singapore among Singapore's population which numbers around 4.2 million. . . The religious breakdown of the population has been reported as the following: Buddhists [and] Taoists (51%); Muslims (15%); Christians (15%); Hindus (4%); No Religion (13%) and Other Religions (2%). . .

In Singapore, where Religion can bolster or facilitate state programs, it is co-opted. It is fair to say that the model of State-Religion relations in Singapore is generally more co-operationist than separationist in nature. There is no strict separation of 'Church (Religion) and State' in Singapore; as such, terms like 'quasi-secular' and 'accommodative secularism' are apt descriptions of the Singapore context. This reflects the pragmatic nature of the continuing experiment in managing religious pluralism and state objectives in Singapore. Nevertheless,

* Excerpted from Li-Ann Thio, *Control, Co-Optation and Co-Operation: Managing Religious Harmony in Singapore's Multi-Ethnic, Quasi-Secular State*, 33 HASTINGS CONSTITUTIONAL LAW QUARTERLY 197 (2006).

government pragmatism has its limits and official policy holds that religion and politics must not mix, which means communities can pursue religious interests with the caveat that the “political cohesion at the centre” must not be threatened. Religion is controlled or limited where it is seen to be a threat to the secularly couched objectives of the state in terms of security and preserving racial and religious harmony, or national policy. It is left to flourish where it is confined to the realms of private spirituality, celebrated as an aspect of cultural identity and source of traditional values or where it operates in the innocuous realm of civic-mindedness and ministers to social needs. Ultimately, the State reserves to itself the right to define religion and the sphere of legitimate religious activity. While religious diversity is an aspect of pluralism, a government minister has noted in general that “our capacity to accommodate diversity and differences is directly tied to the strength of our common values and beliefs. If we do not have these anchor points as a people, then diversity may well tear us apart.” The limits of multiculturalism are tied to the preservation of a national value system, which stresses ‘racial and religious harmony,’ as articulated by the government. . . .

Antidiscrimination and Drawing Distinctions Between Race and Religion

Using antidiscrimination law to protect the dignity and sensibility of ethnic and racial groups is structurally analogous to using blasphemy law to protect the dignity and sensibility of religious groups. For this reason, pluralist blasphemy laws are often conflated with antidiscrimination laws. In Brazil, for example, Article 20 of Statute 7.716/89 sanctions those who “practice, induce or incite discrimination or prejudice based on race, color, ethnicity, religion or national origin.”

This conflation is explicit in United Nations Special Rapporteur Doudou Diene’s response to a controversial set of Danish cartoons depicting allegedly blasphemous images of Muhammad, the Islamic prophet. Diene branded the publication of the cartoons as “Islamophobia” and racial discrimination. He asserted that the cartoons “illustrated the increasing emergence of the racist and xenophobic currents in everyday life.” Those who condemned the cartoons regarded them as “a new sign of Europe’s growing ‘Islamophobia’” because they reinforced “a dangerous confusion between Islam and Islamist terrorism.” Civil rights lawyers in Denmark argued that there ought to be “a balance here between freedom of speech and the right not to be subjected to racial discrimination.”

Given polarizing conflicts, states have a significant interest in prohibiting and preventing discrimination against Muslims. The question is how this objective

ought to be connected to the suppression of speech that Muslims find offensive to their religion.

Freedom of Speech in a Globalized World

Dieter Grimm (2009)*

In a globalized world speech can be universally heard, as the Mohammed cartoons that appeared [in] 2005 in a local Danish newspaper illustrate. . . . Without modern information technology, they would not have been universally noticed within days. In a globalized world speech can provoke universal reactions. Again the Danish cartoons are an example: 139 persons lost their life during the violent reactions following the publication and others were threatened with death; embassies were set on fire, Danish goods boycotted, and journalists were convicted and fined or fired.

It was not by chance that the immediate cause of these events was a religious issue. Religion re-appears on the scene after the end of the Cold War and the collapse of many atheist regimes that suppressed religious movements. One can observe a new politicization of religion, particularly of such religions that have not undergone the process of historicization and contextualization of divine revelation and sacred texts, have not learned to distinguish between the error and the erring person or to bridge doctrinal differences by a spirit of tolerance, and are neither accustomed to a secular state nor to a pluralistic society.

One of the consequences of the violent reactions to the Danish cartoons was a call for better protection of religious sensibilities. The demand came not only from Muslim groups but also from the Christian Churches and found some resonance with politicians as well. Some saw the solution in press self-censorship. Others asked for new laws. Since it will usually be through speech that religious feelings are hurt, increased legal protection against offending religious feelings will entail more restrictions on freedom of speech. This raises the question of whether liberal democracies can fulfil this demand without violating their constitutions.

Legal protection of God, of religious beliefs, doctrine, symbols, rituals, and services has a long tradition in the West. Blasphemy laws could at one time be found in every penal code. They did not protect any religion, but the Christian faith and

* Excerpted from Dieter Grimm, *Freedom of Speech in a Globalized World*, in *EXTREME SPEECH AND DEMOCRACY* (Ivan Hare and James Weinstein editors, Oxford University Press 2009).

the Christian God. Only recently were many of them repealed. What remained in place were provisions against disturbance of the public peace caused by offensive speech against religion. Should the wheel be turned back and, in reaction to growing multiculturalism in Western societies, more protection of religion be furnished, but now in conformity with the anti-discrimination clauses in modern constitutions rather than limited to a certain faith?

The answer requires some reflection on the place of religion in the secular state. The secular state was the historical reaction to the devastating religious wars that followed the Reformation of the sixteenth century. After a long process with results differing from country to country, the state finally succeeded in pacifying religiously divided society by untying its bonds with one religion and making itself independent from a transcendent truth. Religious truth became a matter both of individual belief and individual choice. As little as dominant religious institutions may have liked this new arrangement in the beginning, they came to realize that freedom of religion depends greatly on state neutrality in questions of religious beliefs.

Some secular states understood themselves not only as religiously neutral, but as actually opposed to religion. For them privatization of religion meant more than the state's abstinence from interfering with religious affairs. It meant rather a confinement of religion to the private sphere and the denial of a public role. The French 'laïcité' shows traits of this attitude. Yet, this is not a necessary feature of the secular state. The United States Constitution has been interpreted as requiring strict separation of church and state, but does not deny religion a public role. In many European countries the state explicitly concedes churches a role in the public arena.

Today separation between state and religion does not necessarily mean antagonism. The secular state recognizes religious beliefs as an elementary human urge that seeks collective expression. Freedom of religion enjoys constitutional protection in both its individual and collective dimension. This includes self-determination of a religious group about the content and commands of its faith. The secular state does not oblige any religion to renounce its claim to be the only true one. But it does prevent every religion from imposing its truth on society as a whole. Each religion can retain its truth just because the state does not take a stand in questions of ultimate truth.

However, peaceful coexistence of mutually exclusive beliefs is not possible without limitation on religious freedom. But since freedom of religion is a fundamental right, the limitations must be determined by law in a democratic process, which in turn presupposes an unimpeded public discourse. This means that, in the secular state, religion cannot be exempted from criticism. Freedom of speech and freedom of the media is not less important than freedom of religion. The more

a religious group claims public recognition and respect for its religious norms, the more it must be exposed to public discourse.

Consequently, there are some limits to protection of religious beliefs against speech. Every general prohibition requires a basis in the secular law. Negation or criticism of what a religion regards as sacred, and therefore immunized internally against any form of questioning, cannot be prohibited by the secular state. The secular state may not enforce religious taboos. It is not permissible to shield sacred figures, symbols, or practices against ridicule or mockery. This applies also to speech in the form of cartoons. Cartoons can make a genuine contribution to the public discourse essential to a free and democratic society.

But what about religious feelings? A general prohibition against hurting religious feelings would put the public discourse at the mercy of the sensitivity of religious groups, and particularly of the most militant among them. The state has to protect every religion against violence. But religiously motivated violence caused by offensive speech is something different and cannot justify a prohibition of that speech. Moreover, since the number of religious groups is immense, and since any disturbance of their religious feelings can get global attention, what speech might have this effect would be completely unforeseeable. Such a norm could not be formulated in conformity with rule of law requirements.

Yet, the secular state is not the enemy of religion. It recognizes religion as a value that deserves protection. This is more than mere tolerance. There can be no doubt that instigation to hate ought to be prohibited when it is directed against religious groups, just as it is prohibited when racial or ethnic groups are the target. Likewise speech that degrades, denigrates, or humiliates persons because of their religion can be prohibited without a violation of the right to free speech. These limitations rest on secular rather than religious grounds and thus permit legislation that protects religion.

The problem is identifying the exact boundary between legitimate public discourse and objectionable speech. In this respect, Europe and America may differ from one another. In the United States there seems to be a tendency to assume that a multicultural and multireligious society needs more speech than a homogeneous society. Every religious group must be free to persuade or attack others, but prepared to tolerate the same behaviour when they are the target. In Europe there is a tendency to assume that multicultural and multireligious societies are in need of more consideration among the various groups. Consequently, greater restriction of speech in the interest of peaceful coexistence seems justifiable. . . .

Norwood v. United Kingdom
European Court of Human Rights (Fourth Section)
[2004] ECHR 730

. . . The European Court of Human Rights (Fourth Section), sitting . . . as a Chamber composed of: Mr J.-P. Costa, *President*, Sir N. BRATZA, Mr I. CABRAL BARRETO, Mr R. TÜRMEŒ, Mr V. BUTKEVYCH, Mr M. UGREKHELIDZE, Mrs E. FURA-SANDSTRÖM, *judges*, and Mrs S. DOLLÉ, *Section Registrar*

The applicant, Mr Mark Anthony Norwood, is a United Kingdom national who was born in 1962 and lives in a village near Oswestry, Shropshire. . . .

The applicant was a Regional Organiser for the British National Party (“BNP”: an extreme right wing political party). Between November 2001 and 9 January 2002 he displayed in the window of his first-floor flat a large poster (60 cm x 38 cm), supplied by the BNP, with a photograph of the Twin Towers in flame, the words “Islam out of Britain – Protect the British People” and a symbol of a crescent and star in a prohibition sign.

The poster was removed by the police following a complaint from a member of the public. The following day a police officer contacted the applicant by telephone and invited him to come to the local police station for an interview. The applicant refused to attend.

The applicant was then charged with an aggravated offence under section 5 of the Public Order Act 1986, of displaying, with hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress by it. The applicant pleaded not guilty and argued . . . that the poster referred to Islamic extremism and was not abusive or insulting, and that to convict him would infringe his right to freedom of expression under Article 10 of the Convention. On 13 December 2002 he was convicted of the offence by District Judge Browning at Oswestry Magistrates’ Court, and fined GBP 300.

The applicant appealed to the High Court, which dismissed his appeal on 3 July 2003. Lord Justice Auld held that the poster was “a public expression of attack on all Muslims in this country, urging all who might read it that followers of the Islamic religion here should be removed from it and warning that their presence here was a threat or a danger to the British people.” . . .

The applicant was charged with the offence of causing alarm or distress contrary to section 5(1)(b) of the Public Order Act 1986*

The 1986 Act further provides, in section 6(4): “A person is guilty of an offence under section 5 only if he intends . . . the writing, sign or other visible representation to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting”

The 1998 Act, as amended, introduced a statutory aggravation to a number of offences, including section 5 of the 1986 Act, carrying with it higher maximum penalties. According to sections 28(1)(b) and 31(1)(c) of the 1998 Act, an offence under section 5 of the 1986 Act is “racially or religiously aggravated” if it is “motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.” . . .

The applicant contends under Article 10 of the Convention that the criminal proceedings against him violated his right to freedom of expression. He also complains of discrimination contrary to Article 14. . . .

However, the Court would refer to Article 17 of the Convention**

The general purpose of Article 17 is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention. The Court, and previously, the European Commission of Human

* Section 5 of the Public Order Act of 1986 provides:

- “(1) A person is guilty of an offence if he; . . . (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.
- (2) An offence under this section may be committed in a public or a private place . . .
- (3) It is a defence for the accused to prove—(a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or (b) that he was inside a dwelling and had no reason to believe that the words or the behaviour used, or the writing, sign or other visible representation displayed would be heard or seen by a person outside that or any other dwelling, or (c) that his conduct was reasonable.”

** Article 17 of the European Convention on Human Rights provides: “Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

Rights, has found in particular that the freedom of expression guaranteed under Article 10 of the Convention may not be invoked in a sense contrary to Article 17.

The poster in question in the present case contained a photograph of the Twin Towers in flame, the words “Islam out of Britain – Protect the British People” and a symbol of a crescent and star in a prohibition sign. The Court notes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant’s display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14.

It follows that the application must be rejected as being incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 35 §§ 3 and 4. . . .

The Innocence of Satirists: Will Caricatures of the Prophet Mohammad Change the ECHR Approach to Hate Speech?

David Keane (2012)*

The global reaction to the trailer for the film *The Innocence of Muslims* has prompted the banning of the video-sharing website Youtube in three States, Afghanistan, Bangladesh and Pakistan, with Council of Europe member Russia mooting such a move. Similarly the publication of the *Charlie Hebdo* cartoons of the Prophet Mohammad in France, and the resulting international protests, appear to reignite questions of religious defamation and freedom of expression generated by *Jyllands-Posten* in 2006. To a certain extent the arguments appear unchanged, but there are elements to these recent controversies worth exploring.

Charlie Hebdo has already been in the French courts, in 2007, but was acquitted, while the Danish Public Prosecutor decided not to pursue criminal proceedings against *Jyllands-Posten*. Yet the debate this time around seems less strident in terms of freedom of expression. The BBC points to a somewhat divided

* Excerpted from David Keane, *The Innocence of Satirists: Will Caricatures of the Prophet Mohammed Change the ECHR Approach to Hate Speech?*, EJIL: TALK! (September 26, 2012), available at <http://www.ejiltalk.org/the-innocence-of-satirists-will-caricatures-of-the-prophet-mohammad-change-the-echr-approach-to-hate-speech/>.

French press, albeit one that emphasises freedom of expression within the parameters of the law, with one paper asking whether these are “some cartoons too many.” This is significant given that newspapers of all political colours are the frontline on freedom of expression. Guy Birenbaum on the *Huffington Post* (only available in French) writes: “Come on Charlie, just between ourselves, you don’t have the feeling that this is old hat? Already seen, already read? Where is the subversion, the insolence, and most of all, the humour?” He concludes that mocking Islam has become something of a national sport in France and as a result has lost its subversive value. In this atmosphere, a prosecution appears a little more possible.

Such a prosecution would almost certainly be challenged before the European Court of Human Rights. Article 10 of the European Convention reads: “1. Everyone has the right to freedom of expression . . . without interference by public authority . . . 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others”

In order to uphold the cartoonists’ rights under Article 10(1), the Court would have to go against its past jurisprudence and rule the interference unnecessary under Article 10(2). That would mark a new departure in terms of the European approach to hate speech, which has, perhaps understandably, been marked by the World War II experience and consistently upheld convictions for speech which attacks racial, ethnic or religious groups, or denies wartime atrocities.

There have been relatively few cases in the European Court of Human Rights on hate speech. This is because usually such cases do not pass the admissibility stage. The earliest example, *Glimmerveen and Hagenbeek v. The Netherlands* [1979], involved the members of a Dutch far-right party who passed out leaflets calling for an ethnically homogenous state. They were prosecuted, and their claim of a violation of Article 10 [of the European Convention on Human Rights (ECHR)] was rejected by the European Commission at the admissibility stage. The decision was based on Article 17, the ‘abuse of rights’ clause, rather than Article 10. Article 17 reads: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein”

The subsequent admissibility decision in *Kuhnen v. Germany* [1986], similarly outlining a pamphleteer’s desire for German racial unity, was rejected on the basis of Article 10 and Article 17, with Article 17 used as a guiding provision

while making the decision under Article 10. Thus the interference in the Article 10(1) right was justified under Article 10(2), although the Commission had regard to Article 17.

A series of French cases decisively shifted the approach to Article 17. In *Lehideux and Isorni v. France* [1998], the Court carved out a particular role for Article 17: Holocaust denial. The plaintiffs were prosecuted for glorifying the achievements of Marshall Pétain in a *Le Monde* advertisement. France argued that the interference was justified under Article 17 and Article 10(2). The Court ruled that the offending document sometimes omitted important historical facts, “but does not belong to the category of clearly historical facts—such as the Holocaust—whose negation or revision would be removed from the protection of Article 10 by Article 17.” Since *Lehideux*, Article 17 is applied with strict scrutiny to cases of Holocaust denial only. Thus in *Garaudy v. France* [2003], the plaintiff was prosecuted for a book which wrote about the “myth of the Holocaust.” The application was deemed inadmissible, as the intervention was held to be justified under Article 17.

What is the significance of using Article 17 instead of Article 10? The result is an absence of a balancing process. Article 10 cases take the right to freedom of expression in Article 10(1), and weigh this against the interests in Article 10(2). This is found for example in the *Jersild v. Denmark* [1996] case, in which a journalist was prosecuted for relaying the opinions of a group of racist youths known as the ‘Greenjackets.’ While prosecution of the youths would have been justified under Article 10(2), prosecution of the journalist was not held to be necessary given the serious context of the piece, which was a relevant investigation into far-right movements in Denmark. This is a rare example of a hate speech conviction passing the admissibility stage and being upheld by the Court. There is no such balancing process under Article 17; speech is restricted solely because of its content.

Consequently Europe exhibits a three-tiered approach to hate speech. At the top is Holocaust denial; it is severely restricted under Article 17, with no ‘balancing process’ taking place. In the middle is racist speech; it is protected under Article 10(1) but states are justified interfering with that protection provided they meet the criteria of Article 10(2). This necessitates a ‘balancing process,’ seen in the *Jersild* case, although it should be noted that most instances of racist speech would not pass the admissibility stage. Finally there is religious intolerance, or religious defamation, seen in the Danish cartoons, in *Charlie Hebdo* and on the Youtube trailer for the *Innocence of Muslims*. If Denmark had prosecuted *Jyllands-Posten*, would the magazine have succeeded in invoking their Article 10(1) right to freedom of expression? The answer at present would appear to be no, under past rulings such as the *Otto Preminger Institut v. Austria* [1982] decision, although unlike cases of racist speech, such religion cases will pass the admissibility stage.

One further decision of relevance is *I.A. v. Turkey* [2005], in which the Court upheld a prosecution of the author of a novel, *The Forbidden Phrases*, which contained in the Court's description "an abusive attack on the Prophet of Islam." It held in a close four votes to three against a violation of Article 10, in which the joint dissenting opinion noted, in reference to its precedents, that "the time has perhaps come to 'revisit' this case-law." *I.A.* can also be distinguished in that it involved Turkey, where the Court has been reluctant to involve itself in any domestic decision involving religion or indeed secularism, and the fact that it predates the 'Danish cartoons' and the pan-European investiture of symbolic freedom of expression credentials in such caricatures.

A final word on Youtube; the Human Rights Committee recently issued General Comment 34 on freedom of expression. It makes an important point in relation to internet sites and Article 19(3) of the International Covenant on Civil and Political Rights, which allows interference with freedom of expression for the protection of the reputation or rights of others:

Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3.

This seems to indicate that a generic ban on Youtube cannot be justified under Article 19(3) ICCPR. Yet an interesting question is if a government has requested the removal of specific content, as is the case with *The Innocence of Muslims*, which the server or provider has refused, whether it is then justified in imposing a generic ban. Turkey has imposed a generic ban on Youtube in the past, and even the Turkish President disagreed with it. Again the past jurisprudence of the Court would appear to support such a ban if it were the only way of removing blasphemous material. A potential Russian Youtube ban would make an interesting test. There is a disconnection between the perception that religious intolerance is protected by a common European standard on freedom of expression, and the caselaw from the Court, which clearly indicates that it is not. Furthermore the enclosure of Article 17 for Holocaust denial appears to privilege the criminalisation of this form of expression, removing any balancing process. What may happen is that caricatures of the Prophet Mohammad change the European approach to hate speech, which has been firmly settled since 1945.

In 2006, after *Norwood v. United Kingdom*, the British government amended the Public Order Act 1986 to criminalize the incitement of hatred on

religious grounds. The amendment effort was controversial (partly because the original language criminalizing religious hatred did not include an intent requirement) and went through several drafts before being approved by Parliament).

The excerpts below compare the language of the 1986 Act, which applies to race, with the language of the 2006 Act, which applies to religion. While the language of these statutes converged substantially over the course of the 2005 drafting process, the language and requirements are not identical. In particular, the 2006 statute criminalizing acts that “stir up religious hatred” contains a “[p]rotection of freedom of expression” clause that the 1986 statute does not. The 2006 statute provides that “A person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred.” The 1986 state, by contrast, provides that “A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if—(a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.” The 2006 statute is therefore significantly more speech protective than was the 1986 statute.

Why might this be so? Is there a difference between speech that religious groups perceive to be abusive and speech that racial groups perceive to be abusive? Are we more concerned when the state seeks to suppress potentially offensive religious discussion than when it seeks to suppress potentially offensive interracial insults? Does the Holocaust denial case of *Sheppard and Whittle* suggest that these differences may be more a matter of theory than of practice? Finally, excerpted below is also a statute applied to Northern Ireland that makes no distinction at all between religious and racial groups. The statute was a response to religious and political violence (commonly known as “the Northern Ireland conflict” or “The Troubles”) that rapidly escalated in the late 1960s and continued for three decades.

Public Order Act 1986 United Kingdom

. . . Racial Hatred

Meaning of “racial hatred”

17. In this Part “racial hatred” means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

Acts intended or likely to stir up racial hatred

18.—(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or

insulting, is guilty of an offence if—(a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling. . . .

(4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

(5) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

(6) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme broadcast or included in a cable programme service.

19.—(1) A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if—(a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) In proceedings for an offence under this section it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

(3) References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

...

* * *

Racial and Religious Hatred Act 2006
United Kingdom

. . . 1. Hatred against persons on religious grounds

The Public Order Act 1986 (c. 64) is amended in accordance with the Schedule to this Act, which creates offences involving stirring up hatred against persons on religious grounds. . . .

Meaning of “religious hatred” . . .

In this Part “religious hatred” means hatred against a group of persons defined by reference to religious belief or lack of religious belief.

Acts intended to stir up religious hatred

29B. Use of words or behaviour or display of written material

(1) A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

(4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

(5) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme service.

29C. Publishing or distributing written material

(1) A person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred.

(2) References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public. . . .

29J. Protection of freedom of expression

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system. . . .

R. v. Sheppard and Whittle

Court of Appeal of England and Wales (Criminal Division)

[2010] 1 Cr. App. R. 26

Lord Justice Scott Baker, Mr Justice Penry-Davey and Mr Justice Cranston:

. . .

On July 11, 2008 in the Crown Court at Leeds . . . the defendant, Stephen Whittle, was convicted of four counts of publishing racially inflammatory material and the defendant, Simon Guy Sheppard, was convicted of nine counts of publishing racially inflammatory material. Both defendants then left the jurisdiction and went to the United States of America where they claimed asylum. The trial continued in their absence. . . . The claim for asylum in the United States was refused and the defendants were returned to the jurisdiction. On July 10, 2009 Sheppard was sentenced to a total of four years and ten months' imprisonment and Whittle to a total of two years and four months imprisonment. . . .

Scott Baker L.J. . . .

13. Matters came to light in this way. On August 13, 2004 Professor Klug, a research fellow with the Centre for the Study of Human Rights at the London School of Economics forwarded to Lord Goldsmith, the Attorney General, a pamphlet entitled "Tales of the Holohoax" which had been sent to her personally. Four days earlier on August 9, 2004 a Mr Whine had written to the Chief Constable of Lancashire complaining that the same pamphlet had been received by the Blackpool Reform Synagogue. A similar complaint was made to the Western Division Police Headquarters. The Crown Prosecution Service was invited to consider prosecuting the publisher under Pt III of the 1986 Act.

14. Sheppard was traced through the publisher's address printed on the pamphlet. The Crown Prosecution Service decided that "Tales of the Holohoax" contained words which were abusive, insulting and possibly threatening towards a

racial group, namely Jewish people and that further investigations were required to discover the extent of the publication and distribution. In March 2005 Sheppard was arrested and interviewed. It became apparent that he operated a number of websites, and registrations for 15 websites were found in his name at his home address. The websites had names such as heretical.com; klan.org; nazi.org; and whitepower.co.uk. During a review of this material it became apparent that Whittle had been writing articles under the pseudonym of Luke O'Farrell and these were published by Sheppard on his website heretical.com.

15. Having edited the material, Sheppard posted it to the website in Torrance, California. In order to do this he used a format known as File Transfer Protocol. Once the material reached the server, the server then converted the format of the material to HTML which made it available to be accessed on the internet by those visiting the website, including people within the jurisdiction of England and Wales. Sheppard had control of the website as far as its contents were concerned. He could upload and edit material.

16. The appellants do not challenge the jury's findings that in each of the counts in respect of which they were convicted the material was racially inflammatory; nor could they. . . .

48. . . . The appeals against conviction are dismissed. . . .

Prevention of Incitement to Hatred Act 1970
Northern Ireland

. . . 1. A person shall be guilty of an offence under this Act if, with intent to stir up hatred against, or arouse fear of, any section of the public in Northern Ireland—(a) he publishes or distributes written or other matter which is threatening, abusive or insulting; or (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting; being matter or words likely to stir up hatred against, or arouse fear of, any section of the public in Northern Ireland on grounds of religious belief, colour, race or ethnic or national origins. . . .

**Blasphemy and Incitement to Religious Hatred: Free Speech
Dogma and Doctrine**
Ivan Hare (2009)*

. . . The absence of a positive justification for the offence [of blasphemy] and the definitional uncertainty surrounding it might have suggested that blasphemy was likely to be condemned in Strasbourg. The law clearly interfered with freedom of expression and so the relevant questions were whether the interference was ‘prescribed by law’ and was necessary in a democratic society in the interests of public safety, the prevention of disorder, the protection of morals or the protection of the rights of others. Surprisingly, the [European Court of Human Rights (ECtHR)] held in *Wingrove* that the English law of blasphemy was sufficiently clear to satisfy the requirement that it should be prescribed by law. The case concerned a challenge to the British Board of Film Classification’s refusal to certify for sale or distribution the film *Visions of Ecstasy* on the ground that it was blasphemous. However, the limits of this ruling should be noted. First, the Court’s finding was based on an express concession by the parties. Secondly, the Court referred to the ‘degree of flexibility’ to be accorded to national authorities in defining inherently vague concepts such as blasphemy. There is no reason why this would apply to review by a domestic court.

More disappointing was the decision of the ECtHR that the law of blasphemy fulfilled the legitimate aim of protecting the rights of Christians (and its sympathizers) not to suffer outrage to their feelings and that the refusal to certify the film was a proportionate means of achieving that end. It is possible to overstate the significance of these decisions for a number of reasons. First, the Court relied heavily on the doctrine of the margin of appreciation. Secondly, there were powerful dissents in both cases and the conclusions of the Court were contrary to the firmly expressed views of the Commission that there was a violation of Article 10. Thirdly, the Court appears to be moving towards a more protective approach to free speech in this context as evidenced by the recent decision in *I. A. v. Turkey*. Although the Court upheld an author’s criminal conviction for blasphemy in this case, it did so by a narrow 4-3 margin. Significantly, the dissenting Judges Costa, Cabral Barreto, and Jungwiert made the following points: that a democratic society is not a theocratic one and that the time had come to revisit the *Otto-Preminger* and *Wingrove* judgments which, in their view, placed too much emphasis on conformism or uniformity of thought and reflected an overcautious and timid conception of freedom of the press.

* Excerpted from Ivan Hare, *Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine*, in *EXTREME SPEECH AND DEMOCRACY* (Ivan Hare and James Weinstein editors, Oxford University Press 2009).

Further, the Court has shown itself less willing to protect religious sensibilities in recent cases concerning criticism of secularism and calls for the introduction of Sharia in Turkey and suggestions that aspects of Catholic doctrine may have contributed towards the causes of the Holocaust.

For the above reasons, the abolition of the offence is to be welcomed. However, two reservations must be entered. First, it was pusillanimous for Parliament to create the new offence of incitement to religious hatred in 2006 at least in part to remove the anomalies created by the discriminatory application of the Public Order Act, but not to have addressed the continued and more offensively partial coverage of blasphemy until two years later. Secondly, Parliament did not engage in the kind of principled argument in its recent blasphemy debate that might have been expected. The Government was spurred into action by a judicial decision (itself based on questionable reasoning) and an amendment proposed by a member of another political party. The quality of the debate was not high. A flavour of this is given by the fact that Baroness Andrews on behalf of the Government stated (incorrectly) that her researches revealed only two blasphemy prosecutions in the history of the offence. If one of the reasons for supporting abolition was that this would provide support to the UK's opposition to the draconian application of blasphemy laws overseas, this was an unedifying background to the reform. . . .

As *Norwood* demonstrates, the Public Order Act has been used in a number of cases which would also fall within the ambit of the new offence of incitement to religious hatred even though there was no evidence in that case that any Muslim had seen Norwood's sign. The only reason why an individual would be likely to be charged with incitement to religious hatred would therefore appear to be because of the longer maximum penalty. It is unsurprising that the police and prosecutors will continue to rely on other methods of social control where they do not have to get over the hurdles included in the Racial and Religious Hatred Act. . . .

As a matter of practice, the narrow definition of the offence and the existence of the free speech defence make it unlikely that the police and prosecutors will rely on it rather than the numerous more broadly defined legal tools referred to above. Indeed, it is arguable that the new offence may turn out to be almost impossible to prosecute as it appears to have confused two distinct audiences for inciting speech. Speech which incites hatred against a particular group is not generally threatening towards members of that group because it is intended to incite hatred within those the speaker regards as at least potentially like-minded. As such, it is much more likely to be abusive or insulting towards members of the impugned group. On the other hand, speech which is simply threatening is itself unlikely to incite hatred against a particular group. The

decision to confine incitement to religious hatred to threatening speech has therefore probably narrowed the new offence to the point of non-existence. . . .

BLASPHEMY AND INDIVIDUALIST LAW

In the United States, the First Amendment has been interpreted to preclude the government from prohibiting blasphemy or suppressing speech that is offensive to religious groups. At root, this is because the First Amendment imposes an individualist conception of law that is hostile to the regulation of speech to serve assimilationist or pluralist values.

A Worthy Tradition: Freedom of Speech in America Harry Kalven, Jr. (1988)*

. . . First and most important, the freedom of speech clause of the First Amendment has been the beneficiary of the religion clauses. Throughout history, religion has played a dismal role as a source of motivations for censorship. If a community believes it is in possession of revealed truth and the salvation of man's soul is at stake, indifference will no longer protect and it becomes altogether rational to pay close attention to what people are allowed to say, especially publicly. From such a perspective, prohibitions of heresy and blasphemy make sense.

Perhaps we should all be happier in a society with more religion and less free speech. That is an issue I am not equipped to argue, except to note that the answer does not seem to me a foregone conclusion. Happily, we need not resolve it for present purposes. The American commitment to separation of Church and State has not only had benign consequences for freedom of religion, it has also made it impossible for the state to umpire religious controversies. Thus, a first great principle of the consensus emerges: *In America there is no heresy, no blasphemy.* . . .

* Excerpted from HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (Harper and Row 1988).

Cantwell v. Connecticut in 1940 nicely illustrates the individualist premises of American First Amendment jurisprudence.

Cantwell v. Connecticut
Supreme Court of the United States
310 U.S. 296 (1940)

Mr. Justice Roberts delivered the opinion of the Court.

Newton Cantwell and his two sons, Jesse and Russell, members of a group known as Jehovah's Witnesses, and claiming to be ordained ministers, were arrested in New Haven, Connecticut, and each was charged by information in five counts, with statutory and common law offenses. After trial in the Court of Common Pleas of New Haven County each of them was convicted on the third count, which charged a violation of § 6294 of the General Statutes of Connecticut, and on the fifth count, which charged commission of the common law offense of inciting a breach of the peace. . . .

The facts which were held to support the conviction of Jesse Cantwell on the fifth count were that he stopped two men in the street, asked, and received, permission to play a phonograph record, and played the record "Enemies," which attacked the religion and church of the two men, who were Catholics. Both were incensed by the contents of the record and were tempted to strike Cantwell unless he went away. On being told to be on his way he left their presence. There was no evidence that he was personally offensive or entered into any argument with those he interviewed. . . .

We hold that, in the circumstances disclosed, the conviction of Jesse Cantwell on the fifth count must be set aside. Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact. . . .

The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would

have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.

Having these considerations in mind, we note that Jesse Cantwell, on April 26, 1938, was upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others. There is no showing that his deportment was noisy, truculent, overbearing or offensive. He requested of two pedestrians permission to play to them a phonograph record. The permission was granted. It is not claimed that he intended to insult or affront the hearers by playing the record. It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic. Thus far he had invaded no right or interest of the public or of the men accosted.

The record played by Cantwell embodies a general attack on all organized religious systems as instruments of Satan and injurious to man; it then singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows. The hearers were in fact highly offended. One of them said he felt like hitting Cantwell and the other that he was tempted to throw Cantwell off the street. The one who testified he felt like hitting Cantwell said, in answer to the question "Did you do anything else or have any other reaction?" "No, sir, because he said he would take the victrola and he went." The other witness testified that he told Cantwell he had better get off the street before something happened to him and that was the end of the matter as Cantwell picked up his books and walked up the street.

Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was

held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish. . . .

The judgment affirming the convictions on the third and fifth counts is reversed and the cause is remanded for further proceedings not inconsistent with this opinion. . . .

Cultural Heterogeneity and Law

Robert C. Post (1988)*

. . . According to *Cantwell* . . . the First Amendment should be interpreted in a manner consistent with the presence of a heterogeneous society. . . . The Court in *Cantwell* . . . brought to its reading of the first amendment the assumption that society consists “of many creeds” and is divided by “sharp differences,” in which “the tenets of one man may seem the rankest error to his neighbor.” The presupposition of social uniformity that underlies . . . [an] assimilationist vision seems to have vanished from *Cantwell*’s account, which is much closer in spirit to the “plural” society described by [Lord] Scarman [in the case of *Whitehouse v. Gay News*]. But for Scarman social diversity implied the enactment of pluralist values, so that the law could be used to protect religious differences from “vilification, ridicule, and contempt.” For *Cantwell*, on the other hand, the fact of diversity led in exactly the opposite direction, toward the constitutional requirement that the law tolerate “exaggeration,” “vilification,” and even “excesses and abuses.”

It is not difficult to perceive the line that divides *Cantwell* from *Ruggles*; but what distinguishes *Cantwell* from Scarman’s pluralist vision? The key lies in the fact that while *Cantwell* focuses its analysis on the religious speaker, Scarman concentrates instead on the offense suffered by the religious audience. There is a deeply significant asymmetry in these approaches: the speaker stands alone, whereas the outrage of the audience is generic. For Scarman the law does not respond to the outrage of offended individuals, but to the common outrage of the members of a religious group whose group identity has been attacked. *Cantwell* explicitly rejects this focus on the group, choosing instead to use the law as a “shield” so that “many types of life, character, opinion and belief can develop unmolested and unobstructed.” In essence *Cantwell* requires that established religious groups, who have already developed their distinctive character and beliefs, must suffer offense so that new religious groups can be born. Underlying *Cantwell*, then, lies the classic American commitment to “voluntarism,” to the belief that “religion is . . . a matter of individual choice.”

The contrast between Scarman and *Cantwell* might thus be formulated in this manner: For Lord Scarman religious heterogeneity presupposes a social world in which diverse religious groups already exist as part of a stable and established social fabric, whereas for *Cantwell* religious diversity presupposes instead a social world in which the dynamic of individual choice causes new religious groups continually to evolve. Thus while both Scarman and *Cantwell* recognize the

* Excerpted from Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIFORNIA LAW REVIEW 297 (1988).

existence of groups, Scarman assumes that the function of law is to protect the integrity of established and stable groups, whereas *Cantwell* assumes that the function of law is to protect the capacity of individuals to form new and different groups. The individual is the locus of value for Cantwell; the group is the locus of value for Scarman. The distinction between the two, in short, is that between individualism and pluralism. Unlike the gradient that holds together pluralism and assimilationism, the distinction between *Cantwell* and Scarman is quite sharp, for it turns on the more or less dichotomous determination of whether the law should be used to enforce the norms of groups as against individuals, or to protect instead the prerogatives of individuals as against groups.

In interpreting the Constitution in light of the values and assumptions of individualism, *Cantwell* speaks for what unquestionably has become the great tradition of first amendment thought. . . .

INTERNATIONAL MOVEMENTS IN BLASPHEMY LAW

Between 1999 and 2010, the United Nations Human Rights Council approved a variety of non-binding resolutions on the “defamation of religions.” These resolutions were often proposed by members of the Organization of the Islamic Conference, an international organization of 57 member nations that seeks to advance Muslim interests. These resolutions grew increasingly controversial over the course of the decade in which they were introduced. In 2011, a compromise was reached in the form of Resolution 16/18, which replaced the “defamation of religions” language in the earlier resolutions with more general language on “discrimination, incitement to violence, and violence against persons based on religion or belief.” Below, we reproduce a recent model blasphemy statute from the Arab League, an international organization of Arab states.

Arab Guideline law for the prevention of Defamation of Religion Council of Arab Ministers of Justice Resolution No. 967 (November 26, 2013)*

. . . Article (2): The purpose of this law is to prevent the defamation of religions and to protect them from any attack perpetrated under any justification.

* Excerpted from Arab Guideline Law for the Prevention of Defamation of Religions, received from the U.S. Commission on International Religious Freedom as translated by an unattributed source,

The State guarantees the respect for religions and prophets and messengers and heavenly books and places of worship and is considered as one of the basic pillars of ensuring and consolidating the principles of human rights, fundamental freedoms and citizenship.

Article (3): Dissemination of tolerance and dialogue between religions is considered to be among the fundamental pillars of respect of religions.

Article (4): Freedom of opinion and expression cannot be invoked with any act of contempt of religions or infringement on them, perpetrated in contravention of this Act.

Article (5): It is prohibited to commit any act of defamation of religions or prophets or messengers or the heavenly books, and it is prohibited to attack places of worship. The Commission of any of the preceding acts is considered as an offence which is punishable in accordance with the provisions of this law. . . .

Article (6): Without prejudice to any harsher sentence prescribed by another law, the sentences stipulated in this Act are applied to the listed offences in it.

[Individuals committing the following offenses shall be sentenced:]**

Article (7): . . . [A]nyone who committed an act entailing defamation of religions by using any means of audio or visual or written or electronic or via the Internet or communications networks or industrial materials, whether through words or writing, or expressionist or cartoon or symbolic drawing, or photography or singing or acting or mime or electronic data or other forms and in any language. And . . . anyone who distributed or printed or published or displayed, broadcasted, or campaigned for or undertaken a Visual or audible or electronic transmission of any acts of defamation of religions set forth in article (1)* when there is a proof of his knowledge of the nature of such acts or of the purpose of committing them.

Article (8): . . . Everyone who vandalized or broke or damaged or defected or desecrated deliberately one of the places of worship.

Article (9): . . . [A]nyone who created or established or organized or managed an association or body or organization or an organization's subsidiary or

endorsed by the Council of Arab Ministers of Justice in session 29, under the resolution No. 967, dated November 26, 2013.

** This draft of the law did not describe the length of specific sentences.

* Article (1) defines the religions as "Islam, Al-Nasraniya and Judaism." Al-Nasraniya is an Islamic term for Christianity.

a website in view to disrespect or offend any of the religions or the prophets or the messengers or the heavenly books or with an aim of calling to favour such things or to promote them. A sentence . . . shall be imposed if the objectives set forth in the preceding paragraph were called upon by using force or threats or intimidation or inducement or by any coercive means.

Article (10): . . . [A]nyone who participated in committing any of the offences referred to in the preceding articles.

Article (11): . . . [W]hoever produced or manufactured or sold or offered for sale or trade products or goods or publications or recordings or films or tapes or CDs or computer programs or data in the electronic domain or any other things bearing words or expressionist, caricatures or symbolic drawings, or slogans or symbols or signs or images or songs or acting or other items and in any language defaming religions or announcing about them by any means.

Article (12): . . . [W]hoever possessed or received writings or publications or recordings or tapes or CDs or computer programs or electronic domain data or any other materials or things bearing the words, or expressionist or caricatures or symbolic drawings, or slogans or symbols or signs or images or singing or acting or other items and in any language containing defamation of religions or favouring or promoting them with the aim of distributing them or publishing them or broadcasting them or selling them or informing others about them. Also . . . whoever who made or received any of the electronic or non-electronic means associated to printing or recording or saving or radio or watching or publishing or broadcasting or promotion that are prepared for use in committing the offences referred to in the preceding paragraph, with his knowledge about that intention.

Article (13): . . . [W]hoever requested or accepted or collected or received money or material support, directly or indirectly, from a natural or legal person or any organization or entity inside or outside with intent to commit an act which is punishable under the provisions of this law.

Article (14): . . . [W]hoever joined one of the stipulated entities in the preceding article, or participated in it or provided any sort of assistance to it knowing their goals or objectives . . . [and] whoever forced or subdued someone to join one of the entities stipulated in the previous article by means of force or threat or coercion or inducement.

Article (15): . . . [W]hoever held a meeting for the purpose of defamation of religions or called for or promoted this meeting, knowing its purpose. . . . [W]hoever participated in the preparations for this meeting, or participated in it, knowing its purpose.

Article (16): With the exception of the offences set forth in article (12) the provisions of this act apply to whoever committed or participated in the commission of a crime under this law when this offence was committed or perpetrated wholly or partly within or outside the territory of the State and even if the perpetrator is a non-national. State courts have the jurisdiction to consider offences stipulated in this law when committed in whole or in part within its territory or outside it and even if the offender is a non-national.

Article (17): If any of the offences stipulated in this law was committed by one of the employees of the legal person on his behalf and for his interest, the person in charge of the effective management of the legal person, shall be sentenced with the same sentences stipulated under the perpetrated crime if it was proven that he knew about it. The legal person is responsible by solidarity for fulfilling the rulings of financial penalties or compensations if the crime was committed by one of his employees on his behalf and for his interest.

Article (18): Without prejudice to the rights of third parties of good faith the Court shall order, in addition to the penalties provided for in the preceding articles, to confiscate publications or films or leaflets or recordings or electronic data or money or materials or luggage or other objects used in the commission of other offences stipulated under this Act or prepared for use in its commission. The Court shall order to dissolve the entities stipulated in article 9 of this law and shall order the closure of the places and headquarters or branches of these entities and they are not authorized to open unless they were prepared for a legitimate purpose after the approval of the competent judicial authorities.

Article (19): Doubling the sentences stipulated under this Act in case of recidivism.

Article (20): An exemption from the sentence is to be granted to anyone of the perpetrators of one of the crimes stipulated under this Act who took the initiative to report to the competent authorities about the crime before its detection, so if the reporting by the offender occurred after the detection of the crime the court may exempt him from the sentence when the reporting leads to the detention of any of the offenders. . . .

Article (21): If the investigation showed sufficient evidence of serious accusation in the offences set forth in article (7) of the Act, the competent judicial authority will provisionally order to take the necessary measures to prohibit the distribution or transmission or circulation or displaying writings or publications or images or films or electronic data or materials or other items that contain criminalized acts under the provisions of this Act, so that the ban will be presented

to the competent court . . . to decide about it either by supporting it or amending it or repealing it.

Article (22): Any stakeholder may present a complaint regarding the ban order stipulated in the previous article, to the competent court within a [particular] period . . . from the issuing date of the order or from the date of his knowledge about it. The complaint is done by presenting an application to the Court . . . and the date of the hearing of the application is set out within [a] period . . . from the date of its submission, and an announcement is made to the stakeholders. The Court has to rule on this complaint, deciding to continue or repeal or amend the complained of ban decision, within a [particular] period . . . from the date of the decision. The person whose complaint was rejected may challenge the Court's decision by the usual methods of proceedings after the expiry of a [particular] period . . . from the date of the decision to reject the complaint. The resolution does not preclude any stakeholder, other than the one whose complaint was rejected, to present a complaint of the issued ban's order using the same referred methods of proceedings. Every stakeholder may present a complaint from the procedures of enforcing the issued ban's order using the same methods of procedures stipulated in this article.

Article (23): During the hearing, the competent court may decide, of its own motion or at the request of the competent judicial authority or the stakeholders, to repeal or amend the issued ban's order.

Article (24): There is no expiration of the criminal proceedings for crimes to which the provisions of this law apply and the ordered sentence does not drop by expiration.

Article (25): Each individual holding direct interest has the right to file a request for compensation for damages resulting from the crimes stipulated in this law to the competent court according to the rules prescribed by the law in this regards. . . .

The Council of Arab Ministers of Justice . . . [a]fter discussion, decides:

The adoption of the Draft Arab Guideline Law for the Prevention of Defamation of Religions as amended by the Review Committee of the draft law at its second meeting, held at the headquarters of the General Secretariat of the League of Arab States and its distribution to the ministries of Justice in Arabic States to benefit from it. . . .

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The Honorable András Sajó has been a judge of the European Court of Human Rights since 2008. He received his law degree at the ELTE Law School of Budapest and his Ph.D. from the Habilitation at the Hungarian Academy of Sciences. Judge Sajó has held various research fellow positions at the Institute for State and Law, Hungarian Academy of Sciences, since 1972. He was the founder and spokesperson of the Hungarian League for the Abolition of the Death Penalty, Budapest (1988-1994) and Legal Counselor to the President of Hungary (1991-1992). From 1993 to 2007, he was Chair of Comparative Constitutional Law and University Professor at the Central European University in Budapest. He is a Member of the Hungarian Academy of Sciences. Since 1990, he has been Visiting Professor at Cardozo School of Law in New York and, since 1996, a Global Faculty member of New York University Law School. He is on the Board of Directors of the Open Society Justice Initiative of New York. His recent publications include *Constitutional Sentiments* (2011) and *Comparative Constitutionalism* (with Dorsen et al.), West 3rd edition forthcoming 2016.

Professor Reva Siegel is Nicholas deB. Katzenbach Professor of Law at Yale Law School. Professor Siegel's writing draws on legal history to explore questions of law and inequality and to analyze how courts interact with representative government and popular movements in interpreting the constitution. Her recent work includes *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics* (24 Yale Law Journal 2516 2015) (with Douglas NeJaime), *The Supreme Court, 2012 Term -- Foreword: Equality Divided* (127 Harvard Law Review 2013), as well as *Processes of Constitutional Decisionmaking* (with Paul Brest, Sanford Levinson, Jack M. Balkin & Akhil Reed Amar, 2014); *Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling* (with Linda Greenhouse, 2012); and *The Constitution in 2020* (edited with Jack M. Balkin, 2009). Professor Siegel is a member of the American Academy of Arts and Sciences and an honorary fellow of the American Society for Legal History. She serves on the board of the American Constitution Society and on the General Council of the International Society of Public Law.

Professor Patrick Weil is a Visiting Professor of Law and a Peter and Patricia Gruber Fellow in Global Justice at Yale Law School and a senior research fellow at the French National Research Center in the University of Paris 1, Panthéon-Sorbonne. Professor Weil's work focuses on comparative immigration, citizenship, and church-state law and policy. His most recent book is *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* (Penn Press, 2013). Among his other recent publications are *Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a Case in the Courts* (123 Yale Law Journal Forum 565, 2014); *Headscarf versus Burqa: Two French Bans with Different Meanings*, in *Constitutional Secularism in an Age of Religious Revival* (Susanna Mancini and Michel Rosenfeld editor, Oxford University Press, 2014, 196-215); and *From Conditional to Secured and Sovereign: The New Strategic Link Between the Citizen and the Nation-State in a Globalized World*, (International Journal of Constitutional Law (2011) 9(3-4): 615-635). In France, Professor Weil participated in a 2003 Presidential Commission on secularism, established by Jacques Chirac. In 1997, he completed a mission and a report on immigration and nationality policy reform for Prime Minister Lionel Jospin, which led to the implementation of new immigration and citizenship laws adopted the following year. He also holds an appointment as Professor at the Paris School of Economics.

Professor John Witt is the Allen H. Duffy Class of 1960 Professor of Law at Yale Law School. His most recent book *Lincoln's Code: The Laws of War in American History* was awarded the 2013 Bancroft Prize, was a finalist for the Pulitzer Prize, was selected for the American Bar Association's Silver Gavel Award, and was a New York Times Notable Book for 2012. Professor Witt is currently writing the story of the men and women behind the Garland Fund, the 1920s foundation that quietly financed the efforts that culminated in *Brown v. Board of Education*. He is finishing a casebook, *Torts: Cases, Principles, and Institutions*, forthcoming with CALI, and co-editing a scholarly edition of a lost nineteenth-century manuscript on martial law, tentatively titled *To Save the Country: A Lost Manuscript of the Civil War Constitution* (with Will Smiley). Previous writing includes *Patriots and Cosmopolitans: Hidden Histories of American Law* (Harvard University Press, 2007), and the prizewinning book, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Harvard University Press, 2004), as well as articles in the American Historical Review, the Columbia Law Review, the Harvard Law Review, the Yale Law Journal, and other scholarly journals. He has written for the New York Times, Slate, the Wall Street Journal, and the Washington Post. In 2010 he was awarded a John Simon Guggenheim Memorial Foundation Fellowship for his project on the laws of war in American history. Professor Witt is a graduate of Yale Law School and Yale College, and he holds a Ph.D. in history from Yale. He is a fellow of the American Academy of Arts and Sciences. He served as law clerk to Judge Pierre N. Leval on the United States Court of Appeals for the Second Circuit.

About the Student Editors

Erin Biel is a second-year J.D. student at Yale Law School. She received her B.A. from Yale University, where she double-majored in Global Affairs (International Security) and Ethnicity, Race, and Migration. While an undergraduate, Erin spent all four years volunteering with Yale Law School's International Refugee Assistance Project and studied abroad in Cairo, Egypt. After graduating, she lived in Thailand and Myanmar, where she worked with Burmese migrant workers, women entrepreneurs, and former political prisoners. At Yale Law School, Erin is a Features Editor of the Yale Journal of International Law and is pursuing a focus in international trade and investment law.

Matt Butler is a second-year J.D. student at Yale Law School. He received his A.B. *magna cum laude* from Princeton University's Department of Art and Archaeology. Prior to law school, he attended Yale Divinity School, receiving his M.A.R. in Christian Ethics, and worked in the white-collar unit of the Suffolk County District Attorney's Office in Boston, Massachusetts. At Yale Law School, he serves as Executive Editor of the Yale Journal of Law and Technology and as a Submission Editor of the Yale Journal on Regulation. Matt also sits on the board of a local non-profit dedicated to serving New Haven's homeless population.

Eric Chung is a third-year J.D. student at Yale Law School. He graduated from Harvard University with an A.B. *summa cum laude* in Government and a secondary field in Global Health and Health Policy. He is a 2016 Paul and Daisy Soros Fellow and has worked with a range of government and policy institutions, including the Massachusetts Senate, Organization for Economic Cooperation and Development, Stanford Center for Opportunity Policy in Education, Supreme Court of the United States, the Weatherhead Center for International Affairs, the White House, the U.S. Department of Justice, and the U.S. Department of State. At Yale Law School, Eric is a student director of the Education Adequacy Project and the Supreme Court Advocacy Clinic.

Kyle Edwards is a second-year student at Yale Law School. She graduated from Princeton University with an A.B. *summa cum laude* in the Woodrow Wilson School of Public and International Affairs and a certificate in Gender and Sexuality Studies. She received a D.Phil in Public Health from the University of Oxford as a Marshall Scholar, where her dissertation focused on the role of ethics, scientific expertise, and public participation in the regulation of emerging biotechnologies in the United Kingdom. At Yale, she works on a case challenging the constitutionality of Connecticut's 2014 Ebola quarantines, brought by the Global Health Justice Practicum and Worker and Immigrant Rights Advocacy Clinic, and is the Director of Programming for the Yale Health Law and Policy Society.

Tal Eisenzweig is a third-year J.D. student at Yale Law School. She graduated from Princeton University with an A.B. from the Woodrow Wilson School of Public and International Affairs and with certificates in Near Eastern Studies and French Literature. After graduating, she worked at a Moroccan think tank in Rabat before pursuing research on the recent reforms to Canada's refugee system as a Fulbright Research Fellow in Montreal. At Yale Law School, Tal is involved with the Iraqi Refugee Assistance Project, the Yale Law Journal, and the Yale Journal of International Law. She worked with immigrant youth at The Door her first summer and interned with the Bronx Defenders' Family Defense Practice her second summer of law school.

Rhea Fernandes is a third-year J.D. student at Yale Law School. She completed her B.S. at Cornell University, where she studied public policy and feminist studies. She also holds a Master of Public Policy degree from Oxford University. Prior to coming to law school, Rhea worked as a Research Assistant on domestic voting rights and electoral reform at Open Society Foundations in Washington, D.C. At Yale, Rhea is a student director for the San Francisco Affirmative Litigation Project, the co-president of the South Asian Law Students Association, and a Features Editor on the Yale Law Journal.

Sergio Giuliano holds his LL.M. degree from Yale Law School and his law degree from Universidad de San Andrés, Buenos Aires, Argentina. In the upcoming year, he will clerk at the European Court of Human Rights as a Robina Foundation Human Rights Fellow. He has been a research assistant for Professor Bruce Ackerman on comparative constitutionalism and for Professor Judith Resnik on migration. He was a member of the Yale Law School Constitutional Advisory Group, directed by Professor Richard Albert, where he co-authored draft amendments to the Constitution of the Republic of Albania. Before his LL.M. program, Sergio worked as legal advisor for two subsequent minority leaders at the Argentine Congress.

April Hu is a third-year J.D. student at Yale Law School. She received her A.B. *summa cum laude* from Princeton University's Department of Sociology. Her senior thesis examined the nuances of gender identity for lesbians in Hong Kong. She spent three years at Princeton as a caseworker for Centurion Ministries, a wrongful conviction nonprofit. Prior to attending law school, she also worked for the U.S. Department of Justice's Bureau of Justice Assistance and the Legal Services of New Jersey. She spent her second-year summer working for the Constitutional Accountability Center, a progressive legal advocacy nonprofit, on amicus briefs to the U.S. Supreme Court, and the Department of Justice Civil Rights Division Criminal Section, where she assisted in prosecuting civil rights violations.

David Louk is a 2015 graduate of Yale Law School and a Ph.D. Candidate in the Jurisprudence and Social Policy Program at the University of California, Berkeley. He graduated with honors and distinction from Stanford University with a B.A. in Political Science and also holds an M.Phil in International Relations from the University of Oxford, where he was a Clarendon Scholar. He is currently clerking for Chief Judge Robert A. Katzmann on the U.S. Court of Appeals for the Second Circuit and previously clerked for Judge James E. Boasberg on the U.S. District Court for the District of Columbia.

Beatrice Walton is a second-year student at Yale Law School. She graduated from Harvard University with an A.B. *summa cum laude* in Government and a secondary field in Russia, Eastern Europe, and Central Asia Studies. She earned a M.Phil. degree in International Relations and Politics from the University of Cambridge in 2015. Her research has focused on the role of NGOs in the European Court of Human Rights, and she is a co-president of the Yale Society of International Law, a co-director of the Lowenstein Human Rights Project, an Articles Editor for the Yale Journal of International Law, and a participant in International Refugee Assistance Project and the Media Freedom and Information Access Clinic.